AFFIRMATIVE ACTION AND EQUAL PROTECTION

HEARINGS
BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETY-SEVENTH CONGRESS
FIRST SESSION
ON
S.J. Res. 41
A JOINT RESOLUTION PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES RELATING TO AFFIRMATION ACTION

MAY 4, JUNE 11, 18, AND JULY 16, 1981

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AFFIRMATIVE ACTION AND EQUAL PROTECTION

MONDAY, MAY 4, 1981

U.S. Senate,
Committee on the Judiciary,
Subcommittee on the Constitution,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2228, Dirksen Senate Office Building, Senator Orrin G. Hatch [chairman of the subcommittee] presiding.

Present: Senator Grassley.

Staff present: Stephen J. Markman, general counsel; Tom Parry, chief counsel; and Claire Greif, clerk.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator Hatch. The U.S. Senate Subcommittee on the Constitution today convenes the first in what will be an extensive series of hearings on the subject of affirmative action and, in particular, the relationship beween affirmative action policies and the equal protection guarantees of our Constitution.

During these hearings, it is my intent to explore thoroughly the implications of affirmative action programs for our Nation's values, its institutions, and its moving principles.

The Subcommittee on the Constitution, in this course, will pursue such diverse matters as the legal issues surrounding affirmative action, the administration of affirmative action, the impact of affirmative action upon minorities and majorities, the economic and social effects of affirmative action, and alternatives to affirmative action. We will not, however, lose sight of what is the overriding matter of inquiry—is affirmative action constitutional?

These hearings are long overdue, in my opinion. What is remarkable is that the affirmative action concept—one with so many important implications for what our Nation is all about—should have begun to take root within our system almost totally in the absence of legislative sanctions.

It speaks to other difficulties in our political system that affirmative action has developed solely through judicial and executive branch decisions. Sixteen years after President Johnson issued Executive Order 11246, 12 years after the Philadelphia plan, 9 years after *Griggs* v. *Duke Power,* and 1 year after *Fullilove* v. *Klutznick,* it is about time that Congress start to take an active role in this matter.

At the outset, I would like to clarify how this subcommittee defines affirmative action. It is defined, for the purposes of these hearings, to mean public policies and programs which accord preferential treatment to individuals based upon their race, color, sex, or national origin—although I will admit that there are unique factors that come into play with respect to sex. It is defined to encompass policies which require or permit quotas, timetables, goals, ratios, or numerical objectives on the basis of race, color, sex, or national origin. It is defined to encompass policies which identify discriminatory conduct on the basis purely of statistical evidence and disparate effects rather than on the basis of some demonstration of discriminatory intent or purpose or motivation. It is defined, in short, to include color-conscious public policies.

Affirmative action is not intended here to cover the development of public programs administered without racial discrimination that are anticipated to result in improved opportunities for deprived individuals, a disproportionate number of whom may be members of minority groups.

At the outset, I would also like to make clear my own present thinking on affirmative action. I do not come into this hearing without preconceived opinions. I have written on the subject of affirmative action, and I have introduced legislation on the subject of affirmative action.

The Congressional Record of September 3, 1980, contained 120 pages of fine print on my views toward affirmative action. I have introduced Senate Joint Resolution 41—the equal protection constitutional amendment—that would restore what I believe is the traditional understanding of the 14th amendment in this regard.

[Text of S.J. Res. 41 follows:]

II

97TH CONGRESS
1ST SESSION

S. J. RES. 41

Proposing an amendment to the Constitution of the United States relating to affirmative action.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 26 (legislative day, FEBRUARY 16), 1981

Mr. HATCH introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

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JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States relating to affirmative action.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution if ratified by the legislatures of three-fourths of the several States:

"ARTICLE—

"SECTION 1. Neither the United States nor any State shall make or enforce any law which makes distinctions on account of race, color, or national origin.

"SECTION 2. All laws of the United States or any State which prohibit discrimination on account of race, color, or national origin by private individuals or enterprises shall not be construed to permit the establishment or maintenance by such private individuals or enterprises of any program or policy that makes distinctions on account of race, color, or national origin.

"SECTION 3. Neither the United States nor any State shall establish or maintain, or require or permit any private individual or enterprise within the scope of section 2 to establish or maintain, goals, quotas, timetables, ratios, or numerical objectives which make distinctions on account of race, color, or national origin.

"SECTION 4. Neither the United States nor any State shall make any law which prohibits any person in the absence of intent to discriminate on account of race, color, or national origin, to take actions, otherwise lawful, which have a disproportionate impact or effect upon individuals on the basis of race, color, or national origin.

"SECTION 5. All limitations in this article upon laws, regulations, orders, programs, or actions which make distinctions on account of race, color, or national origin shall encompass laws, regulations, orders, programs, or actions which either make express distinctions on account of such race, color, or national origin or which are intended to result in distinctions on such account.

"SECTION 6. No order or decree shall be issued by any court of the United States or of any State that makes distinctions on account of race, color, or national origin (except to the extent that such order or decree is necessary to remedy the enforcement of a law by the United States or any State, or the establishment or maintenance of a program or policy by a private individual or enterprise, that is in violation of this article).

"SECTION 7. The Congress and the States shall have power to enforce this article by appropriate legislation.".

Senator HATCH. In summary, I do not believe that affirmative action is the logical outgrowth of civil rights efforts that reached their zenith in the 1950's and 1960's. Rather, I am inclined to believe that affirmative action represents a significant retreat from those efforts.

I have described affirmative action, indeed, as the "son of separate but equal." It is a policy that is totally at odds with the conception of civil rights that has been the law of the land since *Brown* v. *Board of Education*. It is a policy that denies that all persons are entitled to the equal protection of the laws. It is a policy representing a return to the medieval notion of government by status.

Although I believe that my concern about affirmative action makes this self-evident, I nevertheless want to emphasize my own personal commitment to equal opportunity for all individuals, without regard to race, color, sex, or national origin. I am presently working as chairman of the Senate Labor and Human Resources Committee to this end and will continue to do so as long as I am in Congress.

I will not, however, let those who have abused the notions of equal opportunity and equal protection define those terms for me. I am convinced that the strongest and most enduring safeguard that minorities in this country possess is the knowledge that they will be judged and treated as individuals on the basis of merit rather than as part of collective groups on the basis of evolving political calculations.

Having made these points, I am enthusiastically looking forward to today's hearings. We are privileged to have four individuals who are among the most respected in the Nation on both sides of the issue before us. Their views, as I believe we will find out shortly, are widely divergent and, I think, will be widely interesting.

I might add that I am certainly interested in learning more from these great thinkers on this particular subject this day.

At this time, I will call all four witnesses if they are all here: Dr. Morris Abram, Prof. William Van Alstyne, Prof. Robert Sedler, and Prof. Martin Kilson.

Let me introduce each of you to the subcommittee.

Dr. Morris Abram is a partner in the distinguished New York City law firm of Paul, Weiss, Rifkin, Wharton & Garrison. He has served in a number of previous capacities relating to civil rights and equal opportunities.

Dr. Abram is a former member of the United Nations Subcommission on the Prevention of Discrimination and the Protection of Minorities. He has been the U.S. Representative to the United Nations Commission on Human Rights. He was cochairman of the White House Conference on Civil Rights and a member of the National Advisory Council on Economic Opportunity.

Dr. Abram is past national president of the American Jewish Committee, a former chairman of the United Negro College Fund, and a former president of Brandeis University.

This committee is extremely privileged to have Dr. Abram as a participant here today.

Prof. William Van Alstyne is the Perkins Professor of Constitutional Law at Duke University. He has taught previously at law schools at Ohio State and at Yale Universities. Professor Van Alstyne has also been a visiting professor at the University of Pennsylvania, Stanford University, and William & Mary.

Professor Van Alstyne is one of the Nation's leading constitutional scholars and has authored numerous Law Review articles on a diverse variety of constitutional subjects.

This committee was privileged to have heard from Professor Van Alstyne during the last Congress on the matter of constitutional convention procedures legislation, and, I believe, we will be having the benefit of his views shortly on the question of Congress' authority under article III of the Constitution to limit court jurisdiction.

Professor Van Alstyne is the former president of the American Association of University Professors and a former long-time member of the board of directors of the American Civil Liberties Union. He is the author of a recent article in the University of Chicago Law Review entitled "Rights of Passage: Race, the Supreme Court, and the Constitution."

We are pleased to have you with us also, Professor Van Alstyne.

Prof. Robert Sedler is a professor of law at Wayne State University. He carries with him the extremely impressive credential of having graduated with a juris doctorate from the University of Pittsburgh, which happens to be my own alma mater. [Laughter.]

Professor Sedler has previously taught at the University of Kentucky Law School and has been a visiting professor at the University of Iowa, Washington University, and Cornell.

Professor Sedler is one of the Nation's most widely respected authorities on civil rights law in addition to being one of the foremost practicing litigators in this field. Among some of his most recent Law Review articles are an analysis of the *Bakke* case in the Harvard Civil Liberties Law Review entitled: "The Constitution in Redressing the Social History of Racism," and an analysis in the Wayne Law Review on: "Racial Preference in the Constitution: The Societal Interest in the Equal Participation Objective."

Again, Professor Sedler, we are delighted to have you with us as well.

Prof. Martin Kilson is the professor of government at Harvard University. He was the first black ever to be appointed to a full professor position on the Harvard arts and sciences faculty.

Dr. Kilson is the author of numerous scholarly articles on the subjects of urban politics, Afro-American politics, and ethnic studies.

Dr. Kilson is a former consultant to the Ford Foundation and the Guggenheim Foundation, a fellow of the American Academy of Arts and Sciences, and a long-time member of the NAACP.

Again, Dr. Kilson, we are delighted to have you with us. In fact, the four of you are as distinguished a panel as I think the Judiciary Committee has ever had. We are delighted to have you with us.

Mr. Sedler, we will begin with you, if that is all right.

STATEMENT OF ROBERT SEDLER, PROFESSOR OF LAW, WAYNE STATE UNIVERSITY, DETROIT, MICH.

Mr. SEDLER. Thank you, Mr. Chairman.

I am pleased to have the opportunity to address the subcommittee on the subject of affirmative action. I believe this is the most fundamental issue of equality that faces the Nation today.

My definition of "affirmative action" is the same definition as that of the chairman—the use of race-conscious criteria favoring blacks and other nonwhite groups such as Hispanics and Native Americans and gender criteria favoring women.

In my prepared testimony before the subcommittee, I have discussed primarily affirmative action from the racial perspective, and I have also shown why related considerations justify affirmative action favoring women. But in my oral presentation, I will limit myself to the justification for racial affirmative action.

Senator HATCH. We will be happy to place your full remarks into the record with any additions that you care to submit.

Mr. SEDLER. Thank you, Mr. Chairman.

SOCIAL HISTORY OF RACISM

The primary justification for racial affirmative action is that it is necessary to insure the full and equal participation of black Americans in all aspects of American life, which participation has been denied to them by the long and tragic social history of racism in this Nation.

The term "social history of racism" is a shorthand expression for everything that has happened to blacks and for the history of discrimination and victimization of blacks in American society. It had its genesis in the institution of chattel slavery, and it is a history of legally-imposed inferiority, of rampant discrimination in employment, of ghettoization, of segregated and tangibly inadequate schooling, and of the denial of access to societal power.

The massive racial discrimination and victimization practiced against blacks is qualitatively different from the kind of discrimination that in times past has been practiced against white ethnic groups in America. This has been noted by all observers.

As the National Advisory Commission on Civil Disorders observed in 1968: "European immigrants, too, suffered from discrimination, but never was it so pervasive as the prejudice against color in America which has formed a bar to advancement unlike any other." The consequences of the long and tragic social history of racism remain and perpetuate themselves.

Again, as the National Advisory Commission on Civil Disorders observed: "In America, there are two societies: black and white, separate and unequal."

The inequality is manifested in a number of gaps—the statistics and the data are all too familiar to this subcommittee. There is the economic gap—black family income is, at most, 60 percent of white family income; unemployment rates are doubled; blacks are concentrated in the least desirable jobs.

There is the educational gap—both a quantitative and qualitative gap—between the educational experience of black Americans and the educational experience of white Americans.

Stated simply, blacks as a group have received far less benefit from the system of education in this country than have whites as a group, and it was set up this way.

There is the power gap. Blacks are underrepresented in the positions of power and prestige in America. Indeed, as the chairman's own introduction of Dr. Kilson indicated, we still hear about the "first black person to * * *" Blacks do not remotely share equally in societal power with whites.

The consequences of this social history of racism are self-perpetuating and self-reinforcing. Indeed, it is only the last two decades that we have made, at most, some progress in halting the overt discrimination against blacks in American society.

Today, we do have in place a system of prevention in the sense that the law prohibits overt discrimination against blacks. But the system of prevention does not purport to deal with the present consequences of the long and tragic social history of racism and cannot do so.

Because those consequences are so enduring and so pervasive, the system of prevention, even if vigorously and fully enforced, will do very little to alter the societally disadvantaged position of blacks and the condition of racial inequality that exists in American society. This is why affirmative action is necessary, and this is why it is justified.

THE EQUAL PARTICIPATION OBJECTIVE

Let me explain exactly what I mean by the equal participation objective. The goal of the equal participation objective is to end white supremacy and black inequality in all their manifestations and to achieve genuine equality between blacks and whites in American society.

This means that ultimately blacks as a group will participate equally with whites as a group in all aspects of American life, blacks as well as whites will be involved in societal governance, blacks as well as whites will share positions of power and prestige, blacks will be meaningfully represented in the economic system, blacks will no longer be disproportionately lower income in relation to whites. This is the goal of the equal participation objective.

It is not based on any notions of reparations or proportionality. It does not mean that because blacks have been subject to a long history of discrimination and victimization, white society now owes blacks reparations. It does not seek to give blacks the proportionate share of societal participation and power that they would have had in the absence of the social history of racism.

But it does seek to give blacks as a group some meaningful share of societal participation and power and to bring them fully into the mainstream of American life.

The focus of the equal participation objective is on the present consequences of past discrimination, on the self-perpetuating and self-reinforcing consequences that are felt by blacks as a group today.

If those consequences did not exist, there would be no basis for affirmative action to implement the equal participation objective. This is another basis for distinguishing the situation of blacks from the situation of white ethnic groups.

For example, it cannot be doubted that in the past there has been discrimination against Jews in America. Since I am Jewish, I can discuss the existence of Jewish societal power without being accused of antisemitism.

But let us assume that if it had not been for such discrimination, Jews as a group would have even a greater share of societal power than they have now—for example, that there would be even more Jewish physicians and lawyers. But Jews as a group do not lack a fair share of societal power. There are, indeed, quite a substantial number of Jewish physicians and lawyers.

If blacks as a group, despite the social history of racism, also had a fair share of societal power and were participating fully in all aspects of American life today, there would be no justification for invoking the equal participation objective to favor blacks.

Similarly, although Asian Americans have been subject to discrimination that truly can be characterized as racial, Asian Americans as a group also have a fair share of societal power and participation in relation to their representation among the general population. So affirmative action favoring Asian Americans cannot be justified as being necessary to advance the equal participation objective.

There are few today who will try to justify overt discrimination against blacks or who fail to express regret over the condition of societal racial inequality that exists today. But they extol the virtues of racial neutrality. They say: "We must have a Constitution that is colorblind."

By proclaiming the virtues of racial neutrality, however, they deliberately choose to ignore the self-perpetuating and self-reinforcing consequences of the social history of racism.

If we have racial neutrality, we will perpetuate and maintain white supremacy. If we have racial neutrality, we will not have racial equality.

After a long history of racial discrimination, the principle of racial neutrality may sound nice, but the bottom line and the realistic meaning of racial neutrality today is the perpetuation of white supremacy and of two societies—black and white, separate and unequal.

There may be other means proposed to overcome this, but basically those means are not directed to the condition of racial inequality that exists in American society.

I would submit, therefore, that in the absence of affirmative action we will continue to perpetuate and maintain white supremacy and racial inequality.

THE COSTS OF AFFIRMATIVE ACTION

Affirmative action has its costs, and this is perhaps the heart of the controversy. Affirmative action will benefit blacks as a group by increasing the participation of blacks in all aspects of American life.

While the immediate beneficiaries, of course, will be individual blacks, the ultimate benefits are realized by blacks as a group as blacks will become full and equal participants in all aspects of American life, and those benefits will be realized by the society as a whole, which needs the full and equal participation of black Americans in that society.

The costs are not borne by whites as a group. Whites as a group now have full and equal participation—indeed, they have supremacy and dominance in all aspects of American life—and whites as a group will not be injured if this participation is shared by blacks.

The direct costs of affirmative action are borne by individual whites who, but for affirmative action, would have received the benefits that are now going to blacks. These individual whites suffer, in the literal sense of the term, racial discrimination—disadvantageous treatment due to considerations of race.

We may assume for purposes of our analysis—although this is not always the case—that the individual whites who suffer this racial disadvantage are "innocent" in the sense that they did not benefit directly from past discrimination against blacks. But they are no more innocent than all of the black population of the United States which has been denied full and equal participation in American life.

What affirmative action means is that the burden of the consequences of the social history of racism in this Nation are shared to some degree by whites instead of falling entirely on blacks. As Chief Justice Burger observed in the *Fullilove* case: "A sharing of the burden by innocent parties is not impermissible."

As is clear, there is a strong societal interest in the full and equal participation of blacks in all aspects of American life. Again, it is a well-settled legal principle that individuals may properly be required to make sacrifices in the public interest.

It cannot be a legitimate objection to affirmative action, then, that it imposes some cost on individual whites. Affirmative action is necessary to overcome the present consequences of a long and tragic social history of racism in this Nation.

It is morally right that those consequences be overcome and that we have true racial equality in American society. The moral rightness of affirmative action is in no way lessened because it requires that the burden of the consequences of the social history of racism be shared by whites instead of being borne entirely by blacks.

THE SOCIETAL INTEREST

The last point I want to make is in regard to the societal interest in the full and equal participation of blacks in all aspects of American life. Let us take an example—the participation of blacks in the functions of government.

Consider first the police function. Blacks traditionally have been grossly underrepresented in municipal police forces, even in cities having a substantial black population and virtually nonexistent in State police forces, even in States having a very large black population.

For example, when the city of Detroit adopted an affirmative hiring program with respect to police hirings and promotions in 1974, the city, with a black population of nearly 50 percent at that time, had a police force that was only 17 percent black and among the supervisors less than 5 percent black.

The city of Detroit, under the leadership of Mayor Coleman Young, adopted an affirmative action program in 1974. When that program was challenged in Federal court, the court found that as a result of the program there was a dramatic improvement in police/community relations; there were fewer citizen complaints; there were fewer shootings of police officers; and, ultimately, there was a lower crime rate.

The equal participation by blacks in the police function most clearly serves the societal interest in effective law enforcement.

There is the same societal interest in the equal participation of blacks in all aspects of government to insure that the government will be aware of the problems and needs of minority communities; that the Government, while making and implementing policy, will have the benefit of the perspective that comes from the experience of being black in America, helping to bring about confidence in the institutions of government on the part of the black community and the part of all people.

If we are to have the best government that it is possible to have, it must be a government that is representative of all the people, and it must include the substantial participation of blacks.

There is the same societal interest in the equal participation of blacks in law and medicine. Lawyers do much more than practice law. They are responsible for the administration of justice and for the legal system. Physicians do more than provide patient care. They are responsible for the administration of the health care delivery system. Again, this society needs substantial black participation in those crucial roles.

We need changes in the structure of the economic system, again, to bring blacks into the economic mainstream, to end the economic gap that exists between blacks and whites.

In the final analysis, in response to the question: Who needs affirmative action? I am going to answer: We all do. We need affirmative action so that we will have a racially equal society, so that we will have a racially just society, so that we will have a society in which blacks participate equally with whites in all aspects of American life.

Affirmative action does have its costs, but in the final analysis the costs of perpetuating racial inequality are much greater than the costs of affirmative action.

At this point in time, this Nation must come to grips with the present consequences of a long and tragic social history of racism. Affirmative action is necessary to bring about true racial equality and a truly just society.

Thank you, Mr. Chairman.

Senator Hatch. Thank you for a very articulate statement. Without objection, we will insert your prepared text at this point.

[The prepared statement of Professor Sedler, with an attachment, follows:]

Prepared Statement of Prof. Robert Allen Sedler

Members of the Subcommittee: I am pleased to have the opportunity to address the Subcommittee on the subject of affirmative action. I believe that this is the most fundamental issue of equality that faces the nation today. The term, "affirmative action," may embrace a number of things, but the controversy over "affirmative action" relates to the use of race-conscious criteria, favoring blacks and other "non-white" groups, and gender criteria, favoring women, in the allocation of societal benefits, such as employment, university admission and the like. I will discuss affirmative action primarily in the context of the use of race-conscious criteria favoring blacks and other "non-white" groups and will develop what I believe to be the primary justification for racial affirmative action. I will also show that there is a related justification for affirmative action in favor of women.

The primary justification for racial affirmative action, in my view, is that it is necessary to insure the full and equal participation of black-Americans in all aspects of American life, which participation has been denied to them by the long and tragic social history of racism in this nation. The term, "social history of racism," is a shorthand expression for everything that has happened to blacks and for the history of discrimination and victimization of blacks in American society. It had its genesis in the institution of chattel slavery, and it is a history of inferiority established by law, of rampant discrimination in employment, of ghettoization, of segregated and tangibly inadequate schooling, and of the denial of access to societal power. Racial discrimination was often commanded by the government at all levels, and when it was not commanded, it was tolerated and encouraged. Private entities and individuals added their significant increment. Stated simply, racial discrimination and victimization of blacks was considered legitimate, and this was the way that American society traditionally dealt with black people, first as slaves, and then as "second-class" citizens.

The social history of racism was predicated on a belief in the moral inferiority of blacks, a belief that was necessary to justify the institution of chattel slavery, and a belief that persisted to justify massive racial discrimination and victimization throughout our history in all aspects of American life. The massive racial discrimination and victimization practiced against blacks is qualitatively different from the kind of discrimination that in times past has been practiced against white ethnic groups in America. As was observed by the National Advisory Commission on Civil Disorders: "European immigrants too suffered from discrimination, but never was it so pervasive as the prejudice against color in America, which has formed a bar to advancement, unlike any other." Justice Marshall summed it up succintly in the *Bakke* case when he said: "The experience of Negroes in America has been different in kind, not just in degree from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized by the Negro; because of his skin color he never even made it into the pot." Indeed, only in the last two decades has any real progress been made in halting much of the overt discrimination practiced against blacks in America.

The consequences of the long and tragic social history of racism remain and perpetuate themselves. In 1968, the National Advisory Commission on Civil Disorders concluded that in America, there were "two societies, black and white, separate and unequal." In 1978, the United States Commission on Civil Rights published a report entitled "Social Indicators of Equality for Minorities and Women," which gave tangible and irrefutable demonstration to the pervasive and continuing societal inequality of blacks and whites. The commission found that while blacks as a group had made some gains in absolute terms according to a number of indicators of social wellbeing, there was little improvement in blacks' societal position in relation to whites. The same tangible and irrefutable demonstration of societal racial inequality is reflected in all the publications of the Census Bureau and every other governmental agency that collects racial information.

We may briefly review some of the now all too familiar and depressing evidence showing the present consequences of the social history of racism. First there is the economic gap between blacks and whites. The unemployment rate for blacks has consistently been over double that for whites. In 1976, the unemployment rate for black males stood at 15.9 percent, compared to 5.9 percent for white males; for black women it was 18.9 percent, compared to 8.7 percent for white women. The disparity was even greater for black teenagers, with 47.8 percent of the black males and 51.3 percent of the black females in the 16 to 19 year old range unemployed, compared to 5.9 percent and 19.2 percent for white male and females in that age range. Today, in the midst of a depressed economy, the gap is likely to be even worse.

Among the blacks who are employed, a disproportionate number are found in the low-paying, low-prestige occupational categories. In 1976, for example, 34.7 percent of the nonwhite work force (this includes Asian-Americans who are adequately represented in the higher-paying, higher prestige occupational categories) were employed in "white-collar" occupations compared to 51.8 percent of white workers. Conversely, 25.4 percent of nonwhite workers were employed in "service" occupations, including household help, while only 12.3 percent of white workers were so employed. Even within the "blue collar" category, where the distribution of blacks and whites is more even, blacks are disproportionately concentrated in the least desirable occupations.

The end result is a most significant income gap between blacks and whites. Median black family income is approximately 60 percent of white family income, a figure that has remained constant for a long time. The disparity in median household per capita income is even greater; as of 1975, black median household per capita income was only 52 percent that of whites. A much greater percentage of black families than white families live below the federally-defined poverty level. In 1976, 28.2 percent of all blacks lived in families whose income was below the poverty level, compared to 7.5 percent of all whites. The gap is even starker for children. As of 1975, over 40 percent of black children were growing up in families with income below the poverty level compared with 11 percent of white children. Finally, blacks enjoy much less upward mobility in income than do whites; the earnings increment by age for black males, for example, is half that of white males. One of the most pronounced consequences of the social history of racism then is a very significant economic gap between blacks and whites.

Another pronounced consequence of the social history of racism is an educational gap between blacks and whites. Blacks continue to lag behind whites in the level of education attained. According to the Census Bureau, as of 1976, the median number of school years completed by black males over age 25 was 10.8, compared to 12.5 for white males. The median number for black women over age 25 was 11.4 years compared to 12.4 for white women. A black American in 1976 was only 32 percent as likely to graduate from college and only 85 percent as likely to graduate from high school as his or her white counterpart.

When the quality of education received by blacks is considered, the gap grows even wider. Recent studies show that in urban areas, where over three-quarters of the black population now live, there is marked discrimination in educational expenditures between low income, predominantly nonwhite neighborhoods and wealthier, predominantly white neighborhoods, even within the same school district. As between the urban school districts, an increasing number of which are predominantly nonwhite, and the virtually all-white suburban school districts, the disparity in expenditures and in the quality of education offered is still greater. A 1977 study by the Office of Education found that only 58 percent of black 17-year-olds were functionally literate compared to 87 percent of white 17-year-olds. By the time that black males reach high school, they are more than twice as likely to be two or more grades behind in school than their white peers. The quality differential carries over into higher education, where blacks are much more likely to be attending poorly rated colleges than are whites.

The economic gap and the educational gap are mutually reinforcing, and perpetuate each other. There is a direct correlation between economic condition and academic performance, even if everything else is equal. Children from economically advantaged homes as a group, who start out with educational advantages, have a much higher level of academic achievement than do children from economically disadvantaged homes as a group. Because so many black children grow up in poverty and low-income homes in comparison to white children, that whites as a group will have a significant "educational lead" over blacks as a group is foreordained even before the children start school.

The built-in educational handicap that black children as a group start out with is aggravated by the fact that the great majority of them have received all or part of their education in predominantly black and thus predominantly lower-income schools. Apart from the socio-economic status of the individual child, the next most important determinant of academic achievement is the socio-economic composition of the classroom in which the child is enrolled. The academic performance level of all children enrolled in classrooms in which economically advantaged children predominate is, on the average, considerably higher than the academic performance level of those enrolled in classrooms in which economically disadvantaged children predominate. The "double built-in" educational handicap of black children as a group is aggravated still further by the overall tangible inequality between predominantly black schools and predominantly white schools, as discussed above.

Low educational attainment, caused in large part by economically disadvantaged status and attendance at schools in which economically disadvantaged children predominate, in turn has a severe detrimental impact, when the children become adults, on their economic status, social mobility and other indicia of social wellbeing. Thus, poorly educated black children find themselves as adults in low-status, low-paying jobs, and their depressed economic condition adversely affects the educational opportunities of their children. Thus the cycle of poverty and inequality is perpetuated from one generation to another.

The third pronounced consequence of the social history of racism is the power gap. Blacks are seriously underrepresented in the "elite" professions, in positions of societal power, and in the "economic mainstream." Although the black population of the United States is close to 12 percent, less than 3 percent of all physicians and less than 2 percent of all lawyers are black. The absence of blacks in the top management of America's corporations needs no documentation. Blacks are equally underrepresented in the top levels of the governmental bureaucracy and educational institutions. There are relatively few black-owned business enterprises, and such existing enterprises do not generate a significant amount of business volume. As of 1976, only 3 percent of the 13 million businesses in the United States were owned by by blacks and other minority persons, and of the $2.54 trillion in annual gross business receipts, only about $16.6 billion, or 0.65 percent of the total, were realized by minority-owned businesses. We still hear about, "the first black person to * * *" There is then an enormous power gap between blacks and whites in this nation, and blacks do not in any way share equally in the exercise of societal power.

As stated previously, it is only in the last two decades that any real progress had been made in halting the overt discrimination against blacks in American society. During this time, the struggle for racial equality concentrated almost entirely on attacking the existing structure of societal racism, in order to remove the structural impediments that denied equality to blacks. From a legal standpoint, this struggle has been largely successful. The Constitution has now been interpreted to prohibit state-imposed segregation and other traditional forms of intentional discrimination against blacks. Federal laws prohibit racial discrimination in voting, employment, public accommodations and housing, and similar protection is afforded by the laws of many states. This means that there is now a system of prevention. The law prohibits present discrimination against blacks and provides remedies for such discrimination.

But the system of prevention does not purport to deal with the present consequences of the long and tragic social history of racism, and cannot do so. Because those consequences are so enduring and so pervasive, the system of prevention, even if vigorously and fully enforced, will do very little to alter the societally disadvantaged position of blacks. This is why affirmative action is necessary, and this is why it is justified. It is only by affirmative action, by the use of race-conscious criteria favoring blacks, that we will be able to make any progress toward undoing the present consequences of the social history of racism and to come anywhere near to achieving genuine racial equality in American society. The consequences of the social history of racism are, as has been demonstrated, self-perpetuating and self-reinforcing. The same factors that have created a societal condition of racial inequality, of "two societies, black and white, separate and unequal," will, if not redressed directly and concretely by affirmative action, cause that condition to continue for the remotely foreseeable future.

I will try to explain in some detail why affirmative action is necessary to bring an end to societal racial inequality and to insure the full and equal participation of blacks in all aspects of American life. I will use as illustrations the three situations that were presented in the affirmative action cases that have been decided by the Supreme Court: medical school admissions, which was involved in *Bakke*, entrance into the skilled crafts, which was involved in *Weber*, and participation in the governmental marketplace, which was involved in *Fullilove*. In all of these situations it is clear that the present consequences of the social history of racism leave blacks as a group at a tremendous disadvantage in comparison with whites as a group with respect to the ability to obtain the benefit in question, so that if racially neutral criteria were strictly followed—if affirmative action were not employed—blacks would be substantially denied access to the benefit.

In the context of admission to medical school, the racial disadvantage is the result of the educational gap that exists between blacks and whites. The number of fully qualified applicants for medical school vastly exceeds the number of available places. At the Davis medical school, for example, there were 3,737 applicants for 100 available places in the 1974 entering class. The approach to medical school admission on the part of the medical schools has been to determine which of the many qualified applicants are the "most qualified" in relation to each other. Since the probability of academic success, particularly at a high level, is a major objective of the selection process, it is not surprising that the selection is made primarily on the basis of comparative predictors of academic performance, such as college grades and standardized achievement test scores. While many of the black applicants are fully qualified in the sense that their college grades and achievement test scores indicate that they can successfully complete the academic work, given the significant educational gap between blacks as a group and whites as a group, the objective academic indicator scores of the white applicants as a group are likely in the aggregate to be much higher than the objective academic indicator scores of black applicants as a group. This does not mean that the black applicants as a group are any less intelligent or any less industrious than the white applicants as a group. It simply means that whites as a group are much better educated than blacks as a group and have derived much more benefit from the system of education in this nation. Thus if race is not affirmatively taken into account, and if the selection is made on comparative objective academic indicator scores alone or any other racially neutral factor reflecting the quality of an applicant's education, few if any black applicants will be admitted. This in turn means that nothing will be done to alleviate the serious underrepresentation of blacks in the medical profession.

It has been argued that it is not necessary to use race-conscious criteria in order to obtain the admission of a substantial number of black students, that this goal could be accomplished if the admission criteria were made more subjective and put less reliance on comparative academic indicator scores. Leaving aside the question of precisely how the admission criteria should be made more subjective and whether this is really feasible, the fact remains that if this were done, the result would be to exclude substantially the same number of white applicants that are now being excluded because of affirmative action programs. The cost of increasing the number of black medical students would still be borne by white applicants, and the "injury" to them is the same whether race-conscious criteria are used directly, or whether the racial objective is achieved by purportedly neutral means. And if the goal of changing the existing admission criteria is to increase the number of black students, it is realistic to assume that whatever subjective criteria were adopted would be skewed so that this goal could be achieved. It seems to me that it is much more desirable, if the goal is a racial one, for the medical school to be "up front" about what it is doing, and to use race-conscious criteria to select what it considers to be the "most qualified" black applicants and the "most qualified" white applicants.

It has also been argued that since so many blacks come from economically disadvantaged backgrounds, if the medical school were to admit a certain number of "economically disadvantaged" students, this would bring about the admission of a reasonable number of black students. It wouldn't for two reasons. First, while proportionately there is a substantially higher incidence of economic disadvantage among blacks as a group than among whites as a group, in strict numbers terms—which is what is important here—there are more economically disadvantaged whites than there are economically disadvantaged blacks. In 1974, for example, there were 6.2 million white children under 18 years of age in families below low-income level compared to 4.0 million non-white children, although only 11.2 percent of all white children were in families below low-income level, compared to 40 percent of all black children. Even if everything else where equal, there would still be a much higher number of whites competing for the "disadvantaged" places than blacks. Second, and even more important, economically disadvantaged whites as a group have not suffered the same degree of educational disadvantage as have blacks as a group. This is so in part because whites are likely to have attended predominantly white and thus predominantly advantaged schools, both in terms of social class composition and tangible quality. The empirical data clearly shows that the academic achievement levels of economically disadvantaged whites as a group are higher than those of economically disadvantaged blacks as a group. The use of the "disadvantaged" criterion then will most certainly favor "disadvantaged" whites, and is not likely to result in the admission of a substantial number of black applicants.

Thus, if blacks are to be admitted to medical school in any reasonable numbers, race-conscious criteria will have to be employed, either directly under an affirmative action program, or by subterfuge, using more subjective admission standards, but skewing them to favor black applicants. It seems far preferable for the medical schools to be honest about what they are doing and more rational for them to use race-conscious criteria directly to select what they believe are the "most qualified" students of both races.

What has been said about admission to medical schools is equally applicable to admission to law schools. Law schools too have a surplus of qualified applicants, and although the objective academic indicator scores of many black applicants are higher than the objective academic indicator scores of many white applicants who were admitted 15 and 20 years ago (and who graduated and became lawyers), if race is not affirmatively taken into account, relatively few blacks will be admitted in most law schools today. Thus the failure to employ affirmative action in determining admission to medical school and law school will result in the substantial exclusion of black applicants and the continued underrepresentation of blacks in the medical and legal professions.

The educational gap between blacks and whites operates to disproportionately exclude blacks whenever eligibility for any position depends on comparative test scores, such as those on a civil service examination or any other standardized test. Any examination will to a large degree be testing the quality of the examinee's prior education, and in light of the educational gap, the test scores of black applicants as a group are likely to be significantly lower than those of white applicants as a group. To the extent then that eligibility for any position depends on comparative test scores, in practice blacks are likely to be disproportionately excluded from that position.

In the *Weber* case, which involved entrance into the skilled crafts, affirmative action was necessary because of the much greater seniority of white workers in relation to black workers, resulting from the fact that blacks had been hired by the employer only in very recent years. Prior to 1974, the employer had no in-plant training program for skilled craft workers, and hired all its skilled craft workers from the outside. Because blacks had long been excluded from craft unions and union apprenticeship programs, less than 2 percent of the skilled craft workers at the plant were black, although blacks comprised 39 percent of the workforce in the relevant labor market. In response to affirmative action pressures from the federal government, the employer established a skilled crafts training program for its in-plant workers. Applicants were selected on the basis of plant seniority, with the proviso that at least 50 percent of the trainees would be black. In effect, there were racial seniority lists, with the white workers and the black workers having the highest seniority on the respective lists being chosen. If the choice had been on the basis of straight seniority without regard to race, not many blacks would have been chosen, since the employer's workforce was only 15 percent black, and most of them were fairly recent hires with very little seniority. It is somewhat ironic that the training program challenged unsuccessfully in *Weber* by a white employee as being "discriminatory" benefited whites as well as blacks, and that if it had not been for that program, neither *Weber* nor any other in-plant white employee would have had the opportunity to obtain entry into the skilled crafts.

Whenever seniority is used as the criterion for selection, it will perpetuate the present effects of past employment discrimination and severely curtail the opportunities for advancement on the part of black employees. Since many employers, particularly in the south, did not hire blacks at all, except for menial jobs, prior to the Civil Rights Act of 1964, and continued to discriminate against blacks long after the Act went into effect, black workers as a group have much less seniority than white workers as a group. The relatively low seniority of black workers as a group has become quite apparent during these times of economic downturn, with blacks, who have been hired later, being laid off disproportionately in comparison to whites. To the extent that seniority is used for any purpose, the effect will be to disadvantage blacks as a group and to perpetuate the present effects of the past racial discrimination in employment.

Affirmative action is also necessary if black business enterprises are to participate at all in the governmental marketplace and to compete at all successfully against white-owned enterprises. When Congress provided for a ten percent "minority business enterprise" set aside in the Public Works Employment Act of 1977, which was unsuccessfully challenged in *Fullilove*, it made legislative findings to the effect that there had been a long history of racial discrimination in the construction industry, which had impaired or foreclosed access by minority business enterprises to public contracting opportunities. Although minority business enterprises were capable and ready to do the work, they simply were not in a position to compete against white-controlled enterprises. The difficulties that minority business enterprises have in capital formation and in other aspects of entrepreneurship were well-known to Congress when it enacted the set aside and continue today.

So unless affirmative action is employed, minority business enterprises will be virtually excluded from participation in the governmental marketplace.

The above discussion, it is submitted, demonstrates why affirmative action is necessary to overcome the present consequences of the long and tragic social history of racism in this nation and to insure the full and equal participation of blacks in all aspects of American life. As stated previously, these consequences are self-perpetuating and self-reinforcing. The same factors that have created a condition of societal racial inequality will, if not redressed directly and concretely by affirmative action, serve to perpetuate and continue that societal inequality.

There are few today who will try to justify, at least publicly, overt discrimination against blacks, or who fail to express regret over the condition of societal racial inequality that exists in America today. But there are many who because they proclaim the virtues of racial neutrality, are opposed to affirmative action. They contend that despite the long history of racial discrimination against blacks and despite the fact that the pervasive consequences of past discrimination against blacks remain, we cannot take race into account and must be "color-blind."

By proclaiming the virtues of racial neutrality, however, they deliberately choose to ignore the self-perpetuating and self-reinforcing consequences of the social history of racism. If we have racial neutrality, we will perpetuate and maintain white supremacy. If we have racial neutrality, we will not have racial equality. After a long history of racial discrimination, the principle of racial neutrality sounds nice, but the bottom line—and the realistic meaning of racial neutrality today—is the perpetuation of white supremacy and of "two societies, black and white, separate and unequal."

The realistic "choice of models" for American society today then is illustrated by the following diagram:

The racial neutrality model

Stage one.—The social history of racism; race taken into account to disadvantage blacks.

Stage two.—Racial neutrality.

Result.—Racial inequality, white supremacy, and the continued disadvantaged situation of blacks.

The affirmative action and racial equality model

Stage one.—The social history of racism; race taken into account to disadvantage blacks.

Stage two.—Affirmative action; use of race-conscious criteria favoring blacks in order to overcome the present consequences of the social history of racism.

Result.—Racial equality between blacks and whites in American society; thereafter racial neutrality.

Proponents of affirmative action, no less than its opponents, also would like to see a society in which race would be irrelevant. But they recognize that we cannot move in one fell swoop from a society in which race was universally taken into account to disadvantage blacks into a society premised entirely on racial neutrality. At least we cannot do so without perpetuating white supremacy and black inequality. Racial neutrality must promote, not defeat racial equaltiy. When we have racial equality between blacks and whites in American society, then and only then can we have true racial neutrality. This is the objective of affirmative action. In the America of the future, as a result of affirmative action, we will have racial equality, and then racial equality and racial neutrality will be correlates, not opposites.

This society has been race-conscious for a long, long time. It has been race-conscious in its discrimination and victimization of black Americans. The consequences of that discrimination and victimization remain, and they will be alleviated only if we deal with them directly. Just as a physician must not only arrest a disease and prevent its recurrence, but must also prescribe treatment for its lingering effects, American society must now deal with the present consequences of its legacy of racism. It is only by the use of affirmative action that we can realistically hope at long last to put an end to this tragic legacy. It is only by affirmative action that we will finally have One America, and true equality between blacks and whites in American society.

Affirmative action has its costs, and this is perhaps the heart of the controversy. Affirmative action will benefit blacks as a group, by increasing the participation of blacks in all aspects of American life. While the immediate beneficiaries will be individual blacks—the black student who is admitted to medical school or law school, the black employee who enters the skilled crafts training program, the black enterprise that gets the government construction contract—the ultimate benefits are realized by blacks as a group, as blacks become full and equal participants in all aspects of American life, and, as will be demonstrated, by the society as a whole. The costs are not borne by whites as a group. Whites as a group now have full and equal participation in all aspects of American life and will not be injured if this participation is shared with blacks. Whites as a group of course can have no legitimate interest in maintaining their present position of societal dominance, and cannot legitimately object to sharing power with blacks.

The direct costs of affirmative action are borne by individual whites, who, but for affirmative action, would have received the benefits that instead are going to blacks. Those individual whites suffer in the literal sense of the term, racial discrimination—disadvantageous treatment due to considerations of race. We may assume, although this is not always the case, that the individual whites who suffer this racial disadvantage are "innocent" in that they did not benefit directly from past discrimination against blacks.

What this means, however, is that the burden of the consequences of the social history of racism in this nation is shared to some degree by whites instead of falling entirely on blacks. While the adversely affected whites are innocent, so are all of the black population, which has been denied full and equal participation in American life. As Chief Justice Burger observed in the *Fullilove* case: "A sharing of the burden by innocent parties is not impermissible." In addition, as will be demonstrated, there is a strong public interest in the full and equal participation of blacks in all aspects of American life. It is a well-settled legal principle that individuals may properly be required to make sacrifices in the public interest, and that the public interest may require that particular individual interests—let alone the interests of an entire race of people—be preferred over other individual interests.

It cannot be a legitimate objection to affirmative action then that it imposes costs on individual whites. Affirmative action is necessary to overcome the present consequences of a long and tragic social history of racism in this nation. It is morally right that those consequences be overcome and that we have true racial equality in American society. The moral rightness of affirmative action is in no way lessened because it imposes some costs on whites and requires that the burden of the consequences of the social history of racism be shared by innocent whites as well as by innocent blacks.

I now want to discuss more precisely the meaning of the equal participation objective. The goal of the equal protection objective is to end white supremacy and black inequality in all of their manifestations and to achieve genuine equality between blacks and whites in American society. This means that ultimately blacks as a group will participate equally with whites as a group in all aspects of American life. Blacks, as well as whites, will be significantly involved in societal governance. Blacks, as well as whites, will share positions of power and prestige. Blacks will be meaningfully represented in the economic system, and blacks will not be disproportionately lower-income in relation to whites. The consequences of the social history of racism will not be so strikingly visible in American society as they are today.

The equal participation objective is not based on any notion of "reparations" or "proportionality." It does not mean that because blacks have been subject to a long history of discrimination and victimization, white society now owes blacks "reparations" and must give blacks benefits at the expense of whites. Nor does it mean that blacks as a group are entitled to the "proportionate" share of the benefits of American society that they would have received had it not been for the social history of racism or a share of those benefits in exact proportion to their representation in the general population. The equal participation objective is not concerned with "reparations" for the past or with "proportionality," but with the absence of the full and equal participation of blacks in all aspects of American life. It does not seek to give blacks the proportionate share of societal participation and power that they would have had in the absence of the social history of racism, but to give blacks as a group some meaningful share of societal participation and power and to bring them fully into the mainstream of American life.

The focus of the equal participation objective is on the present consequences of past discrimination and victimization that are felt by blacks as a group today. If those present consequences did not exist and were not self-perpetuating and self-reinforcing, there would be no justification for invoking the equal participation objective. This is another basis for distinguishing the situation of blacks from the situation of white ethnic groups, and it also points up the irrelevancy of "reparations" and "proportionality" to the equal participation objective. For example, it cannot be doubted that in the past there has been discrimination against Jews in America. (Since I am Jewish, I can discuss the existence of Jewish societal power and distinguish the situation of blacks from the situation of Jews without being accused of anti-Semitism.) Let us assume that if it had not been for such discrimination, Jews as a group would have even a greater share of societal power than they now have, for example, that there would be even more Jewish physicians and lawyers than there are now. But Jews as a group do not lack a "fair share" of societal power; there are, for example, quite a substantial number of Jewish physicians and lawyers. If blacks as a group, despite the social history of racism, also had a "fair share" of societal power and were participating fully in all aspects of American life today, there would be no justification for invoking the equal participation objective, and affirmative action favoring blacks could not be sustained on this basis. Similarly, although Asian-Americans have been subject to discrimination that can be characterized as "racial," Asian-Americans as a group also have a "fair share" of societal power and participation in relation to their representation among the general population. Thus, affirmative action favoring Asian-Americans cannot be justified as necessary to advance the equal participation objective.

In other words, the justification for the invocation of the equal participation objective in support of affirmative action favoring blacks is that the social history of racism has produced present consequences for blacks as a group denying them equal participation in American society and relegating them to a condition of racial inequality, consequences that cannot be overcome without affirmative action. Again, to quote Justice Marshall in *Bakke*: "In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society."

I believe that blacks as a group have a moral right to societal racial equality, to the full and equal participation in American society and in all aspects of American life. This is the essence of the promise that this Nation made to black-Americans when it emancipated them from the chains of slavery that it had forced upon them. This is a promise that the Nation has yet to keep.

But I want now to approach the equal participation objective from another perspective. I want to approach it from the perspective of the societal interest in the full and equal participation of blacks in all aspects of American life. I believe that there is a very strong societal interest in such participation, and that many benefits will flow to American society from the implementation of the equal participation objective. I will develop this proposition by illustrating the operation of the equal participation objective in three areas: participation in the functions of government; participation in the "power" professions, such as law and medicine; participation in the economic system.

As regards participation in the functions of government, consider first the police function. Blacks traditionally have been grossly underrepresented in municipal police forces, even in cities having a substantial black population, and virtually nonexistent in state police forces, again regardless of the size of the state's black population. For example, when the City of Detroit adopted an affirmative action program with respect to police hiring and promotions in 1974, the City had a black population of nearly 50 percent, but the police force was only 17 percent black, and less than 5 percent of the supervisors were black. The State of Alabama and the State of Mississippi, despite large black populations, did not have a single black on the state police force until the federal courts ordered them to do so. So long as blacks are grossly underrepresented in the police force, the police force will be perceived by the black community as an occupying army, as was so tragically demonstrated in the 1967 riots. According to the President's Commission on Law Enforcement and the Administration of Justice: "In order to gain the general confidence and acceptance of a community, personnel within a police department should be representative of the community as a whole . . . If minority groups are to feel that they are not policed entirely by a white police force, they must see that Negro or other minority officers participate in policymaking and other crucial decisions." It was in this spirit that the City of Detroit, under the leadership of Mayor Coleman Young, adopted an affirmative action program with respect to police hiring and promotions in 1974. When that program was challenged in federal court, the Court found that as a result of the program, there was a dramatic improvement in police-community relations, there were less citizen complaints, there were fewer shootings of police officers and ultimately there was a lowered crime rate. As a federal appeals court observed in connection with Detroit's affirmative action program: "The argument that police need more minority officers is not simply that blacks communicate better with blacks or that a police department should cater to public desires. Rather it is that effective crime prevention and solution depend heavily on the public support and confidence in the police. In short, the focus is not on the superior performance of minority officers, but on the public's perception of law enforcement officials and institutions." The equal participation [illegible] blacks in the police function then most clearly serves the societal interest in effective law enforcement.

There is the same societal interest in the equal participation of blacks in all functions of government. The Senate Committee on Labor and Public Welfare, when recommending the extension of Title VII to state and local governments in 1972, observed that: "The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often hostility toward the entire process of government." The equal participation of blacks in all functions of government serves important societal interests by (1) insuring that the government will be aware of the problems and needs of minority communities, (2) insuring that the government, while making and implementing governmental policy, will have the benefit of the perspective that comes from "the experience of being black in America," and (3) helping to bring about confidence in the institutions of government on the part of the black community. If we are to have the best government that is possible to have, it must be a government that is representative of all the people, and it must include the substantial participation of blacks.

We may now consider the societal interest in the equal participation of blacks in the "power" professions, such as law and medicine. As lawyers, we are fully aware of the power and influence that lawyers as a group have in American society, not only in regard to their role in the legal system and the administration of justice, but in Congress, in state legislatures and governmental bodies, and many other important societal institutions. Being a lawyer means that one is in a position, by virtue of one's profession to do important things in American society.

Although the black population is now close to 12 percent, less than 2 percent of the lawyers in this country are black, and blacks clearly are not equal participants in the exercise of societal power that is reflected in membership in the legal profession. The societal interest in the equal participation of blacks in the legal profession is not so much that black lawyers will be available to represent black clients (although blacks should have the same right to be represented by black lawyers that whites have to be represented by white lawyers), but that blacks will be participants in the exercise of societal power by the legal profession and will be able to bring the "black perspective" to that exercise of societal power. Once admitted to the profession in reasonable numbers, blacks, like whites, will be judges and prosecutors and law professors. They will be lawyers for the government, "members of the firm," and bar association officers. They will be in a direct position to contribute to the development of the American legal system and to make that system responsive to the needs of black people. In addition, blacks as a group will have greater confidence in the administration of justice, because blacks, as well as whites, will be full participants in that system. There is thus a strong societal interest in the equal participation of blacks in the legal profession.

There is likewise a strong societal interest in the equal participation of blacks in the medical profession. Apart from the fact that it has been clearly demonstrated that black physicians are far more likely than white physicians to practice in black communities and to serve the immediate health care needs of those communities, the societal interest in the equal participation of blacks in the medical profession relates to incorporating the "black perspective" into the exercise of societal power by the medical profession. The medical profession exercises societal power in a very significant way by controlling, to a large degree, the nation's health care delivery system. Physicians do much more than treat patients. They serve on hospital staffs and medical committees. They influence the distribution of medical resources and the location of health care facilities. They are involved in decisions that affect the kind of medical services that will be offered and the cost of those services. They perform substantially the same function with respect to the health care delivery system that lawyers do with respect to the legal system and the administration of justice.

There is a considerable "health gap" between blacks and whites in this nation, with blacks as a group having higher mortality and morbidity rates than whites as a group and with black communities being underrepresented in the delivery of health care services. It is certainly reasonable to believe that the equal participation of black physicians in the medical profession can contribute to ending the "health gap" between blacks and whites. Black physicians would seem for the most part to be in a better position than white physicians to assess the health care needs of black communities and to understand the difficulties that black people have in making use of the traditionally white-dominated health care delivery system. They could also be expected to be more disposed to "lobby" for the provision of adequate health care facilities for black communities. The equal participation of blacks in the health care delivery system, like the equal participation of blacks in the legal system, serves a very strong societal interest.

Blacks as a group do not participate equally in the American economic system, just as they do not participate equally in the legal or health care delivery systems. As pointed out previously, there are relatively few black-owned business enterprises, and such existing enterprises generate less than 1 percent of the total business volume in the nation. In addition, as pointed out previously, blacks are disproportionately underrepresented in the "white collar" jobs, particularly the more prestigious ones, and even in the "blue collar" category, blacks are disproportionately concentrated in "laborer" jobs and are very underrepresented in "skilled" and "crafts" jobs.

The lack of the equal participation in the economic system directly correlates with the condition of racial economic inequality that has been described earlier. Affirmative action in the economic area involves making structural changes in the way that particular forms of economic activity operate so as to increase black participation in those activities. The affirmative action program involved in *Weber* was directed toward increasing the representation of blacks in the skilled crafts. The affirmative action program involved in *Fullilove* was directed toward improving the position of minority business enterprises by giving them a 10 percent share of public works projects financed by federal grants. The ultimate objective of these structural changes is to alleviate the condition of racial economic inequality, reflecting the lack of equal participation of blacks in the economic system. The training of blacks as skilled workers will contribute to increasing the income of blacks as a group. Similarly, since experience indicates that black business enterprises are likely to employ proportionately more blacks than are whites business enterprises, the continued survival of these enterprises will likewise increase the income of blacks as a group. In addition, the increase in the number of black craft workers and viable black-owned enterprises may have the effect of reducing black unemployment and underemployment. Finally, there will be a multiplier effect insofar as these enterprises deal with other black enterprises as suppliers or customers.

Racial economic inequality is perhaps the most enduring and persistent consequence of the social history of racism and it reinforces other forms of racial disadvantage. Integration of blacks into the mainstream of American society cannot be achieved until race is no longer associated with low-income status, as it is today. As Representative Mitchell has stated: "We cannot continue to hand out survival programs for the poor in this country. We cannot continue that forever. The only way we can put an end to that kind of a program is through building a viable minority business system." Racial economic inequality can be ended only by making structural changes in economic activity so as to increase black participation in that activity and bring about equal participation of blacks in the American economic system. For all of the above reasons, there is a strong societal interest in doing so.

The above discussion is designed to demonstrate the societal interest in the equal participation objective. In response to the question, "Who needs affirmative action," I would answer, "We all do." We need affirmative action so that we will have the full and equal participation of blacks in all aspects of American life. Ultimately, this will give us not only a racially equal society, but a better society, a society in which we will have succeeded in putting the consequences of the social history of racism behind us, once and for all.

I would like next to address what I consider to be some of the "false issues" associated with affirmative action. First there is the "horrible example." With many affirmative action programs, sponsored by a large variety of governmental agencies and private institutions, there are bound to be instances where a particular use of race-conscious criteria or a particular affirmative action program can be shown to have produced what everyone would agree was an unsound result. I am sure, for example, that some government official somewhere has demanded that an employer have certain percentage of blacks in the workforce where no blacks were available. But these "horrible examples," which are found in any program, do not undercut the legitimacy or efficacy of affirmative action. The answer, here as elsewhere, is to correct the deficiencies and to make sure that affirmative action serves the purpose that it was designed to serve.

On the other hand, some of the classic "horrible examples" do not demonstrate an unsound or improper use of affirmative action, particularly in regard to the implementation of the equal participation objective. The most classic "horrible example" cited by opponents of affirmative action is the preference given to an "advantaged" black allegedly at the expense of a "disadvantaged" white. There is the proverbial "black physician's son," who, notwithstanding a superior education at the best private schools, had lower comparative objective indicator scores than white applicants who "worked their way through college," but who was admitted to medical school ahead of the white applicants because of affirmative action. This example, it is said, shows why affirmative action is "wrong." Well, it doesn't. In the first place, as pointed out previously, there simply aren't very many black physicians, so there won't be very many black physician's sons or daughters, and this particular example can't happen too often.

Similarly, while advantaged blacks do show up disproportionately among medical and law school applicants—which would be expected, since they are less likely to have suffered educational disadvantage than other blacks—the fact remains that at most schools, the great majority of the black applicants have come from low or moderate income backgrounds. More to the point, if the purpose of affirmative action in regard to professional school admissions is to increase the number of black physicians, it is rational, in light of that purpose, to admit the advantaged black student despite the lack of individual "deservedness." Because of that person's superior education, that person is more likely to succeed academically, and no matter how advantaged a black person has been, that person still has had the "experience of being black in America." Since the admission of that person serves the social goals of the affirmative action program, it is justifiable. Any criticisms of particular applications of affirmative action must be evaluated in relation to the purpose of the affirmative action program in question, and when viewed in that light, the criticisms may turn out not to be well-founded.

The second false issue is the matter of "merit." It has been contended by opponents of affirmative action that affirmative action is inconsistent with the principle that "each individual should be judged on his or her own merit." In the first place, it may be asked what is meant by "merit." Is it the person's "intrinsic merit," or is it the sum total of the person's knowledge and ability, which frequently reflects the advantages the person has received in life, including for white persons, the advantages that come from being white instead of black in American society? Obviously it is the later. Second, and more importantly, "merit" relates to the needs of the institution or instrumentality making the selection and the purpose for which the selection is made. When a law school or medical school, for example, selects the most "meritorious" students on the basis of comparative objective academic indicator scores, it is selecting the students that it considers most likely to successfully complete the academic work at the highest level, and to the extent that there is a correlation between high level academic performance and successful practice of the profession—a much mooted point—the students most likely to be successful practitioners. The framework of "merit selection" then is determined by institutional and societal needs, and the individual is selected not because of the individuals' "intrinsic merit," but because of the individual's predicted ability to meet institutional and societal needs.

"Merit" then is a function of needs. We select those individuals who have the qualifications needed by the institution or the society to perform particular tasks. The fact that a person is more "qualified" than other persons will not result in the selection of that person if the person's qualifications will not meet the needs at hand. For example, if a baseball team has three outstanding second basemen, it is probably going to have to cut one from its roster, although the one cut is better than all of the pitchers that it keeps. Similarly, if all of the applicants for positions on a police force who have the highest test scores are white, and the police department needs black officers so that it can effectively perform the police function, selecting applicants solely on the basis of the highest test scores will not meet the needs of the police department. As regards those needs, a black applicant with a good test score has more "merit" than a white applicant with a better test score, because the selection of the black applicant will advance certain needs of the department that the selection of the white applicant will not. As this example indicates, since "merit" is a function of needs, and since there is a strong societal interest in the equal participation of blacks in all as aspects of American life, affirmative action is fully consistent with the principle that, "each individual should be judged on his or her own merit."

The third false issue is the matter of "quotas." There are some who say that they are not opposed to affirmative action generally, but do object when affirmative action takes the form of a fixed proportion of benefits going to blacks, e.g., the 10 percent set aside in *Fullilove,* because then it is a "qouta," and "quotas" are undesirable. The term, "quota" does conjure up emotional reactions, because in the past maximum "quotas" were used to limit the opportunities of certain ethnic groups such as Jews. But the "quotas" involved in affirmative action programs, which are designed to provide a minimum porportion of the benefits for blacks, distinguish only between blacks and whites and do not limit the opportunities of any particular ethnic group or of any particular segment of the white population. As stated previously, the equal participation objective contains no notion of "proportionality," and no notion that any group should be limited in its opportunities. There would be no justification, for example, for limiting Jews or Italians or any group to a specified proportion of the available places in medical school or law school, and there is no correlation whatsoever between insuring the equal participation of blacks and limiting the opportunities of any particular group or any particular segment of the white population.

In addition, from a constitutional standpoint, the use of race-conscious criteria favoring blacks must be "reasonable in the circumstances presented. As Justice Powell put it in *Bakke,* the use of race-conscious criteria must be "precisely tailored to serve a compelling governmental interest." It is concepts of "reasonableness" and "precise tailoring" that adequately protect the interests of whites as a group whenever race-conscious criteria favoring blacks are employed. Whether the particular use of race-conscious criteria takes the form of a "quota" is in no way determinative of the question of whether or not it is reasonable, and in *Fullilove* for example, the Supreme Court found that it was fully reasonable for Congress to impose a 10 percent set aside for minority business enterprises. So, once we get over the emotional reaction conjured up by the term, "quota," we see that the matter of "quotas" is a false issue in regard to the validity of affirmative action programs.

In summary, the primary justification for racial affirmative action, for the use of race-conscious criteria favoring blacks, is that it is necessary and proper to insure the full and equal participation of blacks in all aspects of American life. Blacks have a moral right to such participation and to racial equality in American society, and there is a strong public interest in having the full and equal participation of blacks. Racial affirmative action, it is therefore submitted, will bring about a better society for all of us.

I will not discuss the justification for affirmative action favoring other "nonwhite" groups and favoring women. The social history of racism also has an adverse impact on other groups such as native-Americans and hispanics, who like blacks, have been subject to discrimination and victimization because the dominant majority has perceived of them as "non-white." The victimization of native-Americans paralleled the victimization of blacks, and was rooted in the same belief of "moral inferiority." Hispanics, because they too were perceived of as "non-white," shared in the racial victimization of blacks. As the Supreme Court has pointed out, "one of the things which the Hispanic has in common with the Negro is economic and cultural deprivation and discrimination." Today, neither native-Americans, nor hispanics, who now comprise about 6 percent of our population and are the second largest minority, are full and equal participants in American society. The same kind of consequences that are suffered by blacks as a group because of the social history of racism are suffered by native-Americans and hispanics as a group, and there is the same need to insure the full and equal participation of native-Americans and hispanics in all aspects of American life.

As stated previously, the equal participation objective is not based on any notions of "reparations" or "proportionality." It is based on the absence of full and equal participation in American society because of the present consequences of past discrimination. Since Asian-Americans as a group, despite past discrimination against them, now do have a "fair share" of societal power and participation, affirmative action favoring Asian-Americans cannot be justified as being necessary to advance the equal participation objective.

It is a legitimate criticism of some affirmative action programs that they include all nonwhite groups such as Asian-Americans, and even immigrant groups such as Vietnamese, without regard to whether or not those groups, as a result of past discrimination and victimization, presently lack full and equal participation in American society. The equal participation objective, as I have developed it, justifies affirmative action favoring blacks, hispanics and native-Americans. But since it is not designed to bring about "ethnic proportionality" or anything of that sort, it does not justify the extension of affirmative action beyond those groups.

The justification for affirmative action favoring women is related to the justification for affirmative action favoring blacks; it is necessary at the present time to bring about the full and equal participation of women in all aspects of American life. Just as there has been a social history of racism in this nation, there has been a social history of sexism. While the social history of sexism was not predicated on a belief in the moral inferiority of women, and while the discrimination and victimization of women was not overly brutal and was tempered by family and marital intimacy, it existed nonetheless. It was rooted in notions of male supremacy and female dependency, and women suffered discrimination whenever they sought to break out of the dependency role. The primary consequences of the social history of sexism has been the societal subordination of women as a group. Women as a group do not share societal power equally with men, and realistically do not exercise societal power to any significant degree. It is still, as they say, "a man's world," and we still hear about "the first women to * * *"

On the other hand, all of the consequences of the social history of racism do not track those of the social history of sexism. Women as a group obviously do not grow up in poverty, nor is their an "educational gap" between men and women. Women, who have received the same quality of education as a group as have men, perform academically as well as men and can compete equally with men for positions where selection is based on academic achievement or test performance.

There is, however, a great economic gap between working women and working men, just as there is between blacks and whites. The income of working women is about 60 percent of the income of working men, the same income disparity that exists between blacks and whites. Women are disproportionately concentrated in the service and "pink collar" jobs, and are seriously underrepresented in the "power" professions. A lot of this is due to past "channeling," where women have been "channeled" into "women's jobs," while men have been "channeled" into "men's jobs." Since there is a significant income disparity between working women and working men, for many working women, just as for full-time homemakers, their economic status and standard of living depends on their ties to a man.

Certain problems that women face today, which are directly traceable to the social history of sexism and to the historic dependency role of women, do not lend themselves to solution in terms of affirmative action, that is, in terms of the use of gender-conscious criteria favoring women. For example, in most American households, notwithstanding the great influx of women into the labor force, women still assume the primary childbearing and homemaking responsibilities. The need to combine childrearing and homemaking responsibilities is even more acute for the ever-increasing number of women who are single parents. Thus, questions relating to the provision of day care facilities, flexible working time, employment leave and the like, are of crucial importance to women, but are necessarily beyond the scope of affirmative action as that concept has traditionally been understood. The same is true for the problems of the dependent wife in the marriage relationship. Many of the problems faced by women in American society today then are not problems that can be dealt with in terms of affirmative action.

From another perspective, affirmative action is not necessary in some areas because of the differing consequences of the social history of sexism in comparison to the consequences of the social history of racism. Since there is no educational gap between women as a group and men as a group, the elimination of overt discrimination against women will enable women to compete equally with men for positions that depend on educational achievement or other "objective qualifications."

This point is illustrated by the dramatic increase in the proportion of women in law school and medical school today and as a result in the proportion of women lawyers and doctors. Today, at most law schools women make up between 20 percent and 40 percent of the entering class, with the average being close to one-third, and at some schools it is approaching half. At some point in time, as "channeling" diminishes, it is reasonable to assume that half of the law students will be women. A similar change has occurred in medical school enrollment and may be expected to continue.

Just as women possess equal qualifications with men in regard to professional school admission, they possess equal qualifications for jobs in the labor market generally. Title VII of the Civil Rights Act of 1964 has effected a significant improvement in women's access to jobs, at least from a legal standpoint. The statute invalidates non-job-related requirements, such as height and weight restrictions, that disproportinately exclude women, and its "bona fide occupational qualification" exception has been interpreted fairly narrowly. If enforced fully and effectively, the statute can help to bring about gender-based equality in the workplace.

There are two important reasons, however, why affirmative action favoring women is necessary at the present time to insure true gender-based equality and the full and equal participation of women in all aspects of American life. First, in the employment area, both as regards the "prestige" jobs and the other traditional "men's jobs," affirmative action, in the sense of requiring that the proportion of women in the particular employer's workforce bear some reasonable proportion to the proportion of women in the relevant labor market, is necessary as a prophylactic measure to prevent what may be called "institutional sex discrimination." While there seems to be general acceptance of the principle that there should not be overt racial discrimination in employment, there is still a lot of resistance, conscious and unconscious, to the idea that women should be employed in traditional "men's jobs." This is true at all levels and in all kinds of employment, e.g., on the assembly line and in academic departments. No matter how vigorously Title VII similar state laws are enforced, this "institutional sex discrimination" often will be hard to overcome. In this regard affirmative action will complement Title VII and will insure that in practice women will have the same employment opportunities as men.

Second, affirmative action is necessary to accelerate the full and equal participation of women in all aspects of American life and the sharing of societal power between men and women. Gender-based equality is a concept that has come into being only in the last decade or so, and women today do not have a meaningful share of societal power in any respect. They are not adequately represented in the upper or even the middle levels of corporate management, or in the government, or in most societal institutions. They are not adequately represented in the more "prestige" jobs, and in fact are not adequately represented in the "better" jobs within any field.

The same societal benefits that will accrue from the equal participation of blacks will accrue from the full and equal participation of women, and affirmative action is necessary to accelerate such participation. Consider, for example, the equal participation of women in the functions of government. There is a "women's perspective" that comes from the "experience of being a woman in American society" and from a sensitivity to the kinds of problems that women face in that society. The substantial involvement of women in the governmental function will insure that the government will be aware of the problems of women and will have the benefit of the "women's perspective." It will also help to bring about confidence on the part of women in the institutions of government. Above all, it will demonstrate a societal commitment to gender-based quality, made visible by the full and equal participation of women in the governance of that society. The same is true in regard to the full and equal participation of women in corporate management and in the administration of societal institutions.

The movement of women into the "better jobs" and away from the concentration in the "service" and "pink collar" fields will result in reducing the income gap betwen men and women. There is a strong societal interest in reducing that income gap. To the extent that women have true economic equality with men, women will be less dependent on men, and the host of problems associated with the "dependent wife" will be alleviated. In addition, with the sharp increase in the number of families headed by women, there is a societal interest in improving the earning capability of women so as to improve the economic well-being of those families.

Gender-based equality, like racial equality, should be an important goal of American society today, and affirmative action is necessary at the present time to bring about true-gender based equality in that society.

In conclusion, I would submit that at this point in time, this Nation must come to grips with the present consequences of a long and tragic social history of racism and a similar social history of sexism. As a result of this tragic legacy, blacks and women are not full and equal participants in American society. Affirmative action is necessary to bring about true equality and a truly just society. It must be continued and strengthened.

I have appended some of my writings on the subject of affirmative action to this testimony. Thank you for the opportunity to appear before the Subcommittee.

RACIAL PREFERENCE AND THE CONSTITUTION: THE SOCIETAL INTEREST IN THE EQUAL PARTICIPATION OBJECTIVE

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I. INTRODUCTION: RACIAL PREFERENCE AND THE CONSTITUTION

While the concept of "affirmative action" may embrace a number of things, constitutional considerations come into play only when affirmative action takes the form of *racial preference*.[1] Racial preference is involved for constitutional purposes whenever the race of persons is taken into account by the government in allocating benefits or burdens, so that persons are subject to differential treatment on the basis of race.[2] Racial preference is involved when race is taken into account in determining admission to a publicly-supported university,[3] in hiring and promotion in public employment,[4] or in entitlement to governmental contracts.[5] At the present time, the constitutional question arises in the context of racial preference being given to blacks and other racial-ethnic groups, such as Hispanics and Native-Americans, who, like blacks, have been subject to discrimination and victimization in American society because the dominant white majority has perceived them as "nonwhite."[6] While many of the traditional forms of discrimination against blacks resulted in racial preference for whites,[7] there was no need, for purposes of constitutional analysis, to distinguish racial preference from the other forms of discrimination against blacks. The use of race-conscious criteria that produced discrimination against blacks invariably was found by the Supreme Court to be "invidious" and hence unconstitutional, because in no case could it be shown to be "necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the objective of the Fourteenth Amendment to eliminate."[8]

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[1] *See* Legal Aid Soc'y of Alameda County v. Brennan, 608 F.2d 1319, 1343 (9th Cir. 1979).

[2] *See* Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 25.

[3] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[4] Detroit Police Officers Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979); *cf.* United Steelworkers of America v. Weber, 443 U.S. 193 (1979) (private employment).

[5] Fullilove v. Klutznick, 48 U.S.L.W. 4979 (1980).

As I have discussed more fully elsewhere,[9] constitutional doctrine in regard to racial equality has developed with reference to the concept of invidious racial discrimination.[10] The Constitution proscribes invidious racial discrimination, which is the use of race-conscious criteria not necessary to the accomplishment of a valid and substantial governmental interest.[11] The use of race-conscious criteria directed against whites is equally unconstitutional where it is not shown to be necessary to the accomplishment of the requisite governmental interest.[12] Any use of race-conscious criteria by the government is subject to "strict scrutiny,"[13] and all invidious racial discrimination[14] is unconstitutional whenever practiced by the government, whether at the instance of whites or of blacks,[15] and whether the victims of such discrimination are blacks, whites or both.[16]

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[6] Since these groups have been subject to discrimination and victimization on this basis, for constitutional purposes, a legislative body should be able to include them in any racial preference given to blacks. *See* Sedler, *Beyond Bakke: The Constitution and Redressing the Social History of Racism*, 14 HARV. C.R.-C.L. L. REV. 133, 136-39 (1979) [hereinafter Sedler, *Beyond Bakke*]. *See also* Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CALIF. L. REV. 87, 117-19 (1979). As to the matter of inclusion in the preference, see Regents of the Univ. of. Cal. v. Bakke, 438 U.S. at 359 n.35 (Brennan, J., concurring in part, dissenting in part).

[7] *E.g.*, discrimination against blacks in employment or in admission to universities.

[8] Loving v. Virginia, 388 U.S. 1, 11 (1967).

[9] Sedler, *Racial Preference, Reality and the Constitution*, 17 SANTA CLARA L. REV. 329, 368-72 (1977) [hereinafter Sedler, *Racial Preference*].

[10] It has been contended that the Constitution should be interpreted to prohibit "the differential treatment of other human beings by race," Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809 (1979), and that "the proper constitutional principle is not, no 'invidious' racial or ethnic discrimination, but no use of racial or ethnic criteria in the distribution of government benefits or burdens." Posner, *supra* note 2, at 25. My own view of racial preference in terms of constitutional values is, of course, quite different. *See* Sedler, *Racial Preference, supra* note 9, at 361-80. *See also* Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1043-50 (1979). Regardless of one's view as to how the Constitution should be interpreted, however, it has not been interpreted to prohibit "differential treatment on the basis of race," where such "differential treatment" does not amount to invidious racial discrimination. And as Dean Sandalow has noted: "A constitutional principle that government may not distribute burdens or benefits on racial or ethnic grounds is required neither by the 'intentions of the framers' nor by a more general principle of constitutional law." Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 675 (1975).

[11] When race-conscious critera are employed, the state " must show that its purpose or interest is both constitutionally permissible and substantial and that its use

For purposes of constitutional analysis then, there is a distinction between the use of race-conscious criteria and invidious racial discrimination. While it has been contended that any use of race-conscious criteria that produces detriment to persons of the other race amounts to racial discrimination and should be held to be unconstitutional,[17] this has not been the Court's approach to the constitutionality of the use of race-conscious criteria. The Court has interpreted the Constitution to permit the use of race-conscious criteria, like other criteria based on identifiable group membership,[18] where such criteria

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of the [race-conscious] classification is 'necessary . . . to the accomplishment' of its purpose or the safe-guarding of its interest." Regents of Univ. of Cal. v. Bakke, 438 U.S. at 305 (citations omitted).

[12] *Cf.* Strauder v. West Virginia, 100 U.S. 303, 308 (1880) (rejecting systematic exclusion of blacks or whites from jury service); New Orleans-City Park Improvement Ass'n v. Detiege, 252 F.2d 122 (5th Cir.), *aff'd per curiam*, 358 U.S. 54 (1958) (rejecting denial to blacks of equal access to public facilities).

[13] In Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), there was some disagreement between Justice Powell and Justice Brennan over the meaning of "strict scrutiny," with Justice Powell's view appearing to be more exacting. *See* Sedler, *Beyond Bakke*, *supra* note 6, at 141-42. As to the significance of this disagreement in regard to challenges to racial preference, *compare* Greenawalt, *supra* note 6, at 105-06 *with* Perry, *supra* note 10, at 1045.

[14] The invidious racial discrimination doctrine relates, of course, to the express or otherwise intentional use of race-conscious criteria. Under the present state of the law, the use of racially-neutral criteria having a racially-disproportionate impact ordinarily is not unconstitutional. Washington v. Davis, 426 U.S. 229 (1976).

[15] *Cf.* Castaneda v. Partida, 430 U.S. 482 (1977) (discrimination by Mexican-Americans in the "governing majority" against Mexican-Americans is tested under the same standard as discrimination by whites in the "governing majority").

[16] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291-99 (1978) (Powell, J.). This being so, it is submitted that any notion of "reverse" or "benign" discrimination, in the sense of distinguishing *analytically* between the use of race-conscious criteria directed against racial minorities and the use of similar criteria directed against whites is unsound.

[17] See note 10 *supra*.

[18] Such examples include gender, alienage, legitimacy, and age. There is no doubt that the Constitution permits the government to classify on the basis of identifiable group membership, and such classifications have not infrequently been sustained. If the government can constitutionally use gender, alienage, legitimacy, and age "in the distribution of governmental benefits or burdens," it is difficult to see why it is constitutionally precluded from ever using race for this purpose. Whenever classifications on the basis of group membership are used "in the distribution of governmental benefits or burdens," the constitutional question—sometimes obscured by the debate over the appropriate standard of review—is necessarily the same: is the "distribution of governmental benefits or burdens" on this basis necessary to the ad-

use advances a valid and substantial governmental interest by what the Court finds to be appropriate means.[19] In such circumstances the use of race-conscious criteria does not amount to invidious racial discrimination and is constitutional despite detriment that it causes to persons of either or both races.[20] Unless the Court is to radically alter existing constitutional doctrine in regard to racial equality, the constitutionality of racial preference, like the constitutionality of any other race-conscious criteria use, must be analyzed with reference to the concept of invidious racial discrimination. This analysis makes the constitutionality of racial preference depend on whether the use of racial preference, in the circumstances presented, advances a valid and substantial governmental interest by what the Court finds to be appropriate means.

The matter of racial preference bitterly divides American society today,[21] and is the subject of intense moral and philosophical debate.[22] But like many controversial questions of public concern, it has been drawn into our constitutional system, and as Professor Dixon has observed: "Once taken into our constitutional system, the dialogue takes on a new seriousness. It is, therefore, critically important that we get the questions right and the answers right, because constitutional law is written in concrete and is not easily washed out by rain or tears."[23] The right questions, however, and I would submit, the right answers as well, must be formulated in light of constitutional doctrine[24] that the Court has developed in regard to racial equality and in

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vancement of a valid and substantial governmental interest. If so, then it is constitutional. *See, e.g.*, Lalli v. Lalli, 439 U.S. 259 (1978); Foley v. Connelie, 435 U.S. 291 (1978); Califano v. Webster, 430 U.S. 313 (1977); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976). The constitutional question is no different when the "distribution of governmental benefits or burdens" is on the basis of race.

[19] The concept of "appropriate means" seems to be the best way to express the standard by which a court evaluates the permissibility of the particular use of race-conscious criteria in relation to the advancement of the governmental interest found to be valid and substantial. *See* Sedler, *Beyond Bakke, supra* note 6, at 143-44 n.49.

[20] *See* Sedler, *Beyond Bakke, supra* note 6, at 157-62. *See also* Fullilove v. Klutznick, 48 U.S.L.W. 4979, 4988-89 (Burger, C.J.), 4998-99 (Marshall, J.) (1980).

[21] *See* Lipset & Schneider, *The Bakke Case: How Would It Be Decided at the Bar of Public Opinion*, PUB. OPINION, Mar./Apr. 1978, at 38.

[22] *Compare* Cohen, *Why Racial Preference is Illegal and Immoral*, COMMENTARY, June 1979, at 40 *with* Nickel, *Preferential Policies in Hiring and Admissions: A Jurisprudential Approach*, 75 COLUM. L. REV. 524 (1975). *See generally* EQUALITY AND PREFERENTIAL TREATMENT: A PHILOSOPHY AND PUBLIC AFFAIRS READER (M. Cohen ed. 1977).

[23] Dixon, *Bakke: A Constitutional Analysis*, 67 CALIF. L. REV. 69, 70 (1979).

[24] The doctrine that the Court has developed must be related to the Court's "institutional behavior," that is, to the pattern of results that is reached by the Court in cases coming before it for decision. The Court's institutional behavior evolves over a period of time and is not necessarily fully consistent with the doctrine articulated by the Court to explain the basis of its decisions. As regards the doctrine of invidious racial discrimination, the Court's behavior in applying that doctrine in the earlier cases coming before it for decision has almost invariably been to invalidate the particular use of race-conscious criteria. But this was because in none of those cases could

light of general principles of constitutional law. Since the doctrine that the Court has developed in regard to racial equality is based on the concept of invidious racial discrimination, which looks to whether the use of race-conscious criteria in the circumstances presented advances a valid and substantial governmental interest,[25] the first "right question" is whether the giving of racial preference in the circumstances presented advances a valid and substantial governmental interest. Racial preference also means that particular individuals will, because of their race, receive a benefit at the expense of other individuals, who, because of their race, will be denied that benefit. The second "right question," then, is whether, assuming that the giving of racial preference in the circumstances presented advances a valid and substantial governmental interest, there is a principle of constitutional law that renders the giving of the preference unconstitutional because this causes "racial detriment" to particular individuals. It is these questions that will be explored in the present writing.

II. THE CONSTITUTIONAL ISSUE

The constitutional issue, as I have formulated it in terms of the "right questions," revolves around the governmental interest that is advanced by the giving of racial preference, and by the "racial detriment" to particular individuals resulting from the racial preference. While at the present time racial preference is almost invariably being given to blacks and other nonwhite minorities, the constitutional inquiry does not depend on the "direction" of the racial preference as such. Constitutional doctrine in this sense is "universal," since, as I have said, all invidious racial discrimination is unconstitutional whenever practiced by the government, whether at the instance of whites or of blacks, and whether the victims of such discrimination are blacks, whites or both.[26] If, for example, an ordinance were passed in a predominantly black city reserving all public facilities for the exclusive use of blacks, that ordinance would be no less unconstitutional than an ordinance reserving all public facilities for the exclusive use of whites, because the racial

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the use of race-conscious criteria be shown to be "necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the objective of the Fourteenth Amendment to eliminate." Loving v. Virginia, 388 U.S. 1, 11 (1967). See notes 7, 8 & accompanying text *supra*. The Court, however, in more recent times, has sustained the constitutionality of the use of race-conscious criteria because, in the circumstances presented, it was shown to be necessary to the advancement of a valid and substantial governmental interest. See note 20 *supra*. In this area, therefore, we see congruence between the Court's articulated doctrine and its institutional behavior.

[25] It is not necessary to repeat the additional requirement that it must do so by what the Court finds to be appropriate means. See note 19 *supra*.

[26] See notes 12-16 & accompanying text *supra*.

preference in these circumstances either way cannot advance any valid and substantial governmental interest.[27] Similarly, if a public university used a racial quota in assigning places for no other purpose than to prefer members of one racial group over another, the racial preference again would not advance any valid and substantial governmental interest, and would be unconstitutional whether the preference favored blacks or whites.[28] On the other hand, where an employer has discriminated on the basis of race, the courts can order a preferential hiring or promotional remedy. In that case, "[t]he governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated,"[29] and it would make no difference whether the victims of the employer's discrimination were black or white.[30]

The analysis of the constitutional issue, then, is not affected by the race of the beneficiaries of racial preference generally. However, the race of the beneficiaries of the *particular* racial preference is highly relevant to the question of whether the giving of that particular racial preference, in the circumstances presented, advances a valid and substantial governmental interest.

Racial preference in today's society is almost invariably racial preference given to blacks, and the constitutionality of the use of racial preference will be determined in that context.[31] The preference is given to blacks as a group at the expense of individual whites,[32] and the constitutional issue generally has been framed in terms of a conflict between group rights and individual rights. In *Bakke*, for example, Justice Powell stressed that, "[i]t is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group."[33] And in rejecting the contention that redressing the consequences of "societal discrimination" was a valid and substantial governmental interest, justifying the use of racial preference, Justice Powell stated: "Hence the purpose of helping certain groups whom the faculty of the Davis medical school perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries are thought to have suffered."[34] Justice Brennan, while relating "societal discrimination" to the social history of racism in this nation,[35] also framed the issue in terms of group rights and individual rights, noting that the excluded whites such as Bakke were not "stigmatized" by the racial preference, and observing that:

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[27] *See* Sedler, *Racial Preference, supra* note 9, at 373-74.

[28] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (Powell, J.).

[29] *Id.*

[30] *See* United Steelworkers of America v. Weber, 443 U.S. 193, 200-01 (1979); McDonald v. Santa Fe Transp. Co., 427 U.S. 273 (1976).

[31] The institutional behavior of the Court with respect to the constitutionality of the use of race-conscious criteria must also be related to the context in which the question arises. When the Court was dealing with the use of race-conscious criteria directed against racial minorities, designed to maintain the system of white supremacy, *see, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967), it is accurate to say that the Court indicated that the Constitution "removed the race line from our governmental systems." Van Alstyne, *supra* note 10, at 783, *quoting* Plessy v. Ferguson, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting). But just as the prohibition against racial discrimination in Title VII "must be read . . . [in] the historical context from which the Act arose," United Steelworkers of America v. Weber, 443 U.S. 193, 201 (1979), the Court's earlier indications as to the constitutional "irrelevancy" of race must also be taken in context. To paraphrase, Justice Powell's discussion of congressional intent with respect to Title VI's prohibition against racial discrimination: "[t]here simply was no reason for [the Court] to consider the validity of hypothetical preferences that might be accorded minority citizens; the [Court was] dealing with the real and pressing problem of how to guarantee those citizens equal treatment." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 285 (1978) (Powell, J.). The guarantee of equal treatment has not been sufficient to overcome the consequences of the long and tragic social history of racism in this nation. *See* Sedler, *Beyond Bakke, supra* note 6, at 135-41. It is not that "discrimination on the basis of race" means one thing when the discrimination favors blacks and another thing when it favors whites. Rather it is that there may be a valid and substantial governmental interest in favoring blacks in order to overcome the present conse-

> If . . . the failure of minorities to qualify for admission to Davis under regular procedures was due principally to the effects of past discrimination, then there is a reasonable likelihood that, but for pervasive racial discrimination, respondent would have failed to qualify for admission even in the absence of Davis' special admissions program.[36]

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quences of past discrimination against blacks as a group, and in those circumstances the "discrimination" does not amount to invidious racial discrimination for constitutional purposes, just as the racial preference in *Weber* did not amount to "discrimination on the basis of race" within the meaning of Title VII, and the use of race as a factor in determining university admission did not amount to "discrimination on the ground of race" within the meaning of Title VI in *Bakke*.

[32] The preference is not at the expense of whites as a group assuming that the preference is a reasonable one. Whites as a group, of course, can have no legitimate interest in maintaining their position of societal dominance. Loving v. Virginia, 388 U.S. 1, 11 (1967).

[33] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978) (Powell, J.).

[34] *Id.* 310.

[35] Justice Brennan noted:

> Davis' articulated purpose of remedying the effects of past societal discrimination is, under our cases, sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the medical school.

438 U.S. at 362 (Brennan, J., concurring in part, dissenting in part).

[36] *Id.* 365-66.

In commenting on *Bakke*, Professor Dixon has observed that, "[u]nderlying all of the opinions on the merits is the obvious need to clarify our thinking on the concept of 'discrimination' itself, and the emerging question of individual rights versus group rights in our constitutional order,"[37] and that, "[e]specially critical is the extent to which the fourteenth amendment's traditional focus on individual rights can be reshaped into—or replaced by—a group rights concept."[38] Professor Greenawalt has stated the value conflict posed in *Bakke* as follows:

> On the one hand, justice requires that groups that have previously suffered gross discrimination be given truly equal opportunity in American life; on the other, justice precludes the assignment of benefits and burdens on the arbitrary basis of racial and ethnic characteristics. So long as steps to correct racial injustice were limited to assuring that individual members of minority groups would receive the same benefits and opportunities available to persons like them except in race, the steps implemented both these values (against the competing claim that individuals and organizations should be left free to assign benefits and opportunities on whatever grounds they chose). But when individual blacks and members of other minority groups began to be given benefits at the expense of whites who, apart from race, would have had a superior claim to enjoy them, the values were brought into sharp conflict . . . .[39]

As Professor Bell has succinctly put it from a different perspective, whites resist paying the *costs* associated with racial preference designed to overcome the consequences of societal racism.[40]

I too originally approached *Bakke* in terms of the conflict between the interests of blacks as a group and the interests of individual whites.[41] I saw this conflict as in turn implicating the fourteenth amendment values of racial neutrality and black freedom,[42] and concluded that: "The resolution of that conflict may require a *balancing*, a reasonable accommodation between the interests of blacks as a group in full integration into American society, and the interests of whites as a group in racial neutrality and freedom from discrimination."[43] I concluded that a reasonable racial preference, such as that involved in *Bakke*, satisfied this test and, therefore, was constitutional.[44]

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[37] Dixon, *supra* note 23, at 69.

[38] *Id.* 75. The notion that a group as an entity can have rights to distributive and compensatory justice has been the subject of considerable academic debate. *Compare* Fiss, *Groups and the Equal Protection Clause*, 5 PHILOSOPHY & PUB. AFF. 107 (1976) *with* Brest, *The Supreme Court, 1975 Term - Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 48-52 (1976).

[39] Greenawalt, *supra* note 6, at 87.

[40] Bell, *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3, 9-12 (1979).

[41] Sedler, *Racial Preference*, *supra* note 9, at 358-61.

[42] As to the nature of the value of black freedom, see Sedler, *Racial Preference*, *supra* note 9, at 365. *See generally* Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387 (1967).

My post-*Bakke* analysis of the constitutionality of racial preference expanded on this theme and treated the group interest of blacks as one of equal participation in all aspects of American life, which had been denied to them by the social history of racism in this nation. It was my submission that the government was constitutionally permitted to use race-conscious criteria, including racial preference, in an appropriate way, whenever the use of such criteria was related to providing equal participation for blacks in all aspects of American life and thus overcoming the present consequences of the social history of racism.[45] Overcoming the present consequences of the social history of racism, I contend, is a constitutionally permissible objective in light of the broad organic purpose of the fourteenth amendment, and the reconstruction amendments, taken as a whole.[46] Since this is so, the use of racial preference to accomplish that objective advances a valid and substantial governmental interest and is constitutional.[47]

There is, however, a further dimension to the equal participation objective that I propose to develop more fully in the present writing: the *societal interest* that is advanced by the equal participation of blacks in any or all aspects of American life. Rather than view the constitutionality of racial preference in terms of the conflict between the interests of blacks as a group and the interests of individual whites, I will now view it from the perspective of the societal interest in having the equal participation of blacks in various aspects of American life. When viewed from this perspective, the constitutional question no longer revolves around whether group rights can be preferred to individual rights,[48] but around whether the racial preference advances societal interests and, if so, whether this justifies "racial detriment" to individual whites.

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[43] Sedler, *Racial Preference, supra* note 9, at 374.

[44] *Id.* 378-80. It was reasonable, I contended, because it reserved only a limited number of places for racial minorities, in relation to minority representation in the general population, while all of the other places were available for white applicants.

[45] Sedler, *Beyond Bakke, supra* note 6, at 155-56.

[46] *Id.* 156-57.

[47] Again, assuming that this is accomplished by what the Court finds to be appropriate means.

[48] It is my submission, of course, that they can be when the preference for group rights advances a valid and substantial governmental interest, such as overcoming the present consequences of the social history of racism. Sedler, *Racial Preference, supra* note 9, at 370-80; Sedler, *Beyond Bakke, supra* note 6, at 163-71.

It is my submission that there is strong societal interest in the equal participation of blacks in all aspects of American life, and that this being so, the government can give racial preference to advance this interest, even though by doing so it causes "racial detriment" to individual whites. In developing this submission, I will first explain precisely what I mean by the equal participation objective. I will then discuss the general principle of constitutional law that the government can give preference to particular individuals over other individuals when this advances societal interests, and show why this principle is no less applicable when the societal interest is a racial one. In the final section of the writing, I will show how the societal interest is advanced by the equal participation of blacks in a number of important aspects of American life. If I am correct in this submission, there can be no doubt that racial preference designed to advance the equal participation objective is fully constitutional.

III. THE EQUAL PARTICIPATION OBJECTIVE

The equal participation objective relates to redressing the long and tragic social history of racism in this nation, as a result of which fundamental inequalities between blacks and whites permeate virtually every aspect of American life,[49] so that we still have "two societies, black and white, separate and unequal."[50] The goal of the equal participation objective is to end white supremacy and black inequality in all of its manifestations, and in the words of Justice Marshall, to achieve "genuine equality" between blacks and whites in American society.[51]

What the equal participation objective ultimately means is that blacks as a group will participate equally with whites as a group in all aspects of American life. Blacks, as well as whites, will participate in societal governance. Blacks, as well as whites, will share positions of power and prestige. Blacks will be meaningfully represented in the American economic system, and blacks will not be disproportionately lower-income in comparison with whites. The consequences of the social history of racism will no longer be so strikingly visible in American society.

Since the equal participation objective relates to redressing the present consequences of the social history of racism in this nation, it is necessarily a racial objective, and the frame of reference is necessarily black and white.[52] We are concerned with race, not with ethnicity. Blacks are not an "ethnic group" in American society.[53] They are the historic "slave race" and the racial group against which the social history of racism has been directed. As Professor Perry has observed: "The *material inequality* of the races is the objective, concrete, manifestation of the past widespread American belief in the *moral inequality* of the races and of racially discriminatory practices reflecting that belief."[54] The social history of racism clearly was predicated on a belief in the moral inferiority of blacks, a belief that was necessary to justify the institution of chattel slavery, and a belief that persisted to justify pervasive racial discrimination and victimization of blacks throughout American society.

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[49] As to the extent of these fundamental inequalities, see Sedler, *Beyond Bakke*, *supra* note 6, at 135-39.

[50] REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (Bantam ed. 1968).

[51] 438 U.S. at 398 (Marshall, J., concurring in part, dissenting in part).

This pervasive racial discrimination and vicitimization, relating to a belief in the moral inferiority of blacks, is qualitatively different from the kind of discrimination that has been practiced in times past against white ethnic groups in this nation. As was observed by the National Advisory Commission on Civil Disorders: "European immigrants too suffered from discrimination, but never was it so pervasive as the prejudice against color in America, which has formed a bar to advancement, unlike any other."[55] While white supremacy and advantage may not be evenly distributed throughout all segments of the white population,[56] it is the supremacy of whites as a group and the inequality of blacks as a group that has resulted from the social history of racism, and the equal participation objective is designed to remedy the condition of *racial inequality*. This being so, the legitimacy of advancing the equal participation objective and of achieving "genuine racial equality" in American society is not affected by the fact that in the past some segments of the white population have been subject to discrimination by dominant segments of that population and may not share to the same degree all the advantages that have come with being white in American society.[57]

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[52] As to the inclusion of other non-white minorities in the legislative definition of "black," see note 6 *supra*.

[53] Justice Powell appeared to assume this throughout his opinion in *Bakke*.

[54] Perry, *supra* note 10, at 1040.

[55] REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 279 (Bantam ed. 1968). Similarly, as Justice Marshall observed in *Bakke*:

> The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color he never even made it into the pot.

438 U.S. at 400-01 (Marshall, J., concurring in part, dissenting in part).

[56] *See* Justice Powell's discussion in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 295-97 (1978).

[57] Most persons probably still would agree that on balance, even with "affirmative action," it is better to be white than to be black in American society today.

The equal participation objective is not based on any notion of "reparations" or "proportionality." It does not mean that because blacks have been subject to a long history of discrimination and victimization, white society owes blacks "reparations" and must give blacks benefits now at the expense of whites. Nor does it mean that blacks as a group are entitled to the "proportionate" share of the benefits of American society that they would have received had it not been for the social history of racism or a share of those benefits in exact proportion to their representation in the general population.[58] In attacking the constitutionality of racial preference, Professor Dixon states that "there is the plea from many blacks for reparations in the form of a substantial approximation to ethnic proportionality in the allocation of scarce social goods," and contends that "a policy of ethnic proportionality that qualifies a person's equality of opportunity has no foundation in our individual-rights focused constitutional tradition."[59] Regardless of the validity of Professor Dixon's attack on "reparations" and "proportionality," that attack cannot properly be mounted against the equal participation objective. The equal participation objective is not concerned with "reparations" for the past or with "proportionality," but with the absence of full participation of blacks as a group in all aspects of American life. It is concerned with the present consequences of the social history of racism that are felt by blacks as a group today. The equal participation objective does not seek to give blacks the proportionate share of societal participation and power that they would have had in the absence of the social history of racism, but to give blacks as a group *some* meaningful share of societal participation and power, and to bring them into the "*mainstream* of American life."[60]

The focus of the equal participation objective, then, is on the present consequences of past discrimination. If no present consequences remained, despite past discrimination, there would be no basis for invoking the equal participation objective. This is another basis for distinguishing the situation of blacks from the situation of white ethnic groups, and it also points up the irrelevancy of "reparations" and "proportionality" to the equal participation objective. For example, it cannot be doubted that there has been past discrimination against

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[58] What they are entitled to is a "degree of participation in American society roughly equal to that enjoyed by whites." Sedler, *Beyond Bakke*, *supra* note 6, at 157. Insofar as the legislative body determines the extent of the particular preference with reference to minority representation in the general population, this relates to an effort to make the preference a reasonable one, not to any notion of "proportionate entitlement."

[59] Dixon, *supra* note 23, at 74 & discussion at 84-85.

[60] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 396 (1978) (Marshall, J., concurring in part, dissenting in part) (emphasis added).

Jews in America. Let us assume that if it had not been for such discrimination, Jews as a group would have a greater share of societal power than they now have; for example, that there would be more Jewish physicians and lawyers than there are now.[61] But Jews as a group have not been excluded from a "fair share" of societal power and Jews as a group participate fully in all aspects of American life. There are, for example, quite a substantial number of Jewish physicians and lawyers.[62] If blacks as a group, despite the social history of racism, also had a "fair share" of societal power and were participating fully in all aspects of American life today, there would be no justification for invoking the equal participation objective and racial preference for blacks could not be sustained on this basis. Similarly, although Asian-Americans have been subject to discrimination that can be characterized as "racial,"[63] Asian-Americans as a group also appear to have a "fair share" of societal power and participation in relation to their representation among the general population, and preference for Asian-Americans cannot be justified as necessary to advance the equal participation objective.[64] In other words, the justification for the invocation of the equal participation objective is that the social history of racism has produced present consequences for blacks as a group, denying to blacks as a group equal participation in American society and relegating them to a condition of *racial inequality*.[65]

The Court in *Bakke* did not deal directly with the constitutionality of the use of racial preference to advance the equal participation objective. Both Justice Powell and Justice Brennan saw the issue as one of remedying "societal discrimination," and as we have said, framed the constitutional question in terms of a conflict between group rights and individual rights. Justice Marshall, however, emphasized the equal participation objective and related it to overcoming present consequences of the social history of racism. As he stated:

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[61] Whether this in fact would be so depends on the time when the discrimination essentially ended.

[62] On a personal note, when I was in law school, which was over 20 years ago, I did not feel conscious of being Jewish, since there were a number of other Jewish students in the class. There was not a single black student in the class.

[63] See note 6 *supra*.

[64] See the discussion in Greenawalt, *supra* note 6, at 120. In 1973, 13 Asians were admitted to the entering class at the Davis medical school through the general admissions process and only two were admitted through the special program, "thus creating doubt that Asians as a class needed the preference." *Id.* 120 n.133. Preference for Asians generally, however, could be justified in order to advance the "educational diversity" objective.

[65] As Professor Greenawalt points out, the Brennan opinion in *Bakke* requires a "combination of past discrimination and present disadvantage" in order to support racial preference as a means of redressing "societal discrimination." Greenawalt, *supra* note 6, at 115.

> In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society . . . .
>
> . . . .
>
> It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence and prestige in America. For far too long, the doors to those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors. I do not believe that anyone can truly look into America's past and still find that a remedy for the effects of that past is impermissible.[66]

As will be demonstrated subsequently, there is a strong societal interest in bringing blacks "into the mainstream of American life." It is my submission that the existence of that strong societal interest justifies the use of racial preference to advance the equal participation objective.

IV. RACIAL DETRIMENT AND SOCIETAL INTEREST

In the next section of the writing I will discuss the societal interest in the equal participation objective. When the equal participation objective is advanced by means of racial preference, however, this causes racial detriment to whites. By racial detriment I mean tangible detriment caused to particular white individuals by the preference given to blacks in the allocation of societal benefits. Racial detriment is suffered by the white applicant excluded from admission to a publicly-supported university because of preference for black applicants. It is suffered by the white denied public employment or promotion because of preference for blacks. It is suffered by the white entrepreneur who loses out on a public works contract because of preference given to black entrepreneurs. The question with which I am now concerned is whether the use of racial preference, which otherwise is found to advance a valid and substantial governmental interest, becomes unconstitutional because it causes racial detriment to particular white individuals. It is submitted that the answer is clearly in the negative.

It is a general principle of constitutional law that individuals may be required to make sacrifices in the public interest, and the public interest may require that particular individual interests be preferred over other interests and that particular individuals receive benefits at the expense of other individuals. This general principle is applicable in a number of contexts. Perhaps the Court's strongest exposition of the principle occurred in *Miller v. Schoene*.[67] There it sustained against a due process attack a state statute requiring the destruction of cedar trees found to be the host plant for cedar rust, where the cedar trees were located within two miles of an apple orchard. Cedar rust, although having no effect on cedar trees, could destroy apple trees within a two mile radius, and since apple-growing was a major industry in Virginia, the legislature decided to protect the apple trees at the expense of the cedar trees. In holding that this was constitutional, the Court stated:

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[66] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 396, 401-02 (Marshall, J., concurring in part, dissenting in part).

> . . . [t]he state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public. It will not do to say that the case is merely one of a conflict of two private interests and that the misfortune of apple growers may not be shifted to the cedar owners by ordering the destruction of their property; for it is obvious that there may be, and that here there is, a preponderant public concern in the preservation of the one interest over the other. And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.[68]

The giving of benefits to particular individuals and groups at the expense of other individuals and groups on the ground that societal interests are advanced thereby appears in much economic and social regulation. The government can create a monopoly in favor of a particular enterprise or individual.[69] It can prohibit new entrants into a business activity, thereby favoring established enterprises, on the ground that further competition would be "detrimental to public interest."[70] It can favor the financial interests of debtors over the financial interests of creditors by declaring a moratorium on mortgage payments during times of economic depression.[71] It can require consumers to pay higher prices for the benefit of producers.[72] It can do all of these things, because the benefit that one individual receives at the expense of another individual is deemed to advance societal interests.

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[67] 276 U.S. 272 (1928).

[68] *Id.* 279-80 (citations omitted).

[69] Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947); The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873).

[70] "Lochner era" cases holding to the contrary, such as New State Ice Co. v. Liebmann, 285 U.S. 262 (1932), and Louis K. Leggett Co. v. Baldridge, 278 U.S. 105 (1928), have been overruled. North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973).

The government can also give preference to particular individuals over other individuals when it is allocating governmental benefits, on the ground that by so doing it is advancing societal interests. It can give preference in civil service employment to veterans over nonveterans, including those who were not eligible to serve in the armed forces.[73] It can give preference in admission to publicly-supported universities to athletes and give them special scholarships because their skills are useful tc the university's athletic programs.[74] It can make classifications in regard to entitlement to welfare benefits that have the effect of denying the benefit to otherwise deserving persons, because the classification avoids the necessity of individual determinations, thus saving costs and making more funds available to other persons eligible for the benefit.[75] Again, the preference for some individuals over other individuals is justified in terms of the advancement of societal interests.

In all of these instances there is an element of unfairness. As regards veterans preference, for example, while some veterans may have suffered detriment because of their military service,[76] this is not true of all veterans. Indeed, some veterans may have acquired marketable skills in military service that they would not have acquired in civilian life, and they receive a "double benefit" when those marketable skills and their veteran's status result in their receiving a civil service position. Until recently, no more than 2% of the members of the armed forces could be women, so most women could not acquire veteran status. Even though a woman may be "more qualified" for a civil service position in terms of "objective merit," she may lose out to the veteran. But while the veterans preference may be unfair, it is not *unjustifiable*. It is not unjustifiable because the legislature has determined that veteran's preference in the civil service advances an important societal interest, and that determination is a reasonable one.[77] There is unfairness in requiring owners of cedar trees to sacrifice their trees for the benefit of apple tree owners, but it is justifiable to require them to make this sacrifice because the legislature has concluded that society's interest is better served by protecting the apple trees. It is unfair to deny new enterprises the opportunity to compete against established enterprises, but again denial of the opportunity is justifiable because the legislature has concluded that further competition would not be in the public interest. It is unfair to deny welfare benefits to claimants who could establish their entitlement to the benefit if an individualized determination was made, but the societal interest is deemed better served by denying them the benefit to avoid the costs of individual determinations and make more funds available to pay benefits to other claimants. In all of these instances *it is unfair, but it is not unjustifiable*. It is not unjustifiable because societal interests are advanced by preferring some individuals and groups over other individuals and groups. And because it is not unjustifiable, it is not unconstitutional.

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[71] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

[72] Nebbia v. New York, 291 U.S. 502 (1934).

[73] Koelfgen v. Jackson, 355 F. Supp. 243 (D. Minn. 1972), *aff'd mem.*, 410 U.S. 976 (1973). *Cf.* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) (preference statute upheld against equal protection claim of sex discrimination).

[74] *See* Justice Blackmun's discussion in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 404 (1978).

[75] Weinberger v. Salfi, 422 U.S. 749 (1975).

[76] This has been the primary rationale relied on by the courts to sustain the constitutionality of veterans preference. *See* Branch v. Dubois, 418 F. Supp. 1128, 1130 (N.D. Ill. 1976); Feinerman v. Jones, 356 F. Supp. 252, 260 (M.D. Pa. 1973); Koelfgen v. Jackson, 355 F. Supp. 243, 251-52 (D. Minn. 1972).

The principle that the societal interest may require that particular individuals receive benefits at the expense of other individuals is no less applicable where the societal interest advanced by the giving of the preference is a racial interest and the preference is a racial one. It may be contended that there is a significant difference between preferring apple tree owners over cedar tree owners and preferring black applicants to medical school over white applicants to medical school, because the former situation involves economic and societal legislation subject to "minimal scrutiny" under the "rational basis" test, while the latter situation involves a racial classification which is "suspect" and subject to "strict scrutiny." But this difference has no relevance to the point in issue. "Strict scrutiny" relates to the degree with which the Court scrutinizes the justification for the racial classification and the validity of the asserted governmental interest, and the appropriateness of the racial classification as a means of advancing the interest. As Justice Powell explained "strict scrutiny" in *Bakke*: "When they [classifications] touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest."[78]

As *Bakke* makes clear, however, there is no question that when the racial classification, or more accurately, the racial preference, is

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[77] It is reasonable because the legislature has some degree of discretion in making classifications with respect to governmental benefits, and can conclude that the majority of veterans have suffered detriment because of their military service.

[78] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978) (Powell, J.).

"precisely tailored to serve a compelling governmental interest," an individual can be asked to bear the burden resulting from that preference. Thus, in *Bakke*, when Justice Powell, joined on this point by the Brennan group,[79] held that the medical school had a valid interest in achieving an "educationally diverse" student body, so that it could give "competitive consideration to race and ethnic origin" in determining admission to the medical school,[80] he necessarily held that this interest could be advanced at the expense of those white applicants who were excluded from the medical school as a result.[81] This is but an application in the racial preference context of the general constitutional principle that the societal interest may require that particular individuals receive benefits at the expense of other individuals.[82]

It is clear, therefore, that if the societal interest in achieving the equal participation objective is found to be valid and substantial, the use of racial preference to advance the interest is constitutional, notwithstanding that it causes racial detriment to particular white individuals.

V. THE SOCIETAL INTEREST IN THE EQUAL PROTECTION OBJECTIVE

When talking about the societal interest in the equal participation objective, I am not concerned with whether the government has a valid and substantial interest in providing equal participation for blacks so that *blacks* can obtain benefits from such participation.[83]

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[79] *Id.* 311-15 (Powell, J.); *id.* 326 n.1 (Brennan, J., concurring in part, dissenting in part).

[80] *Id.* 320 (Powell, J.).

[81] *See* Sedler, *Beyond Bakke, supra* note 6, at 164-65.

[82] See the discussion of this point in regard to the set-off for minority business enterprises in *Fullilove*. 48 U.S.L.W. at 4989. By the same token, the government could give racial preference to whites where this would advance a valid and substantial governmental interest by appropriate means. A state university, with a predominantly black student body, in order to advance its interest in achieving a racially diverse student body, could give the kind of racial preference to white applicants that the medical school in *Bakke* was permitted to give to black applicants. Or, a public housing authority could assign persons to its housing on a racial basis in order to insure that all sites would be racially integrated, even if there were more blacks than whites on the waiting list so that some whites would obtain public housing sooner in preference to some blacks. *See* Otero v. New York Hous. Auth., 484 F.2d 1122 (2d Cir. 1973).

[83] It was this theme that I developed in *Beyond Bakke*. As I started there:

> Remedying the effects of past societal discrimination — of the social history of racism — and providing equal protection for blacks in all aspects of American life furthers the goal of racial equality that lies at the heart of the fourteenth amendment. Whenever the government acts to advance this objective, it is acting to advance a valid and substantial governmental interest.

Sedler, *Beyond Bakke, supra* note 6, at 170-71.

I am not qualifying my position in any way by maintaining that *in addition* there is a strong societal interest in the equal participation objective. Nonetheless, the focus on the societal interest rather than on the interest of blacks may tend to perpetuate the

The societal interest to which I am referring is the interest of the society *itself* in the benefits that result from the equal participation of blacks in any or all aspects of American life. Although the Court in *Bakke* did not deal directly with the equal participation objective, it did deal directly with the matter of the societal interest, and it is the societal interest that is the basis of Justice Powell's conclusion that the medical school could use race-conscious admissions criteria[84] in order to achieve an "educationally diverse" student body. As Professor Dixon has observed:

> Justice Powell's diversity idea is based on an interest of the *institution*—that is, an enterprise interest in an enriched educational atmosphere—rather than on an interest held by the represented minority group. This seems to be Justice Powell's view, despite the fact that the represented groups are the immediate beneficiaries of the policy, and the proximate cause of the hypothesized enrichment.[85]

This is precisely the point that I want to make about the societal interest in the equal participation objective. The focus is on the societal interest that is advanced by having the equal participation of blacks in various aspects of American life. Just as the university in *Bakke* could assert its own institutional interest to support the use of race-conscious admissions criteria, other agencies of government can assert both their particular institutional interest and the interest of the society they serve in having the equal participation of blacks, so as to justify their use of racial preference in the circumstances presented. This points up the distinction between the societal interest in the equal participation objective that I am discussing in the present writing and the group interest of blacks in the equal participation objective that I discussed in earlier writings.[86]

Justice Powell's opinion in *Bakke* also gives some insights, perhaps unintended, on precisely why there is a societal interest in the equal participation of blacks in the various aspects of American life. Although purportedly applying a standard of "strict scrutiny," Justice Powell appeared to be giving considerable deference to the university's contention that it had a valid and substantial interest in achieving an "educationally diverse" student body, so as to justify

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regrettable process of viewing "affirmative action" with reference to "white interests" and from a "white perspective." See Bell, *supra* note 40, at 3-9.

[84] This necessarily involves racial preference in that it enables particular blacks to be admitted in preference to particular whites who would have been admitted if race-conscious admissions criteria had not been used.

[85] Dixon, *supra* note 23, at 75-76.

[86] There is a valid and substantial governmental interest in providing equal participation for blacks. See note 83 *supra*.

the use of race-conscious admissions criteria.[87] Justice Powell stated that, "[t]he atmosphere of 'speculation, experiment and creation'—so widely essential to the quality of higher education—is widely believed to be promoted by a diverse student body" and concluded that, "[i]n this light, petitioner must be viewed as seeking to achieve the goal that is of paramount importance in the fulfillment of its mission."[88] But there is very little discussion about *racial* diversity as such in the opinion, and Justice Powell does not explicate why *race* as such contributes in a major way to educational diversity.[89] The answer may be that this is so obvious that he considered extended discussion of the point to be unnecessary. Such an explanation is fortified by his reference to the Harvard College Admission Program, in which it is simply stated that, "[a] black student can usually bring something that a white person cannot offer."[90]

The reason why this is so relates to the perspective that comes from "the experience of being black in America." Professor Blasi has contended that, "[i]t is difficult to maintain that there is any one trait that compares with race in terms of the likely contribution of persons who possess the trait to the goal of diversifying," and that, "most educational institutions can rightly regard racial homogeneity as by far the greatest threat to the goal of a truly diverse educational environment."[91] Professor Blasi relates the contribution of blacks to "educational diversity" because of their race by having gone through the "black experience" in American society, and concludes that, "membership in a minority race can be viewed as a good proxy for several personal characteristics that may be important in the learning process."[92] At a minimum, blacks can tell to others first hand

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[87] See the very penetrating analysis of Justice Powell's "two opinions" in *Bakke*, in Karst & Horowitz, *The Bakke Opinions and Equal Protection Doctrine*, 14 HARV. C.R.-C.L. L. REV. 7, 7-20 (1979). As they note, Justice Powell's scrutiny of the university's "educational diversity" claim "is far from exacting." *Id.* 12.

[88] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312-13 (1978) (Powell, J.). See the discussion of this statement in relation to "strict scrutiny" in Karst & Horowitz, *supra* note 87, at 12-13.

[89] He refers to race or ethnic origin as a "single though important element" in achieving "educational diversity." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978) (Powell, J.).

[90] *Id.* 316.

[91] Blasi, *Bakke as Precedent: Does Mr. Justice Powell Have a Theory?* 67 CALIF. L. REV. 21, 43, 45 (1979).

[92] *Id.* 44. As he states:

> Compared to his white counterpart, a black applicant is much more likely to: (1) have been the object of racial prejudice in a wide variety of contexts, and thus have first hand knowledge about the nature and impact of such prejudice; (2) have had his aspirations seriously influenced by preceptions regarding what opportunities were available to persons of his race, and thus have a special appreciation of the social significance of aspiration and self-esteem; (3) have had personal relationships with people who are very poor and frequently unemployed; (4) have spent a great deal of time coming to

what racial discrimination is all about, for, as Justice Marshall observed in *Bakke*, "the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact."[93] A university may conclude, then, that in order for its student body to be truly diverse, there must be some black representation in that student body.[94]

Let me analyze the result in *Bakke* with reference to the societal interest in the equal participation objective. The university was permitted to give racial preference in determining admission to its medical school because the participation of blacks in the educational program of that school contributed to "educational diversity," and so advanced the school's educational goals.[95] The university could conclude that, in light of "the experience of being black in America," a black student "can usually bring something that a white person cannot offer" to the university's educational program.

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grips with his own racial identity as well as thinking and talking about the social problem of race relations; (5) have been the object of special scrutiny by others who were curious to see how a person of his race would behave or perform in the particular situation, and thus have an appreciation of the "fishbowl" phenomenon in social relations; (6) feel a responsibility to help mitigate the suffering of the persons who have been most oppressed by social and political patterns that can be traced in part to racial prejudice; (7) display a special interest in and knowledge about the black experience in the United States and the rest of the world; and (8) feel a disenchantment with, if not hostility toward, social structures and institutions (including principles of distribution) that historically have operated to the detriment of black people. These are characteristics for which the trait of membership in a minority race is a good proxy.

[93] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 400 (1978) (Marshall, J., concurring in part, dissenting in part). As Karst and Horowitz succinctly put it: "It is the history of racial subordination, above all, that makes race socially significant. If a black student can 'bring something that a white person cannot offer' the 'something' is, primarily, an inheritance from past societal discrimination." Karst & Horowitz, *supra* note 87, at 16-17.

[94] Also that this representation must be in more than token numbers. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (Powell, J., appendix).

[95] Professor Greenawalt has observed:

> I have yet to find a professional academic who believes the primary motivation for preferential admissions has been to promote diversity in the student body for the better education of all the students while they are in professional school. Diversity is undoubtedly one reason for such programs, but the justification of countering the effects of societal discrimination relied on by Justices Brennan, White, Marshall, and Blackmun comes closer to stating their central purpose, and Justice Powell offers no convincing reason for rejecting that justification and accepting the diversity argument.

Greenawalt, *supra* note 6, at 16. While I agree fully with Professor Greenawalt's assessment of the real motivation for racial preference in professional school admissions, "educational diversity" would qualify as "purpose" in regard to constitutional analysis, and the "real motivation" would be constitutionally irrelevant. *Cf.* United States v. O'Brien, 391 U.S. 367 (1968) (legislators' "purpose" irrelevant in constitutional challenge to statute). As to compliance with *Bakke, see generally* Lesnick, *What Does Bakke Require of Law Schools*, 128 U. PA. L. REV. 141 (1979).

There was thus a societal interest in the equal participation objective here, in that participation of blacks in the university's educational program improved the educational quality of that program. This being so, the use of racial preference in determining admission to the medical school advanced a valid and substantial governmental interest and was constitutional.

Reasoning from *Bakke*, there would appear to be a societal interest in the equal participation objective whenever a "black [person] can . . . bring something that a white person cannot offer" to any governmental institution, so that the institution, because of black participation, will be in a better position to perform its institutional function. Consider first the police function, which "fulfills a fundamental obligation of government to its constituency."[96] Blacks have traditionally been grossly underrepresented in municipal police forces, even in cities having a substantial black population, and virtually nonexistent in state police forces.[97] Frequently, this has been shown to have been the product of unlawful racial discrimination, and racially preferential hiring and promotional remedies have been ordered on this basis.[98] But suppose that a city concludes that, without regard to identified past discrimination, it wants substantial black participation in the police function, which is now lacking. It then adopts a racially preferential hiring and promotional program, designed to increase significantly the number of black officers and supervisors.[99] There can be no doubt that participation by blacks in the all-important police function advances the societal interest in the effective performance of that function. So long as blacks are grossly underrepresented in the police department, the police will be perceived of by the black community as an "occupying army," as was so tragically demonstrated in the 1967 riots.[100] According to the President's Commission on Law Enforcement and the Administration of Justice:

> In order to gain the general confidence and acceptance of a community, personnel within a police department should be

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[96] Foley v. Connelie, 435 U.S. 291, 297 (1978).

[97] *See generally* REPORT OF THE NATIONAL ADVISORY COMMITTEE ON CIVIL DISORDERS, 315-18 (Bantam ed. 1968).

[98] *See, e.g.*, United States v. City of Chicago, 549 F.2d 415 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977); NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974).

[99] When the City of Detroit adopted a racially preferential hiring and promotion policy with respect to the police department in July, 1974, the city had a black population of nearly 50%, but a police force that was only 17% black. Detroit Police Officers Ass'n v. Young, 608 F.2d 671, 681 (6th Cir. 1979). Based on my personal knowledge as counsel for one of the amicae in the case, less than 5% of the supervisors were black.

[100] REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 299-301 (Bantam ed. 1968).

> representative of the community as a whole . . . . If minority groups are to feel that they are not policed entirely by a white police force, they must see that Negro or other minority officers participate in policymaking and other crucial decisions.[101]

As the Sixth Circuit put it, in holding that racial preference in police promotions could advance a valid and substantial governmental interest:

> The argument that police need more minority officers is not simply that blacks communicate better with blacks or that a police department should cater to the public desires. Rather it is that effective crime prevention and solution depend heavily on the public support and confidence in the police. In short, the focus is not on the superior performance of minority officers, but on the public's perception of law enforcement officials and institutions.[102]

The equal participation by blacks in the police function, then, clearly serves the societal interest in effective law enforcement. This being so, the use of racial preference to implement the equal participation objective advances a valid and substantial governmental interest and should be upheld as constitutional.[103]

There is also a societal interest in the equal participation of blacks in all functions of government. The Senate Committee on Labor and Public Welfare, when recommending the extension of Title VII to state and local governments, observed that: "The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often hostility toward the entire process of government."[104] The equal participation of blacks in all functions of government, then, serves important societal interests by (1) insuring that the government will be aware of the problems and needs of minority communities, (2) insuring that the government, while making and implementing governmental policy, will have the benefit of the perspective that comes from "the experience of being black in America," and (3) helping to bring about confidence in the institutions of government on the part of the black community.[105] Again, the use of racial preference to implement the equal participation objective in this context advances a valid and substantial governmental interest and should be upheld as constitutional.

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[101] TASK FORCE REPORT: THE POLICE at 167 (1967).

[102] Detroit Police Officers Ass'n v. Young, 608 F.2d 671, 696 (6th Cir. 1979). In that case the city claimed that the racially preferential promotions program which was in issue was necessary to remedy the city's own prior discrimination and that, apart from identified prior discrimination, the program was necessary for "operational needs." The district court, applying an erroneous legal standard, held that prior discrimination was not shown. The Sixth Circuit remanded the case for further proceedings in regard to both the prior discrimination claim and the operational needs claim.

[103] As to the governmental interest in advancing the equal participation objective for the benefit of the black citizenry in this context, see Sedler, *Beyond Bakke*, *supra* note 6, at 169 n.154. It was this argument that I presented in the amicus brief in Detroit Police Officers Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979).

[104] SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, 92d. CONG., 2d SESS., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 419 (1972).

Now consider the societal interest in the equal participation of blacks in the "power professions," such as law and medicine. As Justice Marshall argued in *Bakke*, "[i]t is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making the decisions about who will hold the positions of influence, affluence and prestige in America."[106] As a lawyer, I am fully aware of the power and influence that lawyers as a group wield in American society, not only in regard to their role in the legal system and the administration of justice, but in legislatures, governmental bodies, and many other important societal institutions. Being a lawyer means that one is in a position, by virtue of one's profession, to do significant things in American society.

Since entry into the profession is almost entirely dependent upon admission to law school, the requirements for admission to law school are also requirements for admission to the profession.[107] In determining its requirements for admission, therefore, the law school may properly take into account the societal interest in the makeup of the legal profession. As Professor Greenawalt has observed:

> Universities and particularly professional schools have long made decisions about who will have the keys to important societal positions through determinations about admissions and scholarships. Implicit in the exercise of such power is some vision of the public welfare. It would seem appropriate for a law school to choose not to limit consideration even to such broad concerns as potential ability as a lawyer and likely area of legal employment. A school might well, for example, admit

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[105] As to the need for minority participation in governmental decision-making, *see also* Ginger, *Who Needs Affirmative Action*, 14 HARV. C.R.-C.L. L. REV. 265, 270-73 (1979).

[106] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 401 (1978) (Marshall, J., concurring in part, dissenting in part).

[107] Henkin, *What of the Right to Practice a Profession?* 67 CALIF. L. REV. 131, 136 (1979).

> a student it thought had great potential for political leadership, though believing he might perform less well as a lawyer than some rejected applicant. It requires no substantial extension of the institutional responsibility to determine who will become members of the profession for institutions to make some judgments about the social desirability of broadening the availability of professional positions, in the belief that a more diverse and representative profession will enrich the understanding of all its members of relevant social problems and will otherwise promote a more harmonious and integrated society.[108]

Although the black population at the time of the last census was 11%, less than 2% of the lawyers in this country are black,[109] and blacks clearly are not equal participants in the exercise of societal power that is reflected in membership in the legal profession.

A publicly-supported university law school, whose admission requirements are also requirements for the admission to the profession in that state, can reasonably conclude that there is a strong societal interest in having the equal participation of blacks in the legal profession. It can conclude that something is missing when the perspective that comes from "the experience of being black in America" is not adequately represented in the profession. The societal interest in the equal participation of blacks in the legal profession is not so much that black lawyers will be available to represent black clients,[110] but that blacks will be participants in the exercise of societal power by the legal profession and will be able to bring the "black perspective" to that exercise of societal power. Blacks will be judges and prosecutors and law professors. They will be laywers for the government, "members of the firm," and bar association officers. They will be in a direct position to contribute to the development of the American legal system and to make that system responsive to the needs of black people. In addition, black people will have greater confidence in the legal system and in the administration of justice, because blacks, as well as whites, will be full participants in that system. There is, then, a strong societal interest in equal participation by blacks in the legal profession, and racial preference in law school admissions advances that societal interest.

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[108] Greenawalt, *supra* note 6, at 124. In this regard Professor Greenawalt also notes that:

> Indeed it can be argued that the main reasons why applicants with superior qualifications are themselves ordinarily picked has to do with social utility rather than their intrinsic deserts and that they, therefore, have no convincing complaint when reasons of social utility lead to choosing less well-qualified applicants, at least so long as the grounds of the differentiation are otherwise acceptable.

Id. 126 n.150.

[109] Sedler, *Racial Preference*, *supra* note 9, at 347-48 n.70.

[110] The interest of blacks in the equal participation objective would relate to having the opportunity to be represented by black lawyers if they choose just as whites have the opportunity to be represented by white lawyers if they choose, and the interest of having blacks participate in the legal system and the administration of justice.

It may be queried whether the Court in *Bakke* would have viewed racially preferential admissions in a different light if that case had involved admission to law school rather than admission to medical school. The ways in which lawyers exercise societal power, of course, would have been clear to the Court. The ways in which physicians exercise societal power may have been less clear. Moreover, it appears that the university's societal interest justification for racially preferential admissions to the medical school related to the fact that minority physicians were more likely to serve currently underrepresented minority communities.[111] Justice Powell took the position that the university "simply has not carried its burden of demonstrating that it must prefer members of particular ethnic groups over all other individuals in order to promote better health care delivery to deprived citizens."[112] Leaving aside, however, the question of whether black physicians are more likely to serve black communities than are white physicians,[113] the societal interest advanced by the equal participation of blacks in the medical profession does not relate to their practicing in black communities. Like the societal interest in the equal participation of blacks in the legal profession, the societal interest in the equal participation of blacks in the medical profession relates to incorporating the "black perspective" in the exercise of societal power by the medical profession. The medical profession exercises societal power in a very significant way by controlling, to a large degree, the nation's health care delivery system. Physicians do much more than treat patients. They serve on hospital staffs and medical committees. They are involved in decisions that affect the kind of medical services that will be offered and the cost of those services. They influence the distribution of medical resources and the location of health care facilities. They perform substantially the same function with respect to the health care delivery system that lawyers do with respect to the legal system and the administration of justice.

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[111] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 310-11 (1978) (Powell, J.).

[112] *Id.* 311.

[113] The empirical evidence strongly indicates that they do. A major study by the National Planning Association concluded that: (1) young minority physicians are locating at unprecedented rates in the south, where minority urban and rural populations have traditionally been underserved; (2) minority physicians are more likely to settle in large cities with concentrations of low-income populations; (3) they are more likely to engage in primary care practice; (4) they are more likely to practice in large city public hospitals, neighborhood health centers and other public institutions responsible for providing services to low-income persons. Koleda & Craig, *Minority Physicians Practice Patterns and Access to Health Care Service*, LOOKING AHEAD, Vol. 2, No. 6 (1976).

Entry to the profession is completely dependent upon admission to medical school, and the enormous cost of training physicians severely constrains the number of new entrants into the profession. As with publicly-supported law schools, publicly-supported medical schools control entry to the profession in that state, and they can reasonably conclude that there is a strong societal interest in having the equal participation of blacks in the medical profession so that blacks can be involved, along with whites, in that profession's control over the health care delivery system. There is a considerable "health gap" between blacks and whites in this nation, with blacks as a group having higher mortality and morbidity rates than whites as a group and with black communities being underrepresented in the delivery of health care services.[114] It is certainly reasonable to believe that the equal participation of black physicians in the medical profession can contribute to ending the "health gap" between blacks and whites. Black physicians would seem for the most part to be in a better position than white physicians to assess the health care needs of black communities and to understand the difficulties that black people have in making use of the traditionally white-dominated health care delivery system. They could also be expected to be more disposed to "lobby" for the provision of adequate health care facilities for black communities. The equal participation of blacks in the health care delivery system, like equal participation of blacks in the legal system, serves a strong societal interest, and a publicly-supported medical school is justified giving racial preference in admissions to advance that societal interest. If the societal interest in the equal participation of blacks in the medical profession—focusing on their participation in the health care delivery system—had been emphasized in *Bakke*, it is possible that Justice Powell would have found that interest to be "compelling."[115]

I want now to consider the societal interest in the equal participation of blacks in what may be called the "American economic system." Blacks as a group do not participate equally in the economic system, just as they do not participate equally in the legal or health care delivery systems. There are relatively few black-owned business enterprises, and such existing enterprises do not generate a significant amount of business volume. As of 1976, for example, only 3% of the 13 million businesses in the United States were owned by blacks and other minority persons, and of 2.54 trillion dollars in gross business receipts that year, only about 16.6 billion dollars, or 0.65% of the total, were realized by minority-owned businesses.[116] The absence of blacks in the top management of American corporations needs no documentation. Blacks are disproportionately underrepresented in "white collar" jobs,[117] and even in the "blue collar" category, where the distribution of blacks and whites is more equal, blacks are disproportionately concentrated in "laborer" jobs and are very underrepresented in "crafts" jobs.[118]

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[114] For a summary of the data, see M. SEHAM, BLACKS AND AMERICAN MEDICAL CARE 9-11 (1973).

[115] If so, a quota-type preferential admissions program presumably would be found to be an appropriate means of advancing this interest.

The lack of the equal participation of blacks in the economic system directly correlates with the condition of *racial economic inequality* that exists in this nation. There is a substantial "income gap" between blacks and whites,[119] a much higher incidence of unemployment and underemployment among blacks,[120] and a much higher proportion of black families than white families living below the federally-defined poverty level.[121]

Racial preference in the economic area involves making *structural changes* in the way that particular forms of economic activity operate to increase black participation in those activities. In *United Steelworkers of America v. Weber*,[122] last Term's "affirmative action" case, the racial preference was directed toward increasing the representation of blacks in the skilled crafts. In *Fullilove v. Klutznick*,[123] this Term's "affirmative action" case, the preference was directed at improving the position of minority business enterprises by giving them a 10% share of public works projects financed by federal grants.[124] Since *Weber* dealt with a voluntary racial preference contained in an in-service training program established pursuant to a collective bargaining agreement between the employer and the union, the issue was whether the program was violative of Title VII, and the Court held that it was not.[125] In *Fullilove*, the constitutionality of the minority business enterprise "set aside" was sustained by the Second Circuit on the ground that it was designed to remedy past discrimination in the awarding of governmental construction contracts,[126] and the remedying of past discrimination was the essential basis of the various opinions upholding the "set aside" when the case reached the Supreme Court.[127]

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[116] 122 CONG. REC. 13866 (1976) (statement of Senator Javits); 122 CONG. REC. 34754 (1976) (statement of Senator Glenn).

[117] *See* Sedler, *Beyond Bakke, supra* note 6, at 138 nn.22-23.

[118] *Id.* 138-39 nn.24-25. The exclusion of blacks from the crafts on racial grounds has been so clearly demonstrated as to now be a subject of judicial notice. United Steelworkers of America v. Weber, 443 U.S. 193, 198 n.1 (1979).

[119] *See* Sedler, *Beyond Bakke, supra* note 6, at 139 nn.26-27.

[120] *Id.* 138 nn.21-22.

[121] *Id.* 139 n.26.

[122] 443 U.S. 193 (1979).

[123] 48 U.S.L.W. 4979 (1980).

[124] Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2) (Supp. I 1977).

[125] The employer, under the collective bargaining agreement, was to establish an in-plant training program for skilled craft workers. The trainees were to be drawn from the employer's work-force, and half of the trainees were to be black. In effect, separate racial seniority lists were established to determine eligibility for admission to the program. The program was challenged by an excluded white worker who had greater plant seniority than some of the included black workers. The employer and the

I want to approach these cases from the perspective of the societal interest in the equal participation of blacks in the economic system. In order to bring *Weber* into the constitutional ambit, assume that the federal government required the employer, as a federal contractor, to adopt the program in order to be eligible to receive federal contracts.[128] As I have discussed elsewhere, the government, as a contractor, can assert an interest in having the equal participation of racial minorities in the "governmental market."[129] But leaving this aside, I want to discuss the societal interest that is advanced by requiring that black workers be brought into the skilled crafts and by giving black business enterprises a share of governmental construction contracts.

These actions, as we have seen, represent an effort to make structural changes in the operation of particular forms of economic activity to increase black participation in that activity. The ultimate objective of such efforts is to alleviate the condition of *racial economic inequality* that exists in this nation, reflecting the lack of equal participation of blacks in the economic system. The training of blacks as skilled workers will contribute to increasing the income of blacks as a group. Similarly, since experience indicates that black business enterprises are likely to employ proportionately more blacks than are white business

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union did not admit that there had been past discrimination against blacks in the employer's workforce. The Court held that the program was not violative of Title VII on the ground that Congress did not intend to prohibit "all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy [in employment.]" United Steelworkers of America v. Weber, 443 U.S. at 204. It may be noted that the result of the employer's "affirmative action" program here was to open new opportunities for white workers in the plant as well as black workers, since prior to the institution of the program, the employer had recruited all of its craft workers from outside of the plant. *Id.* 198-99. As to gains to whites from programs initially instituted for the benefit of blacks and from black efforts to achieve equality, see the discussion in Bell, *supra* note 40, at 14-16.

[126] Fullilove v. Kreps, 584 F.2d 600 (2d Cir. 1978), *aff'd*, 48 U.S.L.W. 4979 (1980).

[127] See note 139 *infra*.

[128] *See* Exec. Order No. 11, 246, 3 C.F.R. § 339 (1965) *as amended by* Exec. Order No. 11,375, 3 C.F.R. 1978 Comp. pp. 230-34. In *Weber*, the district court found that one of the reasons motivating the adoption of the racially-preferential in-plant training program was Kaiser's concern for meeting the "affirmative action" goal it had established pursuant to E.O. 11246. Weber v. United Steelworkers of America, 415 F. Supp. 761, 764-65 (E.D. La. 1976), *aff'd*, 563 F.2d 216 (5th Cir. 1977), *rev'd*, 443 U.S. 193 (1979).

[129] Sedler, *Beyond Bakke*, *supra* note 6, at 160-62.

enterprises,[130] the continued survivability of these enterprises will likewise increase the income of blacks as a group.[131] In addition, the increase in the number of black craft workers and viable black-owned businesses may have the effect of reducing black unemployment and underemployment.[132]

The question, then, becomes whether the government can reasonably conclude that there is a societal interest in alleviating the condition of racial economic inequality that exists in this nation. Some guidance in this regard can be obtained from the Court's decision in *Weber* and from its decisions interpreting Title VII generally. These decisions indicate that when Congress enacted Title VII, it recognized that there was a societal interest in blacks having a "fair share" of the available jobs in an employer's workforce,[133] so that in time there might be an end to racial economic inequality, resulting in large part from years of rampant racial discrimination in employment. As the Court stated in *Weber*:

> Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with "the plight of the Negro in our economy." Before 1964, blacks were largely relegated to "unskilled and semi-skilled jobs." Because of automation the number of such jobs was rapidly decreasing. As a consequence, "the relative position of the Negro worker [was] steadily worsening. In 1947 the nonwhite unemployment rate was only 64 percent higher than the white race; in 1962 it was 124 percent higher."[134] Congress considered this a serious social problem. . . .
>
> Congress feared that the goals of the Civil Rights Act—the integration of blacks into the mainstream of American society—could not be achieved unless this trend were reversed. And Congress recognized that that would not be possible unless blacks were able to secure jobs "which have a future." . . . Accordingly, it was clear to Congress that "[t]he crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them," and it

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[130] Blacks are more likely to be aware of jobs that are available in black-owned enterprises and are more likely to be hired by those enterprises.

[131] There will also be a multiplier effect insofar as those enterprises deal with other black enterprises as suppliers and/or customers.

[132] As Senator Brooke observed: "[M]inority businesses' workforces are principally drawn from residents of communities with severe and chronic unemployment. . . . Only with a healthy, vital minority business sector can we hope to make dramatic strides in our fight against the massive and chronic unemployment which plagues minority communities throughout this country." 123 CONG. REC. S. 3910 (Daily ed. Mar. 10, 1977) (statement of Senator Brooke).

[133] *See* Sedler, *Beyond Bakke, supra* note 6, at 148.

[134] As of 1976, it was more than double. Sedler, *Beyond Bakke, supra* note 6, at 138 n.21.

was this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed.[135]

As the above discussion indicates, racial economic inequality, in all its manifestations, is a "serious social problem," and "integration of blacks into the mainstream of American society" cannot be achieved until race is no longer associated with low-income status and until there is no longer racial economic inequality in American life.

Racial economic inequality is perhaps the most enduring and persistent consequence of the social history of racism,[136] and it can only be ended by making structural changes in economic activity to increase black participation in that activity and bring about equal participation of blacks in the economic system.[137] There is a strong societal interest in ending the racial economic inequality that exists in today's American society which should render constitutional governmental efforts to bring about equal participation of blacks in the economic system.[138]

It is my submission, therefore, that there is a strong societal interest in bringing about equal participation of blacks in a number of important aspects of American life: the institutions of government, the "power professions," and the economic system. The use of racial preference to advance the equal participation objective, therefore, advances a valid and substantial governmental interest and should be held to be constitutional.[139]

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[135] United Steelworkers of America v. Weber, 443 U.S. at 202-03 (citations omitted).

[136] Black family income, for example, has never exceeded 60% of white family income. Sedler, *Beyond Bakke, supra* note 6, at 139, and the other indicators of economic inequality have likewise persisted over the years. *See generally* U.S. COMM. ON CIVIL RIGHTS, SOCIAL INDICATORS OF EQUALTY FOR MINORITIES AND WOMEN (1978).

[137] This point was emphasized in the debates over the minority business enterprise set aside. According to Representative Mitchell: "We cannot continue to hand out survival programs for the poor in this country. We cannot continue that forever. The only way we can put an end to that kind of a program is through building a viable minority business system." 123 CONG. REC. H. 1437 (daily ed. Feb. 24, 1977) (statement of Representative Mitchell). As Representative Biaggi concluded: "This amendment will go a long way toward helping to achieve [economic] parity and more importantly to promote a sense of economic equality in this Nation." *Id.* (statement of Representative Biaggi).

[138] Because these efforts adversely impact upon the economic interests of individual whites, the courts will carefully scrutinize the appropriateness of the means used. But the key to appropriateness is the reasonableness of the preference, and a reasonable racial ratio, such as the 50-50 ratio involved in *Weber*, which is intended to "eliminate a manifest racial imbalance," United Steelworkers of America v. Weber, 443 U.S. at 208, or the 10% set aside involved in *Fullilove*, clearly satisfies this test. Fullilove v. Klutznick, 48 U.S.L.W. at 4889-90 (Burger, C.J.), 4997 (Powell, J.), 4999 (Marshall, J.).

[139] Since Fullilove v. Klutznick, 48 U.S.L.W. 4979 (1980), was decided after this article had gone to press, there was no opportunity to incorporate a discussion of the

VI. CONCLUSION

In this writing, I have considered the constitutionality of racial preference in light of the societal interest in the equal participation objective. In the final analysis, the societal interest is an interest in bringing about equal participation of blacks in all aspects of American life, in getting the consequences of the social history of racism behind us, once and for all,[140] in ending the existence of "two societies, black

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case in the body of the article. By a vote of 6-3, the Court upheld the constitutionality of the 10% minority business enterprise "set aside." There was no majority opinion. Chief Justice Burger wrote an opinion joined in by Justices White and Powell. Justice Powell also wrote a separate opinion. Justice Marshall wrote an opinion, joined in by Justices Brennan and Blackmun. Justice Stewart, joined by Justice Rehnquist, dissented, and Justice Stevens dissented separately.

The remedying of past discrimination was the essential basis of the opinions upholding the constitutionality of the "set aside." Chief Justice Burger saw the "set aside" as representing the determination of Congress, acting pursuant to its spending power and to its power under Section 5 of the Fourteenth Amendment, that grantees of federal funds would not employ procurement practices that might result in "perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority businesses to public contracting opportunities." 48 U.S.L.W. at 4986. Justice Powell contended that deference had to be given to the conclusion of Congress that "purposeful discrimination contributed significantly to the small percentage of federal contracting funds that minority business enterprises have received." 48 U.S.L.W. at 4995. Justice Marshall, while maintaining that his resolution of the issue in *Fullilove* was governed by his separate opinion in *Bakke*, also emphasized that "Congress had a sound basis for concluding that minority-owned construction enterprises, though capable, qualified, and ready and willing to work, have received a disproportionately small amount of public contracting business because of the continuing effects of past discrimination." 48 U.S.L.W. at 4999. Justices Stewart and Rehnquist in dissent argued that the government could never require that public works contracts be awarded on the basis of race. 48 U.S.L.W. at 5000-5001. Justice Stevens, while not going quite that far, maintained that Congress had failed to "demonstrate that its unique statutory preference is justified by a relevant characteristic that is shared by the members of the preferred class." 48 U.S.L.W. at 5008.

Because of the majority's emphasis on remedying past discrimination, there was no real consideration of the societal interest in the equal participation of blacks in the economic system. *Fullilove* may indicate that for the foreseeable future, "affirmative action" cases will be litigated (and "affirmative action" programs will be structured) within the framework of "remedying past discrimination" rather than with reference to the equal protection objective that has been the focus of this article.

[140] As Justice Blackmun observed in *Bakke*: "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause (perpetrate racial supremacy." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J.).

Professor Van Alstyne argues to the contrary:

> Rather, one gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment *never* to tolerate in one's own life—or in the life or practices of one's government—the differential treatment of other human beings by race. Indeed, that is the great lesson for government itself to teach: in all we do in life, whatever we may do in life, to treat any person less well than another or to favor any more than another for being black or

and white, separate and unequal."[141] The use of racial preference to achieve the equal participation objective, therefore, is in the societal interest, and since it is in the societal interest, it is constitutional. Whether viewed in terms of constitutional values,[142] or in terms of the societal interest in the equal participation objective, the use of racial preference to advance the equal participation objective is constitutional because it is related to achieving "genuine equality" between blacks and whites in American society.[143]

> white or brown or red, is wrong. Let that be our fundamental law and we shall have a Constitution universally worth expounding.

Van Alstyne, *supra* note 10, at 809-10. Given the present consequences of the social history of racism in this nation, however, Van Alstyne's view of a "Constitution universally worth expounding" would be a Constitution that reinforces white supremacy and black inferiority. As has so frequently happened in American society, see Bell, *supra* note 40, at 16, the costs of this "lofty" constitutional principle would be borne unmitigatedly by blacks, who for the remotely foreseeable future would be relegated to a condition of societal inferiority and denied equal participation in American life. I do not think that such a Constitution would be one "universally worth expounding."

[141] See note 50 *supra*.

[142] This was the approach that I took in my prior writings. See note 83 *supra*.

[143] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 398 (1978) (Marshall, J., concurring in part, dissenting in part).

Senator HATCH. Dr. Abram, let us turn to you. Then we will turn to Dr. Kilson and then finally to Prof. Van Alstyne.

TESTIMONY OF MORRIS B. ABRAM, ESQUIRE, NEW YORK, N.Y.

Mr. ABRAM. Thank you, Mr. Chairman.

I have a prepared statement which I have filed with the committee.

Senator HATCH. We will insert your complete statement in the record as though fully delivered. We will be interested to hear whatever you have to say here this morning.

Mr. ABRAM. Thank you.

I would like to say, to begin with, something about where I come from and the angle from which I approach this issue.

Since I was 17 years old, in rural Georgia, I have considered segregation and racial discrimination as repulsive to the traditions of my country and my faith. You have, in my biography, stated, I think clearly, the acts which affirm my long devotion to the civil rights movement.

Senator HATCH. There is no question about that.

Mr. ABRAM. I would like to say that for 14 years of my life—and I would never have left Georgia until that job was completed—I fought and eventually won in the Supreme Court of the United States with Bobby Kennedy arguing by my side the one-man, one-vote decision which overturned the racially motivated county unit system in Georgia.

I was one of the original founders of the Lawyers Committee for Civil Rights Under Law, to which I am going to refer in a moment, and I think I took the first litigated case of that distinguished group when I went down to Americus, Ga.—whilst Jimmy Carter, by the way, was the State senator—and freed five black and white kids—demonstrators in Martin Luther King's ranks who were being held without bail under a capital charge of an invalid law which claimed they were seditious.

So, for half a century I have been engaged in this work, and I have not altered my faith since I enlisted in this cause in order to remove all distinctions based on race, religion, or sex.

I enlisted in this cause to end white supremacy, and I might say that until 1965 the only person to argue for preferences based on race were white supremacists.

The whole thrust of the white supremacist argument was that whites deserve—for whatever reason—preference.

For 40 years, the standard under which we marched was the dissenting opinion in *Plessy* v. *Ferguson* by the first Mr. Justice Harlan who wanted, and was not able to obtain in that decision in 1896, a colorblind interpretation of the equal protection clause.

Mr. Chairman, I am here today to say that we do not need a Constitution like an accordian to play the current political hit tune. Today, such a hit tune may be "We Shall Overcome," the anthem of a movement that I enlisted in, but tomorrow it can easily become the theme song of "The Birth of a Nation."

I would like to call the subcommittee's attention to the extraordinarily pertinent words of Mr. Justice Jackson written in the Japanese exclusion cases that grew out of our sad history with respect to the racial discrimination against the Japanese.

Speaking of a military order which applied only to Japanese of American ancestry, Mr. Justice Jackson warned: "Once a judicial opinion rationalizes such an order"—that is, a racial order—"or, rather, rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all times has validated the principle of racial discrimination. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim"—as Mr. Sedler just did—"of an urgent need."

The entire civil rights movement, in which I enlisted in the 1950's, agreed with Mr. Justice Jackson. So did the distinguished Thurgood Marshall. Now there has been a reversal of direction, and it is now fashionable in some circles to argue as Mr. Sedler has.

But this reversal has been gradual, and it has been insidious. It has amounted to what I now wish to discuss as the transmogrification of a laudible spirit of what was first known as affirmative action and which I supported, and apparently you do, too, Mr. Chairman.

Senator HATCH. That is correct.

Mr. ABRAM. I understood "affirmative action" to mean affirmative remedial efforts to identify those who had been left out of the race and to bring them up by education and other means, but without regard to what their race was, or their color was, or their gender. The purpose was to assist all to come to full fruition of their talents and to see that none was left in the closet and overlooked.

But the test is not now that of equality of opportunity or affirmative action. The test now is equality of result. It has become, and it is undeniably now, a full-throttled program of quotas.

I would like to give you the paradigmatic example. I recently testified before the U.S. Commission on Civil Rights. They had put out on the table a proposed affirmative action called—I wish you would get it, Mr. Chairman, and read it—"Affirmative Action in the 1980's."

They speak of quotas, targets, goals, and preferential treatment, mixing them all up elusively as in a game of four card monte. It is all the same thing. It is a set-aside, a quota, it is racial discrimination and gender discrimination of which the target always is the white male, despite the fact he may be an Appalachian who has been, for generations, in ignorance and deprivation.

Another example of what affirmative action has come to mean is a letter I received from a very distinguished lawyer on the staff of the Lawyers Committee for Civil Rights under Law, Mr. Richard Seymour, who was defending the action of the lawyers committee and the Government in entering that consent decree in the *Leuvano* v. *Campbell* case invalidating the PACE examination for 118 entry-level jobs in the Federal civil service.

Listen to what Mr. Seymour, a distinguished lawyer, said to me in this letter. "For example," he said, "suppose that 100 whites and 100 blacks applied for 50 jobs." Now, this is in the Federal civil service. This happens to be those who examine your taxes, the curators of your museums, the claims examiners for the social security system. He continued: "If there were no adverse impact in the examining procedure used to select for these jobs, one would expect to see 25 blacks and 25 whites hired."

Under the 80 percent test used by the consent degree that the Carter administration entered into under the cover of night in the waning days of the administration, "It would be a matter of indifference," he writes, "if 27 whites and only 23 blacks were hired."

I shall not hereafter in this testimony use the words "affirmative action." I shall call it by what it is—the preferential treatment plan.

We have been led to accept that, as Mr. Seymour assumes, for the Federal merit system, if minorities happen not to be chosen in proportionate numbers to the population or, as he suggests, in proportionate number to the applicants, that the system of examination is presumptively discriminatory.

Such a rationale has to proceed from the premise that for any academic or administrative or professional opportunity people are proportionately qualified by race, gender, and ethnic origin in accordance with U.S. population statistics. That is absurd.

Mr. Chairman, I have a fairly good IQ, I think. I have five children. Not one of them has ever done well on the mathematical aptitude test; they do brilliantly on the others. On the other hand, I have a partner who has two children who each scored 800 on mathematical aptitude, and they do not read well. There are differences in people.

Since we know this to be true, how can leaders contend that unless an examination produces a proportionate result it is presumptively discriminatory, and how can lawyers litigate such issues?

I would like to trace how we got there because I think it is important to do this to see how we get out of it.

Mr. Chairman, I was raised in a little country town—Fitzgerald, Ga.—right in the middle of south Georgia. It had 6,000 people, and 35 percent of its population were black.

Since you could vote if you were white and illiterate, the fact was that you had all white voters and almost no blacks—disparate impact on the voting rolls. What did it prove? It proved discrimination. That is obvious. Since the same was true of the grand juries—that no blacks served on the grand juries—you had to know that there was discrimination at work in the selection process.

As a matter of fact, that great man, Elbert Tuttle, the former chief judge of the fifth circuit court of appeals, and I as a very young lawyer appeared amicus curiae in a brief in the Supreme Court of Georgia in 1949 in a case called *Franklin* v. *Harper,* in which Judge Tuttle—then Mr. Tuttle—and I tried to overturn this specious sham of a literacy test designed to still keep blacks from voting in Georgia.

A sham is a sham is a sham, and these original disparate impact cases were discrimination cases, and the testing was merely a device, screen, or a sham to keep the discrimination in place.

Now you get title VII and you get this *Griggs* v. *The Duke Power Co.* case involving coal handlers. Coal handlers in the South are fungible. A coal handler does not really need to have passed the thematic aptitude perception test; we know that. So the fact that you did not have blacks handling coal for the Duke Power Co.—the disparate impact—meant discrimination, and the fact that you put up a test that is totally irrelevant for a job that does not need any kind of test is a sham just like the literacy test was a sham that Judge Tuttle and I attacked.

But from the *Griggs* case to where this principle has been extended by people who advocate, as my brother does on my right, and by some of the lower courts but, thank God, not yet by the Supreme Court of the United States is a very large kangaroo-type jump.

The jump is the type of leap that was attempted and succeeded, by consent, by the way, in the Carter administration in *Leuvano* v. *Campbell.* There you had an attack on the Federal civil service examination because it was producing disparate impact. Of course, it produced disparate impact, because any merit system test under the Pendleton Act of 1883 would produce disparate impact on some groups. All groups do not have the same qualification, training, and do not come from the same background and have not had the same opportunities.

We were seeking a Federal merit system, so the Department of Justice, on January 9, over the objections—as I understand it—of the Office of Personnel Management, previously the Civil Service Commission, walked over and entered a consent degree agreeing, essentially, to wipe out the PACE examination and to have some substitute examination. So you sacrifice the Federal civil service for what? For discriminatory arrangements.

In my judgment, Mr. Chairman, in all cases where disparate impact is actionable—and it should be in some cases—the actionable vice must be discrimination, and nobody thinks—at least, I do not—that the present Office of Personnel Management has a discriminatory purpose.

Senator HATCH. May I interrupt you on that point?

Mr. ABRAM. Yes, sir.

Senator HATCH. You make an important point, relating to what has been a major controversy here in the Congress last fall during the Fair Housing Act amendments debate.

As you may know, I opposed that bill despite my belief that we need more teeth in the present Fair Housing Act.

Under that bill, there would have been employed a disparate impact or effects test for identifying discrimination. I insisted instead upon an intent standard. I felt there had to be some element of intent before branding someone a civil rights violator.

We were prepared to say that "intent" could be identified through any conduct, direct or indirect, including circumstancial evidence, including the use of disparate impact or effects evidence.

The Justice Department could have brought any case they desired under that test, but they insisted upon a pure disparate impact or effects test. This approach would have allowed them to come into any city, or town, in America and second-guess land use planning and zoning ordinances of those towns even though there was never any intentional or purposeful discrimination.

Mr. ABRAM. I agree with you, Senator Hatch. From the viewpoint of a lawyer—which I have been for so many years—every lawyer likes to have an easy way to prove a case.

Aside from it being the device by which you easily prove what you want to prove, in my judgment, it is an immoral thing to impute discrimination from disparate impact except in cases where—as in voting cases and in grand jury cases and in common laborer cases—all of the persons who are applying for the privilege or opportunity are equally qualified or presumptively equally qualified. Otherwise, it is my judgment, one has to prove intent.

In the housing field, you raise a question that is not in my testimony, but I want to say this. I really think one of the great problems in this country is this fact—and my brother alluded to it, but he did not draw the same conclusion I did.

If you take white America and black America and draw a line, you will see that black America has a very thin line of privilege, and—to the credit of black America—that privilege is sometimes and most frequently defined by education rather than wealth. It is a fine thing, really.

White America has a substantial class of privilege defined by education, family, and wealth. But most whites are in the great middle class, or think they are. And, unfortunately, until fairly recently, not many blacks were in the middle class.

Then the white class of underprivileged was significant, but the black class of underprivileged is huge. I am going to come to that in a moment.

This is a class problem because you have more absolute numbers in the white underclass than in the black underclass, absolutely, but proportionately far more blacks are in the underprivileged group.

Thus, housing, which is a reflection of economic possibility or potentiality, obviously, is a function of class as well as race, and it is wrong—as you are, I think, suggesting—to impute discrimination to something which has its origin in class or economic condition—concerning which I feel very keenly, and I will say something about that in a minute—but it is not necessarily discrimination.

Mr. Chairman, some may say—and some do—that regardless of what the law is racial and gender preferences are a good thing. I want to say quite flatly that what you do, sir, with respect to your own personal life or I with mine should have a long leeway. If I want to prefer a black to a white or a woman to a man in my personal life, I give it a long leeway. But there are limits to that, as the racial covenant cases show—*Shelley* v. *Kramer*—if you ask the Government to recognize and enforce a private preference.

But what I think your committee is dealing with is State action—Federal, State, and local—and institutional action where the institution has some kind of contact with State policies.

Some say that society, not individuals, owes minorities—blacks particularly—preferential treatment because of egregious past wrongs. We have just heard a very eloquent assertion of that. But if you listened to Prof. Sedler, he was saying that group rights take precedence over individual rights. So far as I know, this is not the American constitutional framework.

Let me give a little test. I do not know of any area of life in which the blacks have been more cruelly discriminated against than in voting. Since the 15th amendment was passed, they should have had the right to vote; they did not.

Senator **Hatch**. As you know, this committee has been assigned the Voting Rights Act which has to be reauthorized before August of 1982. So we will be considering that as well.

Mr. **Abram**. Yes.

So, you see, sir, I feel about this very keenly, as the fact that I joined with Judge Tuttle in 1949 to litigate this matter demonstrates. Moreover, the effects of past discrimination in the voting field against blacks still linger on. They are not registered proportionately to whites; they do not vote proportionately to whites. So you could say this is a result of discrimination—the legacy of slavery and its aftermath. OK.

So why do we not do this: why do we not even things up a little bit—why do we not simply say we will have no more white registrations until blacks are registered proportionately to the population as whites; or, since we really want to have a good result right away and urgency is important—forget the Constitution—the end justifies the means—why do we not simply say that in a community that has two whites and one black we will let two whites vote but we will wait for a black to get to the polling place and hold the white until a black has voted, so that we will have proportionality of voting, so that we will have no disparate impact?

There are those who say: "Well, if we do this business of racial preference, we will only have to suspend the normal operation of the Constitution for a short period of time." But my question, as always, is: Who is going to determine how long one suspends the Constitution of the United States? and, those who would suspend the operation of the 14th amendment, equal protection clause—are they willing to suspend the Bill of Rights and the first amendment and free speech and free press for a short length of time?

Senator **Hatch**. If I might interrupt you here—with an example from the last election. I quoted, in my remarks on September 3, from an article in the Wall Street Journal entitled "The Peril of Irony." Some comments seemed to be taken seriously even when intended as a joke.

> Add to that list a satirical idea for an equal opportunity lawsuit dreamed up by University of Chicago constitutional law professor Philip Kurland and floated at a luncheon meeting. He predicted that an affirmative action suit would be brought to invalidate the nomination and election processes in the current presidential contest on the ground that minority members had been underrepresented.
>
> Word got out around the campus, and the lawsuit idea began to attract supporters, forcing Mr. Kurland to remind everyone that the Equal Employment Opportunity Commission has not yet been given jurisdiction over presidential elections.

I hope you do not state your idea quite as forcefully in the future as you have here.

Mr. **Abram**. Well, sir, there is a slippery slope, as we all know.

Senator **Hatch**. I understand.

Mr. **Abram**. I would like to turn, Mr. Chairman, to this question: How would this heterogenous society deal with the kind of balancing act that would be required if Professor Sedler's views were universally adopted?

First of all, I would like to point out that the disparities within one group are frequently greater than the disparities between groups. The average income from the last census before this one showed that the American family had an average income of $10,678. West Indian blacks had almost the same income—$9,821—

but native blacks had a parlous record of $6,821. Between blacks, who would be preferred as a group, there are vast disparities.

Mr. Sedler mentioned the Asians, but the Filipinos are protected as Asians and Pacific Islanders under EEOC classifications. The Japanese are also protected, and they have one of the highest average incomes of any group of Americans.

The disparities between groups are huge. For example, the American Indian who was left out in the *Leuvano* v. *Campbell* PACE examination consent degree had his land seized, and he was the subject of massacre. Yet, he does not benefit from this decree that the Attorney General of the United States entered to.

Then I wonder how one is going to divide up this pie. Twenty percent to blacks and Hispanics, 2 percent to Indians, 5 percent to Asians, 20 to 30 percent to ethnics, 50 percent to women—the whole is not equal to the sum of the parts, and the stage is set for a resentful confrontation.

I would like to spend my last minute or so dealing with what I think is a fundamental problem. Mr. Sedler mentioned black poverty. The 60-percent ratio between white and black family income has been fairly stable for many years. That is, blacks as a group earn only about 60 percent of what whites as a group earn. It is a problem. Any compassionate, any caring, any civic-minded American wants to address it. But you cannot address it as some would.

For example, black women who have been to college earn more than white women who have been to college today.

Mr. KILSON. 105 percent.

Mr. ABRAM. Yes—thank you, Marty.

And there are other categories that are closing. The problem is that this 40-percent gap is not closing because, in the black female-headed household, the income in that frail household is a third of the income in black household headed by a male, and it is dragging down the entire statistics, and it is tragic.

There has been an increase from 1962 to 1979 in the black female-headed households of something like 23.2 percent to 40.5 percent. Poverty hovers over these frail households.

The problem of poverty in the uneducated and under present conditions sometimes uneducable household must be addressed, but it is not relevant to the issue of preferential treatment.

Justice Potter Stewart said in a recent decision—and Mr. Sedler should listen to this, I think, when he says that white rights as a group will not be injured by preferential treatment—

> No race has a monopoly on disadvantage. In 1978, 83.4 percent of persons over 25 who had not completed high school were white, 79 percent of households with an annual income of less than $5,000 were white.

This country has got to address the problem of need and ignorance, but need is need, and ignorance is ignorance, and illiteracy is illiteracy wherever it occurs. It is not a racial proposition.

As a matter of fact, preferential treatment plans tend, as in the attack on the Federal Civil Service by the civil rights groups, to deal with those who are already on the escalator up and not those who are in the pit. In fact, preferential treatment plans create further divisions within groups.

What are we going to do to stop this? I would like now to be *practical. I think first* we have got to attack this need, this illiteracy, this poverty of education.

Second, I think we have got to stop the inversion of the American principle which was, as I grew up and was taught to believe, that people should be treated as individuals, not as groups.

We have got to build—as you yourself have said, Mr. Chairman, in your considerable effort in the Congressional Record to which you pointed—on the principle of those Supreme Court cases—which are very current, by the way. To use the word of Teamster repeated in the *Furnco* case—"Some people are less favorably treated than others because of their race, color, religion, or national origin." That is the problem of discrimination; that is the issue of civil rights.

I should like, therefore, to see Congress legislate—you do not really need a constitutional amendment, in my judgment, sir, for this purpose. Have Congress legislate its determination, its finding, its will that in all of the antidiscrimination and civil rights legislation enacted to date or subsequently this legislation shall be interpreted in accordance with the principle that the Supreme Court of the United States set out in the recent case—the recent case—of *Washington* v. *Davis* arising in the District of Columbia and dealing with the Washington, D.C., police force.

The case arose under 42 U.S.C. 1981, the Civil Rights Act of 1975. This is what the Supreme Court said—and I wish Congress would say it applies to all of its legislative purposes—"The invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."

Mr. Chairman, those were the words of the Supreme Court of the United States dealing with a test to be applied to the Washington Police Department where there was disparate impact. They upheld the test because it was not deemed to have been enacted for racially discriminatory purpose. That is what is required urgently from this Congress, and all that is required, in that sense, is legislation saying how title VII and title VI and the other titles shall be interpreted.

Third, the executive should weed out all invidious classifications in the host—there are tons of regulations that have been built up in the name of affirmative action but have nothing to do with it. They are preferential treatment plans and racially motivated and gender-motivated regulations.

Fourth, appointments to agencies should be of people who believe in what the NAACP pronounced until the end of the *Brown* v. *Topeka* cases, staffing agencies with servants committed to human equality and equal protection of the law.

Mr. Chairman, human equality and equality protection of the law is the banner under which I and all of my colleagues in the civil rights movement marched proudly, until a new and strange device of preference based on race was unfurled.

But the Constitution cannot be set aside by Congress, the courts, or the people of good will. I say to such people: "God bless you." But they sometimes, in their zeal, destroy that which is most fundamental in this society, and that is the Constitution of the United States, exactly as Thurgood Marshall urged it to be interpreted in case after case and which I proudly supported and still support.

Thank you.

Senator HATCH. Thank you, Dr. Abram. Without objection, we will include your prepared text at this point.

[The prepared statement of Dr. Abram follows:]

PREPARED STATEMENT OF MORRIS B. ABRAM

Ever since I was 17 years old and living in rural Georgia, I have considered segregation and racial discrimination repulsive to the traditions of my country and my faith.

I am proud of my length devotion to civil rights for each and everyone of this country's citizens and I yield to no one in my desire to have equality of opportunity become inextricably woven into the fabric of our national life.

I fought the racially motivated country unit system in Georgia for 14 long years until I finally prevailed in the Supreme Court in the one-man, one vote case (*Sanders* v. *Gray*).

President Johnson appointed William T. Coleman and me the co-chairmen of the Planning Conference for the White House Conference on Civil Rights in 1965. I served as the U.S. Representative to the United Nations Commission on Human Rights, and was one of the principal authors of the United States Convention for the Elimination of All Forms of Racial Discrimination. I have also served as Chairman of the United Negro College Fund.

In addition, President Johnson offered me the opportunity to become the first Chairman of the Equal Employment Opportunity Commission.

In 1963, I litigated the first major case for the Lawyers' Committee for Civil Rights Under Law in Americus, Georgia, to free five followers of Martin Luther King, Jr. held without bail under an invalid sedition law.

In sum, for half a century I have not altered my faith and support of the principle of equality of all men and the rights of all citizens to equal treatment regardless of race, creed, color or sex.

It follows then that I oppose any preference based on any of those distinctions. The civil rights movement itself has historically and invariably regarded such preferences as invidious, odious and intolerable. Indeed, in the 1950's—and until the mid-1960's—the only persons insisting on racial preferences were white supremacists. The very hallmark of white supremacy was to maintain by law preferences for the white race. Its legal theorists successfully defended the cornerstone of this system under the equal but separate doctrine which was not finally overturned until *Brown* v. *Topeka* in 1954. Those who today advocate racial preferences for minorities are treading on old and dangerous political ground, wading into murky ethical swamps and traducing the constitutional principles which guard us all in our marvelously hetergenous and wonderfully volatile society. They are today struggling to overturn the very principle that the law must be blind to distinctions based on race, creed, color or sex, which from 1896 (the date of *Plessy* v. *Ferguson*) until 1954 they fought to establish.

The last thing needed in America is a constitution which expands and contracts as an accordion to play the current political hit tune. Today it may be "We Shall Overcome;" tomorrow it may be the theme song of the Birth of the Nation. Justice Robert Jackson, in the Japanese exclusions cases, put the matter most eloquently as he railed against the 1941 military order which operated exclusively against citizens of Japanese ancestry: "Once a judicial opinion rationalizes such an order or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."

Despite the fact that the very heart of the civil rights movement was consecrated to the riddance of color preference and in behalf of a color blind interpretation of the Constitution—a cause urged upon the country and the court by no less a figure than Justice Thurgood Marshall in 1952-53—that "movement" now pushes for the very opposite. The reversal of direction has been gradual and insidious. Laudable purposes have been cloaked in innocuous phrases such as "affirmative action"—a program which had and has my support when presented as an effort to seek out, train and educate (often by remedial means) persons qualified but overlooked. Gradually the strategists of the movement inched up notch after notch and affirmative action has come to mean goals and timetables as indices not to test equality of opportunity but rather to enforce equality of result. The laudable goal of affirmative action has been skewed into a full throttled program of quotas by whatever name.

Examples of this sorrowful transformance abound. This is nowhere better illustrated than in the Affirmative Action Proposal of the United States Commission on Civil Rights, entitled "Affirmative Action in the 1980's: Dismantling the Process of Discrimination." In that proposal, drafted by the governmental organization established in 1957 at the behest of people such as myself, the words "quotas," "targets," "goals," and "preferential treatment" are used elusively as in a game of four-card monte. Henceafter I shall call Affirmative Action Plans by the name into which they have been transmogrified: "Preferential Treatment Plans."

The philosophy of the Civil Rights Commission proposal is the same as that expressed in a letter to me dated February 13, 1981, from Richard Seymour of the staff of the Lawyers' Committee for Civil Rights Under Law as a representative of the plaintiffs in *Leuvano* v. *Campbell*. Attacking PACE, the qualifying examination for 118 intra-level positions in the federal civil service merit system, and defending a preferential action consent decree which would have required racial-quota hiring, he wrote:

"For example, suppose that 100 whites and 100 blacks applied for 50 jobs. If there were no adverse impact in the examining procedure used to select for these jobs, one would expect to see 25 blacks and 25 whites hired. Under the 80 percent test used by the Consent Decree, it would be a matter of indifference if 27 whites and only 23 blacks were hired."

We all know that those applicants who merit selection for any given administrative or professional job do not come proportionately qualified by race, gender and ethnic origin in accordance with U.S. population statistics. Yet those who want to believe otherwise find it impossible to accept as valid any selection procedure which does not result in a one-to-one match between the race, gender and ethnic composition of the applicant pool and the candidates selected. This, I fear, is the underlying philosophy of what "affirmative action" has come to mean—a presumption that, for every opportunity in life, the meritorious candidates selected must necessarily include minority applicants in their proportionate numbers, and that a test or admission practice based upon merit which does not confirm this presumption is therefore suspect, however neutral and relevant, must overcome the presumption.

The underlying principle of a Preferential Treatment Plan is that group rights (leaving aside the question of how the group should be defined) are more important than individual rights. That is, that everyone is to be treated as a group member, not as an individual with distinctive abilities, interests and character, and that individual merit is to count for little or nothing as compared to one's gender or the color of one's skin.

Given that principle, preferential treatment for a minority, especially when that minority has unquestionably suffered egregiously from past discrimination, seems on its surface to be appealing. Why should not those who have suffered long a pervasive discrimination, the effects of which still persist, be given some form of compensation? But the idea becomes less and less appealing under rigorous analysis and eventually it is appalling. Consider, for example, the case of the Georgia black voter. My native state had denied black voters the precious civil rights of franchise from the adoption of the Thirteenth Amendment until the middle 1930's. The effects of this deprivation endure. Then why should Georgia not restrict white registration until blacks are proportionately enrolled or place whites on hold at the polling places at every election until blacks have turned out in exact proportion to their appearance in the local population?

Next, let us not forget that America has had many different victims of discrimination beginning with its native Indians. To the ranks of those who have suffered in varying degrees must be added blacks, Chicanos, Chinese, scores of ethnics, Catholics, Jews and women. To measure discrimination by creating broad classifications of those who may ever have been affected by it is impossible, and to compensate for it by individual allocation of advantages and burdens becomes ridiculous. Those who suffered most from discrimination may have long departed and the most egregious oppressors with them. More importantly, within each of the protected minority groups which the EEOC classifies as "Black of non-Hispanic origin," "Hispanic," "Asian or Pacific Islanders," and "American Indian or Alaskan Native," are subgroups with different experiences of oppression. Do blacks of British West Indian origin suffer the same discrimination as American blacks? Are Japanese "Asians" in the group of persons to be protected from present disadvantage, and on what premise? Are Hispanics of Argentine origin to be given the same preferential treatment as Puerto Ricans? How much blood is required for admission to or exclusion from the preferred caste?

Second, the EEOC's broad categories of minorities to be afforded special protection, on which many of the premises of Preferential Treatment rest, simply will not stand up under even the most gentle examination.

The 1970 census figures demonstrate that the mean income of employed persons varied as much by subgroups within the "protected minority" classifications as the comparative figures for these classifications varied in comparison with the total U.S. population, whose median annual family income was then $10,678. West Indian black families here earned almost as much, $9,821, though black American families earned a meager $6,821. In the face of these facts, should we prefer all blacks equally? Are Puerto Ricans, whose average family income was $6,728, to be preferred over American Indians whose family income was even lower? And if Hispanics in general are to be advantaged, should we include professionals of Castilian origin?

Under the protection and advantages to be conferred on "Asians" do we include Chinese Americans whose family income of $12,176 is well above the national average, or Japanese here who enjoy, I believe, an extraordinarily high family income for any group in America? And where do the Italian Catholics fit, who may rightfully point to the massive discrimination against them enshrined for generations even in the immigration laws; or the Poles, who suffer even today from persistent ethnic slurs?

Such a concept of Preferential Treatment, if enforced as national policy across the board, would thus recast the nature of American society. Groups would be assigned proportions of opportunities in the most bizzare manner. After allocating perhaps 20 percent of such opportunities to blacks and "Hispanics," 2 percent to American Indians, 5 percent to "Asians," 20–30 percent to those of various kinds of European ethnic origin, and varying percentages for others of differing religious or ethnic origin who have legitimate claims of unequal treatment, and making sure that assigned opportunities within these groups are divided equally between men and women, the whole may not be equal to the sum of the parts. The stage would be set for a vast resentful confrontation between people of differing race and ethnic origin.

Any group-oriented proposal must fail to fit the problems of our society because it is comprised of individuals, not groups. Any attempt to categorize by group is doomed to failure because there is often greater diversity within any group than between groups.

For example, gross income figures, when broken down, show that if discrimination is measured by income, it is not equally pervasive within any one group. For example, educated black women earn more than their white female counterparts and the gap between all black and white family groupings is closing, except in "the exploding number of black female-headed families" over which poverty hovers, as the black Chairman of the University of Chicago's Sociology Department, Professor William J. Wilson, has noted. In this category, family income is about one-third that of black households headed by a male. Thus, within the black community (leaving aside any comparison with the white) there is a vast disparity in the incomes of black families. Homes without an adult male head have grown from 23.2 percent of all black families in 1962 to 40.5 percent in 1979. It is the woefully meager incomes of these families that is skewing the median black family income average and preventing the closing of the 40 percent disparity between black and white families as a whole.

Moreover, no "affirmative action" proposal to date has taken into consideration the nigh hopeless condition of our uneducated and unemployable urban underclass, whether black, white, male, female. We ignore these growing numbers at our peril, but their problems are not touched by scrapping the Federal Merit System Examination or other such "achievements" under Title VII. Nor by the extraordinary racially biased State Department regulation set forth in 1980 which waives the written examination for minority candidates and sets up a separate register on the basis of race for the employment of Foreign Service officers.

The transition from equal opportunity to guaranteed result has been grafted into our consciences and consciousness by imaginative legal craftsmanship. It developed through the analogy by which disparate impact in one field—where it correctly identified discrimination—to other areas in which disparate impact proves nothing except disparate qualification

In a wide variety of circumstances, discrimination can be supported by disparate impact. For example, if my home town of Fitzgerald, Georgia, permitted illiterate whites to vote and only 5 percent blacks were registered in a community of 9,000 souls, 55 percent of which were black, it would be clear that there is discrimination. Similar disparate impact with respect to the composition of grand juries in that community would indicate that discrimination is at work. Literacy tests such as those which I attacked in *Franklin* v. *Harper*, 305 Ga. 779, 555 E.2d 221 (Sup. Ct. Ga.

1949) in 1949, were nothing but shams, the purpose of which was to put a screen around the discrimination rather than to set neutral tests for voter qualification.

The experience in voter and jury selections—where citizens are for the most part fungible under qualifications generally prevailing—could properly be transported into the employment field for relatively unskilled workers. Thus, in a southern town, a great disparate impact in the proportion of black coal handlers, was tangible proof of discrimination and contrived tests to justify the disparities were properly judged to be sham. A sham is a sham whether it is used for voter or worker qualification. It was a clever try to insinuate abstract principles correctly applied in *Griggs*—involving coal handlers—into contests involving academic and professional employees, and no doubt some courts will not detect the sleight of hand. But if the issue which Title VII addresses is discrimination, disparate impact in the case of academic, professional or indeed any skilled employment does not prove nor even necessarily suggest that discrimination is at work.

Indeed, the Supreme Court recently gave the Fifth Circuit Court of Appeals a unanimous rebuke in *Texas Department of Community Affairs* v. *Joyce Ann Burdine*, 49 U.S.L.W. 4 214 (Mar. 4, 1981). In that case, the Supreme Court rejected the Fifth Circuit's determination that, in order to prevail, an employer charged with employment discrimination in hiring, firing or promotions would bear the burden of proving that the person hired was more qualified than the allegedly discriminated against employee. The Supreme Court was not willing to impose such burden on the defendant and quite properly held that the burden of proof rests at all times on the plaintiff.

There are serious economic and social problems in this country and racial and gender discrimination persists. The most serious racial handicap is closely tied to poverty. This reminder may have come as a shock to the coterie of pleaders, bureaucrats and even courts, who seem to have overlooked the fact that the civil rights reforms were directed at discrimination, which is a fact to be proved rather than an assertion to rebutted. Too many have slipped into the false assumption that the Congress has legislated and the Constitution permits the redistribution of society's opportunities to racial, ethnic and gender groups by aliquot fractions. Discrimination still means what the Supreme Court in *Furnco* v. *Waters*, 438 U.S. 567, said:

"The central focus of the inquiry * * * is always whether the employer is treating 'some people less favorably than others because of their race, color, religion, sex or national origin,'" citing *Teamsters* v. *U.S.*

Poverty must be attacked across the board and not on purely racial lines. As Supreme Court Justice Stewart recently noted: "No race has a monopoly on disadvantage. In 1978, 83.4 percent of persons over the age of 25 who had not completed high school were white and 79 percent of households with annual incomes of less than $5,000 were white." Need is need, ignorance is ignorance, in whatever identifiable groups they occur. Obviously full employment, the control of inflation, better medical care, sensitive education in a non-combatant environment, are all probable requirements to help people in their efforts to meet opportunity equally well prepared.

Preferential Treatment Plans, however, seek to focus remedial action on the areas where most progress has already been made in eliminating inequities, and would leave those in direst need in the pit. Justice Douglas wrote in dissent in *DeFunis:* "The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized."

Preferential Treatment Plans are ill-fated social engineering attempts to move up those who are already on the upward-mobile escalator, leaving the most disadvantaged behind and dividing man against man and man against woman. It is not enough that we recognize the drift from the American principle of equality now masked as "affirmative action."

It is time that we take affirmative action to end racial, ethnic and gender preferences in state action and at the same time rededicate the country to the extirpation of every vestige of unequal treatment based on these invidious distinctions. The Congress should clearly reaffirm that all of its legislation in the civil rights field must be read by the bureaucracy and the courts as the Supreme Court read Title 42 U.S.C., Section 1981 in the recent case of *Washington* v. *Davis*, in which the Court stated:

". . . The invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."

The Executive should weed out all regulations—there are tons of them—which are not predicated on a color or gender blind reading of our traditions.

Agencies of governments such as the United States Commission on Civil Rights, the EEOC, the OFCCP, and the civil rights organs of the departments should be staffed by servants committed to human equality and equal justice under law.

It was this cause in which I enlisted as a young man and it is under this banner I still wish to march. It happens to be the same banner under which moved all of my colleagues in the civil rights struggle until a new and strange device was unfurled in the middle 1960's. Some say that we should march under this new banner temporarily and then return to the old. For my part the constitutional principles of freedom of speech or press or, as in this case, the equal protection of the laws, cannot be set aside, not by the Congress, not by the courts, not by the bureaucracy and not by people of good will.

[From the New York Times, June 7, 1981]

SKEWING AFFIRMATIVE ACTION'S PURPOSE

(By Morris B. Abram)

As a former Georgian, I am proud of my lengthy devotion to civil rights. I fought the racially motivated electoral system in Georgia for 14 years until the United States Supreme Court finally affirmed the principle of one man, one vote.

In 1963, in litigation, I helped free five followers of Dr. Martin Luther King, Jr., held without bail in an Americus, Ga., jail, under an invalid sedition law carrying a capital penalty.

I have always believed that the very heart of the civil rights movement is abhorrence of color preference and devotion to a color-blind interpretation of the Constitution. I endorsed and continue to support affirmative action as an effort designed to seek out, to train, and to educate (often by remedial means) disadvantaged persons who would not otherwise acquire the qualifications necessary to make equality of opportunity a reality.

Some leaders of the civil rights movement now push, however, for racial preferences that the movement has always considered invidious, odious, and intolerable. The laudable purpose of affirmative action has been skewed into a program of quotas, goals, and timetables, used not to test equality of opportunity but rather to enforce equality of result. Affirmative action has been turned into preferential treatment. Thus, it is now assumed that if under a merit system, 100 whites and 100 blacks apply for 50 jobs, nearly 25 blacks and 25 whites should be hired, for otherwise discrimination is assumed to be present in either the testing or the hiring practices, or both.

The transition from equal opportunity to guaranteed result has been grafted into our conscience and consciousness by imaginative legal craftmanship. It developed through the misuse of a legal analogy by which "disparate impact" (the apparent underrepresentation of minorities), which exposed discrimination in one area was applied in others where such underrepresentation reflected nothing except unequal qualifications.

In a wide variety of circumstances, discrimination can and should be proved by disparate results. For example, if my hometown of Fitzgerald, Ga., with a population of 9,000 of which 35 percent are black, permitted illiterate whites to vote, but only 5 percent of the blacks were registered, it would be clear that there was discrimination. In such an instance, "qualification" such as a literacy test is nothing but sham, the purpose of which is to put a screen around discrimination rather than to set a neutral test for voter qualification.

The experience in voter selection, whereby citizens must be considered the same if democracy is to function, could properly be applied in the employment field to relatively unskilled workers.

Thus, in a southern town, if blacks were not permitted to work as coal handlers, "disparate impact" was tangible proof of discrimination. Any test contrived to justify such disparity could be dismissed only as sham. But disparate impact of a selection process in the case of academic, professional, or indeed any skilled employment does not prove, nor even necessarily suggest, that discrimination is at work.

The issue that the civil rights laws address is discrimination, and the fundamental principle is that persons are to be treated as individuals, with due regard for their distinctive ability and character. The underlying principle of preferential treatment, however, is that every applicant is to be regarded as a member of a group, with a person's merit counting for little or nothing as compared to one's gender or skin color.

It is argued that preferential treatment should be seen as a temporary measure. However, an ethnic spoils system, once introduced, is bound to become entrenched, and requires a suspension of the 14th Amendment, which guarantees equal protection of the law, a step no less hazardous than the suspension, for a time, of free speech and press.

The most serious racial handicaps in this country are closely tied to poverty. The current program of preferential treatment, however, plans remedial action for those who have experienced the most progress—the skilled, the educated, the middle class. By doing so, it leaves those in direct need in the pit.

In the 1950's, and until the 1960's, the only persons insisting on racial classification and preferential treatment were white supremacists. Those who today insinuate racial preferences into the rule of law are treading on old and dangerous political ground—a path to be avoided even by people of good will.

(Morris B. Abram, former president of the American Jewish Committee and former United States representative to the United Nations Commission on Human rights, is a lawyer here.)

Senator HATCH. Dr. Kilson, we are happy to have you with us also.

These first two statements have not only been eloquent but very extremely informative. This has been an excellent hearing thus far; we are looking forward to listening to you, Dr. Kilson, and hearing your point of view. Then we will finish with Professor Van Alstyne.

STATEMENT OF MARTIN KILSON, PROFESSOR OF GOVERNMENT, HARVARD UNIVERSITY

Mr. KILSON. Thank you, Senator Hatch. I am very pleased to be here.

Let me say straight off by way of introduction—and which I do not say here in the text which I have called "Affirmative Action Is Fair and Reasonable," a copy of which I have already given to the staff and which I will present in a moment as swiftly as I can—in my text I do not say what I want to say here: First, that my remarks are based upon a distinction among those who have been critics of affirmative action.

I distinguish between the bad critics—whom I often like to call also the loudmouth critics—and the good, sympathetic critics. Perhaps the most eloquent, fervent, and brilliant exponent is this great gentleman, Dr. Morris Abram, to my right.

I walk, in my thinking about affirmative action, a tightrope of sympathy toward the good critics—Dr. Morris Abram, a long-standing defender of equal opportunity, who put his career, his life, and his status on the line in behalf of it—on the one hand—and skepticism toward his passionate and rigorous opposition to quotas and preferential treatment as the most operative mode of affirmative action. It is not an easy tightrope to walk—that tightrope of respect for a colorblind approach to equality, on the one hand, and my own belief that a colorblind democracy can in fact be true to its longrun values of equality while at the same time use public policy to aid, in a racially skewed manner, Afro-Americans to gain parity of opportunity for social mobility with white Americans. This is, perforce, a process that will be rather messy, not always true to principles of colorblind democracy, but nevertheless it is a process that the history of racism dictates. After all, the critics of affirmative action—either good or bad ones—can hardly claim that our system has never adopted other public policies whose application produced conflict between competing ideals.

I defend affirmative action as equal opportunity. I am much less in defense of it as quotas and preferential treatment, and I will get around to that.

There are several familiar criticisms from the critics of affirmative action—as I have just mentioned the good critics and the bad. Let me state them, and then I will address them.

First, that skewing of opportunity for occupational and social mobility in favor of blacks, women, and other groups identified under affirmative action guidelines in legislation is unprecedented and thus unfair—it is argued—for no other group or sectors in American political history and life have been affirmatively assisted through public policy. That is one argument.

Second, helping Afro-Americans to gain occupational parity with whites after a century of massive discrimination against Afro-Americans violates the new status of equality before the law that was created by the civil rights legislation in the 1960's.

A third criticism is that those citizens who are asked to sustain restitution to Afro-Americans by way of affirmative action practices—for example, Alan Bakke—did not, themselves, commit injuries or oppressive acts against Afro-Americans in the past.

A fourth criticism is that merit, obviously so fundamental to efficiency and fairness in our modern society, will be made a shambles by affirmative action practices.

I should like to comment on these several criticisms.

First, it is not correct, I think, to argue that affirmative action practices are without precedent in American politics—as many bad critics do—and, therefore, that white groups were never affirmatively assisted through public policy.

Politics in American cities, counties, and States have involved the control of extensive social resources and benefits—patronage, if you will—which, by means fair and foul, have been skewed for long periods of time in behalf of specific ethnic and interest groups.

For a century or more, this has amounted, I suggest, to a form of de facto affirmative action, though never labeled such—affirmative action, that is, for Irish Americans, for Anglo Protestants in the South and elsewhere, for Italian, Slavic, and other white ethnic groups—a point the bad critics have always failed to recognize.

The same skewing of resources and opportunity for occupational and social mobility through politics and public policy has favored other types of white interest groups—groups like veterans or producer groups like tobacco farmers, cotton farmers, dairy farmers, and other such groups.

In San Francisco, for example, between 1879 and 1900, Irish Americans, a controlling force in the city's politics, received 30 percent of all white-collar public jobs, and by 1900 the public sector in San Francisco employed 10 percent of all Irish white-collar workers. And I could give you so many more examples of such.

This, I dare say, is and was and has been a form of affirmative action. So, too, was the skewing in favor of whites of some 10 million housing units provided by the FHA between 1935 and 1955, a skewing that was mandated by FHA guidelines, guidelines that explicitly excluded Afro-Americans as housing recipient and a skewing the political practices of city and State governments helped to carry out.

This affirmative action for whites in the past has meant in this particular case that barely 1 percent of FHA-provided housing went to Afro-Americans between 1935 and 1955. The brilliant analysis of this process—anyone who is interested—can be found in the work of Dr. Abram's namesake, the great Charles Abram, the major FHA Administrator in those years.

A similar form of affirmative action for white groups was apparent in the admissions practices of America's great State university systems from their very founding in the late 19th century down to the 1960's—nearly a four-generation period when white preferential treatment for admission to public colleges was based upon nearly total exclusion of Afro-Americans.

Thus, in these and in many, many other areas that one could mention, social mobility was linked to public policy between the late 19th century and the 1960's. It is not an exaggeration, sir, to say that, while not called affirmative action, something rather like it applied to whites and, by contrast, what we can call affirmative discrimination applied to Afro-Americans.

Curiously enough, the affirmative action policies for Afro-Americans since 1970 have been labeled by critics of these policies—the bad critics—as a form of affirmative discrimination against whites. My colleague at Harvard University, Nathan Glazer, perhaps was the first to use the term "affirmative discrimination" in his widely-read book by that title.

The argument is twofold. First, it is claimed that the new status of equality before the law provided by civil rights legislation of the 1960's—that great epic—is adequate for the typical Afro-American to start the occupational and social race for parity of mobility with white Americans. Second, in this affirmative discrimination argument, it is claimed that reinforcing Afro-Americans' equality before the law with policies which aid them or compensate them in gaining occupational and educational positions is unprecedented and unduly discriminatory toward white Americans—in short, a denial of equality before the law since the 1960's.

In regard to the first aspect of the affirmative discrimination claim, I think it is based on a rather shallow understanding of the awful legacy of institutional constraint and psychic trauma visited upon Afro-Americans by racist practices including the white supremacy ideological orientations and the shameful violence that sustained the worst racist practices for nearly a century.

Conservative and other critics of affirmative action fail, I suggest, to grasp that the century-old assault of racism on Afro-Americans' chances for equal opportunity was too complex to be corrected merely by the final mandating in the 1960's of a colorblind Federal Government and Constitution.

In debating the critics of affirmative action, it is always my hope to help them respond to racism's damage to Afro-Americans with some of that sense of outrage that postwar German intellectuals like the great Gunther Grass responded to the human wreckage that fascism visited upon European Jewry.

I hope these critics of affirmative action when facing racism's true wreckage to blacks—might share Grass's response when he first saw the concentration and death camp Dachau: "Realizing," he said, "what unbelievable crimes have been done in the name of my generation and what guilt, knowingly or unknowingly, our people have brought upon themselves."

Thus, inasmuch as most conservatives—old and new, I suspect—would surely agree that property-holders and corporations who are victimized by the State warrant compensatory treatment, is it really beyond their values or rules to grant that a people victimized by the State and—yes—under cover of the State's example or authority by its citizens equally warrant compensatory policies?

I submit that Afro-Americans are, by any serious, historical, and moral measure, such a victimized people. Affirmative action is, despite its many limitations and difficulties, a fairly reasonable compensatory policy for these victims.

In regard to the second aspect of the affirmative discrimination argument, it is important to recognize that affirmative action is not the first time our system, through public policy, has walked the delicate tightrope between equality before the law, on the one hand, and disproportionately aiding a given constituency, on the other hand.

I have already mentioned policies favoring the employment and education of veterans, compensating them, as it were, for risking their lives in wars. Furthermore, the Federal reconstruction policy after the Civil War, fragile though it ultimately was, recognized that despite the new equality before the law there was, indeed, a need to flesh out or reinforce the Negroes' new freedom with assistance for occupational and social mobility.

Professor Kenneth Stampp, the University of California historian, puts it this way in his book, The Era of Reconstruction: 1965–1877,:

> Aid to the freedmen was, thus, at the very heart of Republican reconstruction. It was this aspect of the program and little else that justified designating as radicals the Republican leaders in Congress at the time.
>
> Their attempt to give full citizenship to southern Negroes was the great leap in the dark of the Reconstruction era. Some of the Republican radicals believed that it would be essential to give the Negroes not only civil and political rights but some initial economic assistance as well. The four million people had emerged, after all, from bondage in complete destitution without land, without shelter, without a legal claim even to the clothes on their backs.
>
> Neither Lincoln's Emancipation Proclamation nor the 13th Amendment, Professor Stampp said, had required masters to make any settlement with their former slaves for past services or provided for economic aid from the public treasury.

He continues:

> This condition of economic helplessness some Republican radicals thought was what threatened to make Negro freedom purely nominal. The Republicans did, therefore, Stampp claims, attempt to give the freedmen Federal assistance.
>
> In March 1865, Congress created the Freedmen's Bureau. It was to provide food, clothing, and medical care, and, in general, to help the freedmen in the period of transition from slavery to freedom—to get them back to work, to aid them in their dealings with the landlords, and to provide them with schools.
>
> Congress, in February 1866—a year later—passed a new Freedmen's Bureau bill—indeed, over President Johnson's veto—indefinitely extending the Agency's life, increasing its power to supervise labor contracts, and authorizing it to establish special courts for Negroes when they were unable to get justice in the regular white-controlled courts.

It is also important, I want to suggest here, to note that throughout the short era of Reconstruction, in the first effort of applying through public policy what today we would call a form of affirmative action in behalf of blacks, the Afro-American political leadership in the South was essentially moderate and intelligently pragmatic, always sensitive to the needs and claims of the white majority, including their racial preferences.

Professor John Hope Franklin, in his truly brilliant book, Reconstruction after the Civil War published in 1961, tells us that: 'Negroes attempted no revolution in the social relations of the races in the post-Civil War South. Negroes, as a rule, conceded to the insistence of whites that they were a race apart, and they made little or no attempt to invade social privacies. They did not attempt to destroy white supremacy except where such supremacy rejected Negroes altogether as human beings, and there was almost nowhere any serious consideration given to providing legal approbation of interracial marriages."

"While Negroes sought equality as human beings," Prof. John Hope Franklin claims about their leadership posture toward Reconstruction, "they manifested no desire to involve themselves in the purely social relations of whites as individuals or as groups."

"It is a wholesale falsehood to say that we wish to force ourselves upon white people," so declared the mulatto Lieutenant Governor of Louisiana, P. B. S. Pinchback.

Professor Franklin also offers the very important observation that Afro-American leaders in the South always endeavored during the Reconstruction era to balance the economic gains they sought through Reconstruction policies with the economic need and interest of white folks.

As Professor Franklin tells us:

> Nor did any considerable number of Negroes seek to effect an economic revolution in the South.
>
> Henry McNeil Turner, that great and fearless Negro leader, who was almost universally disliked by white Georgians, did what he could to assist the whites in recovering their economic strength. In the Georgia Convention, Professor Franklin tells us, Turner secured the passage of two resolutions that indicated a remarkable willingness to stabilize the economic life of the white community after the Civil War.
>
> One resolution sought to prevent the sale of property whose white owners were unable to pay their taxes. The other resolution provided for the relief of banks.
>
> In South Carolina, Negro leaders such as Robert DeLarge and Francis Cardoza supported relief measures with a full knowledge that whites would benefit as much as Negroes.

It is important, I suggest, to recognize today, as we ponder the future of affirmative action policies which are today's variant of post-Civil War Reconstruction, that this same responsible pragmatism, this same sense of fairness toward the economic needs and economic interests and requirements of whites informs today's Afro-American leaders' approaches to affirmative action.

No responsible Afro-American leader today I know of—not Ben Hooks or Margaret Bush Wilson of the NAACP, not the National Urban League's Vernon Jordan, not the 18 black Members of Congress—not any of them favors the advancement of blacks on the backs of whites.

Put simply though bluntly, Afro-American leaders, for the most part, have not been crazy in the past and are not crazy today. Critics of affirmative action—the bad critics—who suggest that Afro-American leaders are irresponsible on this issue are either badly misinformed or, worse still, downright dishonest.

Before leaving the experience of Reconstruction, let me say that this first application through public policy of affirmative action, or what we would call it today, for Afro-Americans was shortsightedly aborted by the counterrevolution of modern racism or what the great Yale historian, Prof. C. Van Woodward, likes to call the strange career of Jim Crow—a counterrevolution led by the Ku Klux Klan among the South's redneck lower classes and by the one-party and coercively authoritarian politicians among the South's white upper classes.

But had the U.S. Congress and the President at that time demonstrated the moral fiber and—yes—the political courage required to continue Reconstruction's variant of affirmative action for another decade or maybe two more decades I dare say, Senator Hatch, that America's shameful experience of 20th century racism would have been quite different and, surely, the problem of equality today before us easier to achieve.

In regard to the issue of who should sustain the costs of restitution or the element of restitution that is associated with affirmative action, my Harvard colleague, a conservative, Prof. James Q. Wilson in my own department of political science—or, as we like to call it at Harvard 'of government'—offers the following comment in The Washington Post, March 4: "Affirmative action is often thought of as a form of restitution, but those who pay—for example, Alan Bakke—are not those responsible for the earlier evil."

I suggest that this perspective is entirely wrong. No serious observer would apply this formulation to, say, indemnities imposed on the German State for expropriating property and destroying careers and lives of millions of Jews during World War II. Nor would a serious observer of these kinds of problems apply this formulation to a court's damages on a chemical corporation for contaminating the drinking water or the housing sites of an American community.

Successor politicians to the German States and—yes—their citizens too, while not having themselves harmed the Jews, are liable in international and civil law to acknowledge restitution, and the same is true for the new executives and stockholders of the polluting firms, while not themselves the polluters.

Thus, I submit that affirmative action policies, if enacted by our Government and courts after finding massive violations of Afro-American rights in the past, are as valid as the indemnities on the German State or damages on a polluting corporation.

It is, of course, the task of our politicians—a difficult task—and of our leaders in private institutions, in finance, industry, education, and the like, to carry out the compensatory features if they are associated with affirmative action, and they have the clearly difficult task of trying to do this in a judicious manner, in a manner beneficial to Afro-Americans but not destructive of whites' interest.

It is here, of course, where the issue of merit looms large. There are two sides, at least, to the merit issue. First is the matter of quality and efficiency. Second is the matter of goals and quotas, so brilliantly spoken to just a moment ago by Dr. Abram.

With regard to the matter of the quality of personnel selected for all kinds of jobs with the aid of affirmative action policies, practices, or guidelines, I myself do not think there is any intrinsic reason why merit has to be destroyed under affirmative action any more, say, than it had to be destroyed during a century of patronage-driven politics controlled in cities by white ethnics or controlled in southern counties and States by white Protestants.

It happens that American pragmatism—one of our really great gifts to the world—has allowed us to interpret meritocratic criteria broadly rather than rigidly.

Thus, meritocratic criteria are, in practice, more relative than they are absolute. Any WASP in early 20th century Boston could tell you that the training of professional occupations in American universities varies greatly at the time in regard to merit criteria as between, say, the elite Harvard Law School and the elite MIT, on the one hand, and the professional and technical schools by the hundreds founded in early 20th century Boston and elsewhere for students from ethnic and lower strata families like New England School of Law, on the other hand.

In fact, the New England School of Law—originally Portia Law School—did not require bachelor's degree training—an undegraduate degree—as a condition for picking up some skills regarding the law. I think that remained so until about 1953.

Here, then—and this is my point—was a redefinition of existing meritocratic criteria as defined by upper class WASP institutions in order to open up new opportunity, new paths for social mobility for, say, Irish Americans, Italians, no status or redneck Protestants, Greeks, and others.

Yet, college-trained Afro-Americans—I submit here today—while accepting the validity of affirmative action practices and programs, surely have a vested interest in protecting the proper use of merit.

Simple-minded dismissal of merit by some elements in black leadership is a disservice to all blacks. Therefore, I agree with Dr. Abram. I oppose changing the rules in favor of blacks who take the entry civil service examinations. This is a transparent effort to deny what I call the proper use of meritocratic criteria.

The matter of goals and quotas is, of course, a difficult feature of affirmative action practices, and rightly so. Groups like American Jews who have had quotas used against them naturally resist a public policy that employs quotas or some variant thereof in allocating jobs and college slots.

Quotas employed in a rigid manner are not, I think, necessary to affirmative action. Yet, some kind of numerical yardstick—let us say some generalized notion of goals—is somewhat necessary for affirmative action. Sensitive administrators, when carefully watched by vigilant officials and interest groups, can, I think, walk this delicate tightrope between what I call rigid quotas and preferential treatment, on the one hand, and some generalized notion of goals, on the other.

Interestingly enough, Senator Hatch, quotas and preferential treatment as a form of affirmative action, suggesting, as they do, in fact, too much rigidity in basing these decisions on gender or race, are rejected in a 1977 Gallup poll and in more recent polls, by the way—and I just picked up the data closest to me when I was preparing this last week—by blacks and whites—rejected by 55 percent of blacks and by 84 percent of whites as a form for executing affirmative action and equal opportunity.

Yet—it is important to note—over two-thirds of whites and blacks support the practice of affirmative action as a form of equal opportunity in jobs and education without rigid quotas being employed.

Furthermore, the most recent survey on these matters by Sindlinger poll—which actually exists about two towns away from where I grew up in the eastern central part of Pennsylvania; it operates out of Valley Forge—in 1980, asked white folks whether minorities—mainly blacks—and women aided in training and jobs by affirmative action policies: "affected your own attitude toward minority and women doctors and lawyers?"

To this query, 20 percent of white adults said yes, but 75 percent no.

When asked another query: "Whether qualifications of a black lawyer or woman doctor are likely to be worth as much as those of other doctors and lawyers"—and the presumption is that these are persons whose mobility into these professions was assisted by affirmative action policies—17 percent of whites said no, but 67 percent said yes.

Finally, when asked by Sindlinger Poll: "If you would yourself avoid dealing with a black doctor or a woman lawyer," 11 percent said yes, but 84 percent said no.

Mr. Chairman, very much to their credit, most white Americans, despite clear uneasiness with aspects of affirmative action, are behaving quite decently and maturely toward it and its outcomes. Blacks have white allies on this issue among both Democrats and Republicans, and I hope some of those allies sit on this committee today.

Further reasons for being sanguine about white allies are found in another set of recent survey data, relating less to the issue of quotas in affirmative action than to the overall activity of the Federal Government in specifically aiding greater social mobility for Afro-Americans. A Roper poll in February 1980 found 33 percent of voters responding "gone too far" but 67 percent saying "about right" or "not far enough," 43 percent the former, 24 percent later when asked: "What about blacks and job opportunities—do you think that we in this country have gone too far, not far enough, or have done about the right amount in making job opportunities for blacks?" While an overwhelming proportion of liberal respondents, 76 percent, said "about right" or "not far enough", 41 percent and 35 percent respectively, a rather sizable proportion of conservative respendents, 61 percent also replied "about right" or "not far enough", 41 percent and 20 percent respectively. Only 24 percent of liberals said "gone too far," but, interestingly enough, only 39 percent of conservative felt this way. And all polls since Reagan's election have about two-thirds of voters, liberal and censervative, favoring expenditures on CETA programs. For exampe, a recent New York Times/CBS poll, May 3, 1981, found 16 percent of liberals favoring cutbacks in CETA funds and only 32 percent of conservative backing cutbacks.

Thus if the current Congress, and especially the Senate with its new Republican majority, has the will to sustain affirmative action programs, there is rather strong support for this policy among voters. On the other hand, if the militant conservatives in Congress wish to apply to affirmative action their ideological preference to reduce drastically Government's role in American life, they might well get away with it without fear of voter reaction at the ballot box. For though a clear majority of voters favors the current status of affirmative action—save their opposition to quotas—it is doubtful that the intensity of this support is great enough to threaten Congressmen who vote to weaken affirmative action.

Thus, like the "First Reconstruction" a century ago, the future of what might be called the "Third Reconstruction" [the "Second Reconstruction" being President Johnson's civil rights and Great Society policies] depends upon those elusive ingredients of successful leadership in American politics—namely, moral fiber and political courage. It is hoped that these leadership attributes are not wanting as Congress considers the future of affirmative action in this and coming sessions—that, indeed, the pathetic failure of moral fiber and political courage that allowed Congress to wreck the "First Reconstruction" a century ago will not repeat itself in the 1980's.

Thank you.

Senator HATCH. Thank you. We appreciate your eloquent remarks. Prof. Van Alstyne?

STATEMENT OF WILLIAM VAN ALSTYNE, PROFESSOR OF LAW, DUKE UNIVERSITY

Mr. VAN ALSTYNE. Mr. Chairman, you have heard from my three colleagues to such an elaborate extent that I am going to curtail my opening remarks in the optimism that perhaps we can join issue on some more particular issues after each of us has presented his opening remarks.

In my prepared statement, I cut it into two parts and will address myself in these opening remarks just to the first half. The second half is an addendum that deals with the current status of constitutional law and the Government's current uses of race under law. I will omit that for the time being but hope, because of some contrary representations from several who preceded me, we might return to it.

Senator **Hatch**. That will be fine.

Mr. **Van Alstyne**. In a preliminary fashion, I feel awkward in having to reassure the subcommittee and those in this room of a very keen sense of solidarity with the civil rights movement: awkward because any introduction of this kind necessarily advertises a certain self-defensiveness about one's owns biography.

Senator **Hatch**. I understand your feelings.

This of course, is not an easy subject for anyone. I have received much criticism from people who do not realize that I feel very strongly about the Civil Rights Act of 1964, as amended. It was a necessary measure. Yet, I think affirmative action is a policy calling into question the very foundations of that act. This issue is a bit awkward for most of us.

Mr. **Van Alstyne**. For that reason then, I will swallow my sense of embarrassment, particularly after the exceptionally able presentation by Professor Kilson. I do not want to risk any misunderstanding of a clear position.

PERSONAL BACKGROUND

My first job out of Stanford Law School was, frankly, to forego large firm practice and enter the Attorney General's honors program with the civil rights division in 1959, which was then a very fledgling division.

My entire work for the division was the enforcement of the newest civil rights statutes adopted by Congress since Reconstruction, more effectively to assure equality of voting rights throughout the United States and particularly in the South.

Earlier, as student body president of my undergraduate university—it seems so long ago now, it was 1955—I felt compelled to lead a boycott of my own commencement because my institution at that time had presumed to confer an honorary degree upon the then Governor of Texas whose recent remarks published in the New York Times indicated that as Governor he would resist the implementation of *Brown* v. *The Board*.

While I would have welcomed the Governor as a visiting speaker, the suggestion that he should preside at our commencement and receive an honorary degree under those circumstances seemed to me extremely distasteful.

When the university administration could not be persuaded to rescind that invitation, I then did call Chet Huntley, who was then working at a Los Angeles radio station, and we led a very large boycott.

As a law student, I joined a very small group called the NAACP in an unincorporated area nextdoor to Palo Alto—unincorporated and unloved—and spent a long time as a student trying to do something for that neighborhood before leaving for the Justice Department.

I was with 250,000 other people in 1963 listening to Martin Luther King.

A precept of a race-free society, therefore, has truly animated most of my career. It figures quite conspicuously in much of my work in the Federal courts, and perhaps as much as half of all of my writing.

So I feel intensely about the issue. And the issue, as I see it, really is the termination of racism in the United States.

Professor Kilson quite nicely summarized at the front of his speech five criticisms that have been made to the new form of race discrimination under the law in the United States. There is, however, at least one other that I want to draw to your attention, merely in improvising at the beginning of my own statement.

GOVERNMENT CERTIFICATION OF RACIAL INFERIORITY

One of my abiding concerns is that the manner in which these programs are now proceeding reintroduce a new sense of racial condescension and a new racism in the United States if we take precisely the last category of affirmative action plans to which Professor Kilson directed his attention, and if we assume that which can be shown to be empirically correct in some instances, as Morris Abram brought to your attention: that certain kinds of standards, whether they are admissions to Harvard or admissions to Portia Law School, or whether they are a standard for hiring into the civil service, have been validated.

That is to say, they have been very closely tested so that we are not in doubt as to whether they are a furtive masquerade for the old racism, or a screen of some sort, but that we can, with a fair degree of empirical validation, match the quality of service being performed in the future both in the schools and later in practice, with certain background features.

In the case of law school admission, for instance, a predicted first year average can, with a reassuring degree of reliability, be derived in many instances from a combination of a law school admission test score plus an undergraduate grade point average, moderated and balanced by quite a variety of factors.

To the extent that those criteria are racially skewed, it can be empirically forecast—and, alas, it does therefore happen exactly—that those in behalf of whom the skewing is done correspondingly are resegregated within the particular educational institution and tend to perform less well than the others. They are known to have been admitted under these auspices, and, indeed, they are more or less set aside or resegregated de facto.

Their race is now used institutionally to certify them to be inferior in fact. Those who see them in class, and who work with them, and who interview them for jobs, are instructed by what the Government has done, in skewing its standards, that they are not dealing with persons identifiable by race on the same terms as other persons.

The particular character of this development can even be seen in the latest development of the Harvard Law School—a very distinguished school by all means, having demanding standards of admission, comparable to the best in the United States.

When the number generated by this racial skewing necessarily perform generally exactly as forecast, with no contrivance at all and with every bit of compassion, there tends to set in an additional tier of misgiving—that too few numbers are turning up at the top of the class and are correspondingly not commensurately eligible by racial cohort for election to the Harvard Law Review.

So we now have a second generation of affirmative action plan proposed through the Harvard Law School. It is to bend the standards at the second level, in order to produce the "appropriate" racial cohort at that level as well. And so it will carry on into job placement.

I do not doubt Professor Kilson's reports of the polls. Most of these plans are in their infancy. As they take hold, as they are beginning to take hold, as they spread, as they have tended to spread, as they multiply, then all of the American body politic comes to know empirically that insofar as the Government uses particular standards of a validated sort for all other persons than only certain persons, it is stamping them with an empirical badge of inferiority and telling all other persons that the quality of service they can expect rationally to receive under these circumstances on the average will be less excellent than that of others.

In my opinion, this is tending to generate a new, smirking form of racial smugness and condescension in the United States. It is in my view, to a certain extent, nothing more than the tragic version of Hans Christian Andersen's fairy tale about the emperor's new clothes.

Insofar as certain standards can be shown to be correct and not a masquerade for anything, they do measure in general and in the main the quality of competence and service that people can expect to receive under the circumstances.

When the Government departs systematically from those criteria and does so uniformly in behalf of a racially identifiable cohort, then you must expect that the natural anticipation from the body politic is to see that the emperor, essentially, has no clothes at all—that people are being granted positions on the basis of racial charity rather than opportunities being magnified under what can appropriately be described as an affirmative action program.

AFFIRMATIVE ACTION DEFINED

In my view, much of this has been a debator's struggle over the turf of positive language. "affirmative action" I identify, first, as a strict policy of nondiscrimination at every level of Government; second, as fitting into place adequate monitoring mechanisms to make sure that no furtive deliberate discrimination takes place; third, the systematic review of Government standards to make sure that they are not gratuitously or even inadvertently excluding disproportionate cohorts of talented and capable people, simply because those unexamined standards have been passed along by convention from generation to generation.

The elimination of gratuituous exclusionary barriers marks an excellent, defensible, worthwhile kind of affirmative action plan for this Government to promote.

Fourth, the systematic cultivation under the massive resources of the Federal Government of the kinds of programs that Morris Abram has spoken to more generically, where the good will result disproportionately to racial underclasses by far, but which are never administered on a racially discriminatory basis.

Insofar as, for instance, people may be able to secure additional education and additional jobs by the furnishing of daycare centers—the availability of which, however, is not racially rationed—that, to me, is an extremely positive form of affirmative action. It seeks to ameliorate economic and racial disadvantage on a neutral foundation, and it bears every empirical prospect of improving opportunity across the board, albeit by definition in economically disadvantaged groups of disproportionate advantage to those of particular races or ethnic backgrounds.

Those are all admirable forms of affirmative action.

I deem it also a point of high irony that the first Federal mention I can find of the phrase "affirmative action," Mr. Chairman, happens to appear in the Executive order with which you introduced these hearings—11246—and it is very interesting that what that order explicitly required of all Federal contractors was that: (a) they would not discriminate on the basis of race, religion, or national origin; and, (b) they would take affirmative action to insure that no person was refused a job or a promotion on grounds of race, religion, or national origin.

In short, the origin of the phrase "affirmative action" is to take positive steps to institute and maintain with full credible integrity a rigid policy pursuant to which this Government would not tolerate racial discrimination of any kind.

It became quite something else. As Mr. Abrams said, it has been converted into preferential treatment. My own view, quite respectfully, Mr. Chairman, is that it has been converted into a rationale of racial discrimination that promises this country largely a highly destructive competition for racial spoils at virtually every level of Government.

I would seek to halt it by all means and urge that this committee work for a bill by Congress very much in line with what Mr. Abram suggested which would make quite clear that no variety of racial discrimination under the auspices of the Government of the United States will be allowed at all, and that no citizen of the United States shall ever be made to feel anxious because of their race in the treatment they receive from their own Government.

THE CORRECT CONSTITUTIONAL STANDARD

This very brief summary of my view, and especially in respect to its position on this latest variety of nondescript affirmative action, is rooted in my own profound agreement with the views of two Justices of our Supreme Court writing more than half a century apart.

The first was Mr. Justice Harlan, dissenting from a decision by the Court permitting racial segregation under the law. The second was Mr. Justice Douglas, dissenting from a decision by the Court which declined to forbid racial discrimination against a white applicant to a State university law school. In each, the common element was the Government's use of race to index people by their race and in some measure to fix their civil rights according to their race.

In each instance, these Justices recognized that all such practices by this Government are necessarily divisive, they are explicitly discriminatory, and in both views immoral and unconstitutional.

So Mr. Justice Harlan declared prophetically in the dimming twilight of the 19th century:

> The destinies of the races in this country are indissolubly linked together, and the interests of all require that the common Government of all shall not permit the seeds of race hate to be planted under the sanction of law. The sure guarantee of the peace and security of each race is the clear, distinct, unconditional recognition by our Governments—National and States—of every right that inheres in civil freedom and of the equality before the law of all citizens of the United States without regard to race.

And Mr. Justice Douglas added more than half a century later:

> So far as race is concerned, any State-sponsored preference for one race over another is, in my view, invidious and violative of the equal protection clause.

Mr. Justice Douglas wrote almost exactly a full century after Richard Cain, a black Representative elected from North Carolina, addressed his colleagues in the House of Representatives in this Congress in 1875. "We do not want any discrimination," said Richard Cain. "I do not ask any legislation for the colored people of this country that is not applied to the white people."

Indeed, as distinguished from large numbers of lobbyists who have presumed to advise this Congress in recent years that this sentiment is no longer shared, no major poll has disclosed a prevailing sentiment within any race whatever declaring that they wish race to be used as a factor in any Government program.

There is, for instance, of course—this has already been mentioned—a far higher percentage of black people who are poor in this country than of white people. There are, as Mr. Abram has equally observed, vastly more poor white people in the United States than the total number of poor black people.

No poll has shown that among the poor there is a majority of any race that thinks it just or fair to make racial distinctions respecting eligibility for programs at the local, State, or national level meant for the disadvantaged.

The very idea of providing racial budgets, of dividing eligible persons by racial cohorts, or of suggesting that the "white" budget has already been exhausted by prior users, or the "black" budget exhausted by prior applying blacks, is repugnant.

Similarly, as poverty is poverty such that one person's poverty is not to be measured as less than another's or less eligible than another's by race, so, equally, unemployment is unemployment and no racially-contrived shares can creditably be established by this Congress or by any Federal agency.

Identically, if a particular family is by need and identifiable circumstance at least as eligible as another for housing assistance, by what proper power has this Congress or any Federal agency to ask that they step aside because of their race on the basis that this Congress or, rather, more typically now, a Federal agency desires what it regards as a more "wholesome" racial mix in a particular housing facility and will, on that account, declare persons ineligible for such housing when their desired racial mix is threatened?

That was exactly the arrogance by Government rightly regarded as a shocking instance of outrageous presumption when used by a

State university law school to support its racially discriminatory policy in the *DeFunis* case. It is the very thing Mr. Justice Douglas believed to be a vice, not a virtue.

Indeed, his fuller quotation is, to me at least, extremely instructive. "The equal protection clause," he said, "commands the elimination of racial barriers and not their creation in order to satisfy our theory as to how this society ought to be organized. A DeFunis, who is white, is entitled to no advantage by reason of that fact, nor is he subject to any disability no matter what his race or color. So far as race is concerned, any State-sponsored preference of one race over another is, in my view, invidious."

As it is with these few examples, so, respectfully, it is equally in respect to all else undertaken by this Government of ours.

There is simply no noninvidious basis whatever to reject an application for a small business loan on the foundation that the "fair share" of that businessman's race has already been exhausted by others of his race whether in terms of his need, the soundness of his proposal, limitations on the budget of the Small Business Administration, or any fair comparison with the applications of others.

What, indeed, ought his race have to do with it? If he is white but the majority of those who work for him are black, and thus may especially benefit if the loan is granted, shall he then be switched to a different racially qualifying group?

Or is there some Agency perception that this is unwise as it preserves racial stereotypes within a business and that it might be "better" if it is an award to favor a small business where the owner is black and the employees are white, if it is an award of a Federal contract restricting the competitive bid process by racial shares?

Shall this Congress act to authorize Federal agencies to work out distinctions of that kind? What percentage of a contracting firm's management must be black or brown to be eligible for special racial shares? What percentage of its workforce—indeed, what percentage of its stockholders?

These examples sound grimy; they sound harsh. They are harsh; they are the way these things operate in practice. They are what is transpiring now. They report the actuality of Federal ubiquitous race uses compelled by making any exception which this Government would make never to tolerate the use of race as a means of indexing its citizens by race and measuring their rights under law by race.

They are not, in my view, instances of "affirmative" action to safeguard persons from racial discrimination, whether overt, furtive, or merely inadvertent. They are not affirmative action to increase the skills and opportunities of disadvantaged persons generally or in particular.

They are not affirmative action. They are instances of racial discrimination which now divide us and render all of us anxious that this Government of ours may ask us what race we are, so that it might presume to treat us differently on that account under the laws of our own country.

In my view, they reduce us in our common humanity, and they insure the permanence of racial anxiety in the United States. They operate negatively, and they operate destructively, even as reported in the Washington Post about a year ago, in the particular administration of the District of Columbia's own racial double standards pursuant to which "proper" racial certification guarantees competition for racial spoils alone.

I now read to you a portion of that report:

> A highly unusual and controversial proposal under consideration by a city agency would eliminate a large number of local ethnic groups from eligibility for lucrative minority contracts with the District of Columbia government. The proposal by the staff of the Minority Business Opportunity Commission would eliminate from minority status all Hispanics born in Europe and South and Central America, leaving only Hispanics born in Mexico or Puerto Rico eligible for the contracts. The proposal would eliminate from minority status persons born in Vietnam, India, China, Korea, and Africa.
>
> Four major local Hispanic-owned companies have won a total of more than $20,000,000 worth of the city's special minority contracts in the last year. These, incidentally, are set-aside contracts quite apart from their equal and uniform eligibility to bid on all of the other contracts—it is just a racial add-on. This represents 40 percent of the entire minority additional share of the local market.

"Oh, my God," one influential Hispanic leader with ties to the mayor's administration said when informed of this proposal.

> If [Mayor] Marion Barry agrees to do something like this, then it's really going to be a political war between Hispanics and blacks, and that would be terrible.
>
> I've been working in the District of Columbia for 20 years, said Jose Rodrigues, who was born in Argentina and is coowner of a major Hispanic company that does minority business with the District. To be Rodrigues or black is the same thing.
>
> Rodrigues and his brother Francisco own Fort Myer Construction Corp., in Arlington, which he says does more than $3 million in the minority business with the city *quite apart from $1.5 million in the regular competitive market.* (Italic added.)

WHAT CONGRESS SHOULD DO

It is to me unbelievable that this Congress would not know from 300 years of failed efforts to use race in measuring civil rights now to have stopped it completely and to have stopped it across the board.

Yet, as the members of this committee are very well aware, among our current laws there are several which provide for racial discrimination and, indeed, require racial discrimination in the administration of several Federal programs.

They are not, I say again, affirmative action in any proper sense. They do not end racial discrimination, and they do not relieve people in this country of a continuing anxiety that their race will be used at the Federal, State, and local level to their disadvantage.

Their presence drains away support for efforts to help disadvantaged persons generally, and they tend monumentally to discredit more genuine affirmative action undertakings of the kind I attempted to describe in the opening portion of my statement.

Respectfully, I would urge this committee to prepare for Congress a new act, succinct and unequivocal, forbidding any form of racial discrimination by the Government of the United States, superseding all other laws of the United States insofar as they are inconsistent with this statute.

Thank you, Mr. Chairman.

Senator HATCH. Thank you, Professor Van Alstyne. Without objection, we will insert your prepared text at this point.

[The prepared statement of Professor Van Alstyne follows:]

PREPARED STATEMENT OF PROF. WILLIAM VAN ALSTYNE

I am William Van Alstyne, Perkins Professor of Law at Duke University. My principal concentrations in teaching and in writing are constitutional law and the federal practice of civil rights. I am a member of the Supreme Court Bar and of the Bar of the State of California. My academic degrees are from the University of Southern California and from Stanford University. During the past decade, I have served on the National Board of Director sof the American Civil Liberties Union and, for two years, I was National President of the American Association of University Professors. I have appeared by invitation previously before a number of Senate and House Committees, usually in connection with an inquiry into some issue of constitutional law, and often in support of various civil rights bills. I appreciate your invitation to appear on this occasion in respect to the subject of racial discrimination and affirmative action. My views on both matters can be easily summarized.

Racial discrimination by the government of the United States should be forbidden without exception and utterly without qualification. Affirmative action which requires that appropriate care be taken to safeguard individuals from racial discrimination by their own government is readily defensible as well. Essentially, such affirmative action provides safeguards that a clear and firm policy forbidding racial discrimination in any practice or operation related to this government is neither deliberately nor even inadvertently violated. In brief, affirmative action, properly understood, goes beyond the mere statement that racial discrimination is forbidden, recognizing that racial discrimination may in fact take place, both willfully and gratuitously, despite an express Act of Congress forbidding it. Affirmative action thus supplements a policy forbidding racial discrimination by putting into place a variety of mechanisms to insure the complete integrity of that policy of nondiscrimination. Among these mechanisms are the following:

1. Requirements of record keeping subject to periodic review for the purpose of determining whether in fact individuals are being discriminated against, despite formal commitments or promises to the contrary;

2. Periodic review of employment, contract, promotion, or other standards which, while nominally not racially discriminatory on their face, do not in fact have any defensible significant purpose and do in fact operate gratuitously to discriminate racially;

3. The development of additional programs, operated without any racial discrimination whatever, which may nonetheless be expected significantly to improve the skills and opportunities of disadvantaged persons many of whom are of ethnic minorities.

This third step is not, strictly speaking, essential as a means of affirmative action that safeguards a policy of nondiscrimination from furtive or from gratuitous violation. Insofar as it assists disadvantaged people without presuming to pick and choose on racial grounds, however, it may be an altogether proper means to enhance the real opportunity of many people who would otherwise not acquire the skill or the education enabling them to advance very far even in the absence of any racial discrimination whatever. Such programs are wholly affirmative. They reflect appropriate government action. So long as they do not themselves then presume to use race as a means to fix eligibility for participation, or to favor or to disfavor any otherwise eligible person on racial grounds, they are consistent and, indeed, supportive of a policy pursuant to which this government resolves never to make any citizen to be anxious that his own government will use his race as a basis of exclusion or disadvantage.

This brief summary of my views, and especially in respect to its position on affirmative action, is rooted in my profound agreement with the views of two justices of our Supreme Court, writing more than a half-century apart. The first was Mr. Justice Harlan, dissenting from a decision by the Court permitting racial segregation under the law.[1] The second was Mr. Justice Douglas, dissenting from a decision by the Court which declined to forbid racial discrimination against a white applicant to a state university law school. In each, the common element was the government use of race to index people by their race and, in some measure, to fix their civil rights according to their race. In each instance, these justices recognized all such practices by the government as necessarily divisive, discriminatory, immoral, and unconstitutional. Mr. Justice Harlan declared:

"The destinies of the * * * races in this country are indissolubly linked together, and the interests of [all] require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law."

* * * * * * *

"The sure guarantee of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, National and States, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States without regard to race."

And Mr. Justice Douglas declared:

"So far as race is concerned, any state-sponsored preference for one race over another is in my view 'invidious' and violative of the Equal Protection Clause.

Mr. Douglas wrote almost exactly one century after Richard Cain, a black Representative from North Carolina, addressed his colleagues in the House of Representatives in this Congress, in 1875:

"We do not want any discrimination. I do not ask any legislation for the colored people of this country that is not applied to the white people."

As distinguished from large numbers of lobbyists who have presumed to advise this Congress in recent years that this sentiment is no longer shared, moreover, no major poll has disclosed a prevailing sentiment within any race whatever declaring that they wish race to be used as a factor in any government program.

There is, for instance, a far higher percentage of black people who are poor in this country than of white people. There are, at the same time, vastly more poor white people in the United States than the total number of poor black people. No poll has reported that among the poor, there is a majority of any race that thinks it just or fair to make racial distinctions respecting eligibility for programs at the local, state, or national level meant for the disadvantaged: the very idea of providing racial budgets, of dividing eligible persons by racial cohorts, or of suggesting that the "white" budget has already been exhausted by prior users (or the "black" budget exhausted by prior-applying blacks) is repugnant.

Similarly, as poverty is poverty, such that one person's poverty is not to be measured as less than another, or less "eligible" than another, by race, so equally unemployment is unemployment and no racially-contrived shares can creditably be established by this Congress or by an federal agency. And identically, if a particular family is by need and circumstance at least as eligible as another for housing assistance, by what proper power has this Congress, or any federal agency, to ask that they step aside because of their race? On the basis that this Congress (or, rather, more typically a federal agency) desires what it regards as a more "wholesome" racial mix in a particular housing facility and will, on that account, declare persons ineligible for such housing when the "desired" racial mix is threatened? But that was exactly the arrogance by government rightly regarded as a shocking instance of outrageous presumptuousness when used by a state university law school to support its racially discriminatory policy in the *Defunis* case; it was the very thing Mr. Justice Douglas believed to be a vice, not a virtue. Indeed, his fuller quotation is additionally instructive:

"The equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized."

* * * * * *

"A DeFunis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color."

* * * * * *

"So far as race is concerned, any state-sponsored preference to one race over another * * * is in my view 'invidious' and violative of the Equal Protection Clause."

As it is with these several examples, so it is equally in respect to all else undertaken by government. There is no noninvidious basis whatever to reject an application for a small business loan on the foundation that the "fair share" of that businessman's race has already been exhausted by others of "his" race. Whether in terms of his need, the soundness of his proposal, limitations on the budget of the Small Business Administration, or any fair comparison with the applications by others, what does his race have to do with it? If he is white, but the majority of those who work for him are black (and thus may especially benefit if the loan is granted), shall he then be switched into a different, racially-qualifying group? Or is there some agency perception that this is unwise, as it preserves racial stereotypes within a business, and that it would be "better" to "favor" a small business where the owners were black and the employees white? If it is an award of a federal contract, restricting the competitive bid process by racial shares, shall this Congress act to authorize federal agencies to work out distinctions of this kind? What percentage of a contracting firm's management must be black (or brown) to be eligible for special racial advantage? What percentage of its workforce? What percentage of its stockholders?

These examples doubtless sound harsh. They are harsh * * * because they are real. They report the actuality of ubiquitous race uses compelled by any exception which this government makes *never* to tolerate the use of race as a means of indexing its citizens by race and measuring their rights under law by race. They are not instances of affirmative action to safeguard persons from racial discrimination, whether overt, furtive, or merely inadvertent. They are not affirmative action to increase the skills and opportunities of disadvantaged persons generally or in particular. They are not "affirmative" action at all. They are instances of racial discrimination which divide us, and render all of us anxious that this government may "ask" us what race are we so that it might treat us differently on that account under the laws of our own country. They reduce us in our common humanity and insure the permanence of racial anxiety. They operate negatively and destructively, even as reported in the Washington Post of May 22, 1979, in the administration of the District of Columbia's racial double-standards pursuant to which "proper" racial certification guarantees competition for racial spoils:

"A highly unusual and controversial proposal under consideration by a city agency would eliminate a large number of local ethnic groups from eligibility for lucrative minority contracts with the District of Columbia government.

"The proposal by the staff of the Minority Business Opportunity Commission, would eliminate from minority status all Hispanics born in Europe and South and Central America, leaving only Hispanics born in Mexico, or Puerto Rico eligible for the contracts.

"The proposal would also eliminate from minority status persons born in Vietnam, India, China, Korea, and Africa.

"Four major local Hispanic-owned companies have won total of more then $20 million worth of the city's minority contracts in the last year. This represents 40 percent of the entire minority share of the local market."

* * * * * *

" 'Oh, my God,' one influential Hispanic leader with ties to the Barry administration said when informed of the staff proposal. 'If [Mayor] Marion agrees to do something like that, then it's really going to be a political war between Hispanics and blacks, and that would be terrible.' "

* * * * * * *

" 'I've been working in the District of Columbia for 20 years,' said Jose Rodrigues, who was born in Argentina and is co-owner of a major Hispanic company that does minority business with the District. 'To be Rodrigues or black is the same thing. * * *' "

* * * * * * *

"Rodrigues and his brother Francisco own Fort Myer Construction Corp. in Arlington, which he said does more than $3 million in minority business with the city. He said his business also does another $41.5 million in the regular competitive market."

It is frankly unbelievable to me that this Congress would not know from three hundred years of failed efforts to use race in measuring the civil rights of people to have stopped it completely, and across the board. Yet, as the members of this Committee are well aware, among our current laws there are several which provide for racial discrimination and, indeed, require racial descrimination in the administration of several federal programs. They are not, respectfully, forms of "affirmative" action in any proper sense in relation to ending racial discrimination and relieving citizens of this country of a continuing anxiety that "their" race will be used by their own governments, federal, state, and local, to discriminate against them. There presence, moreover, drains away support for efforts to help disadvantaged persons generally, and they tend to discredit more genuine affirmative action undertakings of the kinds I described in the opening portion of my testimony.

Respectfully, I would urge this Committee to prepare for Congress a new Act, succinct and unequivocal, forbidding any form of racial discrimination by the government of the United States, superseding all other laws of the United States insofar as they are inconsistent with this statute.

AN ADDENDUM RESPECTING THE CURRENT CONSTITUTIONALITY OF RACIAL DISCRIMINATION UNDER LAW

The preceding statement, and the preceding proposed Act of Congress forbidding any form of racial discrimination by the government of the United States, represent my best personal and professional recommendations to this Subcommittee. Among other witnesses appearing before you, however, not all take the same view. Among those urging the continuation of racial discrimination in the government of the United States, moreover, some will point out that popular misconceptions to the contrary notwithstanding, racial discrimination by the government is not now unconstitutional. In this respect, they are correct. Because the prevailing plurality within the Supreme Court finds no suitable basis for holding certain varieties of racial descrimination by government unconstitutional, moreover, some have also concluded that such discrimination may therefore even be desirable. In this respect, I think they are wholly mistaken. It may be useful to this Subcommittee to have some additional statement on this matter.

First, as a professional matter, I think it important to be clear and straightforward respecting the current constitutionality of government-directed racial discrimination in the United States. Briefly, the Court's majority position is essentially one of equivocal deference to the continuing discretion of this Congress to pursue experiments in racial discrimination.

In 1896, a Supreme Court majority declined to invalidate laws forbidding citizens to attend the same school or even to find seats in the same railroad passenger car, insofar as state legislatures "determined" that blacks and whites might be better off under such arrangement. This was the Court's view in *Plessy* v. *Ferguson*, the case that provoked the anguished dissent from Mr. Justice Harlan (previously quoted). In 1974, a Supreme Court majority declined similarly to invalidate a racial restriction eliminating, solely on reacial grounds, a white Jewish applicant from a state university law school. In holding the case to be moot (because lower courts had granted relief to the excluded student who would therefore, contrary to the law school's original efforts, be allowed to complete his education), the Court drew the dissent from Mr. Justice Douglas also noted earlier in this statement. In 1979, A Supreme Court majority declined to invalidate a racial limitation on the number of white students eligible for admission to a state university medical school. The controlling (singular) opinion by Mr. Justice Powell "held" that a citizen's race could be used by his own state government to exclude him from its institutions of higher learning if the state legislature were of the view that that exclusion would serve useful educational purposes. In 1944, a Supreme Court majority declined to invalidate the forced physical exclusion of more than 100,000 American citizens selected categorically and solely by race, when in the President's opinion such racial "relocation", without due process, was warranted in the interests of national defense. And in 1980, a Supreme Court majority declined to invalidate an act of Congress requiring that white citizens may be disqualified from bidding on federal contracts, if "their" racial "share" of such contracts had already been exhausted by other citizens of "their" race.

So far as the Supreme Court is concerned, therefore, it is quite plain that government-directed racial discrimination is not now constitutionally forbidden. Rather, so long as the government's own racial discrimination comports with public interests that, at the time, the Court itself thinks not unreasonable to advance by racial laws (as it agreed in all of the cases noted above, in 1896, 1944, 1979, and 1980), the determination as to whether racial laws, differently indexing people by subrace, allocating contracts, university education and other resources by race, is solely a legislative prerogative.

This is not to say, of course, that the Court is of one mind. Indeed, in fact no point of view respecting the constitutionality of racial discrimination by government commands more than three votes on the current Supreme Court. (More precisely, three Justices, Stevens, Stewart, and Rehnquist, would virtually never sustain racially discriminatory government practices; three Justices, Marshall, Brennan, and Blackmun, would usually sustain racially discriminatory practices against whites; the remaining three, Burger, White, and Powell, are somewhere between and effectively control the outcome of adjudication.)

Professor Sedler and other's who will appear before this Subcommittee are therefore correct in maintaining that the Constitution does not foreclose this Congress merely from taking race into account (which it might do, of course, without also using race as an explicit basis for discriminating between two or more persons). Indeed, the Constitution is not now interpreted by a majority of our Court to foreclose this Congress from explicitly, by law, fixing one person's legal rights as different from another's using race alone as the basis for "preferring" one and "dispreferring" the other. Concretely, as between two unemployed persons, this Congress can require that though equal or every other ground, they be made unequal by race alone—that one shall be deemed ineligible solely because of race and the other hired solely because of race. Equivalently, it appears to be fully constitutional for Congress (or for a state legislature) to exclude a person on purely racial grounds from being admitted to a public university, from receiving a low-interest loan from the Small Business Administration, or from being considered as a bidder on government contracts, under any one or more of the following "explanations":

1. If persons of "his" race are adequately "represented" (or even "overrepresented") among those already hired or admitted on a nondiscriminatory basis;
2. If other persons like him (i.e., "like him" in respect to race) already have such advantage as a racial group, that it is deemed appropriate to discriminate against him individually by race whether or not individually he has no actual advantage over any other person at all;
3. If the "value" of people of "his" race is less than the "value" of some other race.

These are the several "explanations" that make race (and racism) of such long life today, in the United States. They are, as in the past, beguiling. They appeal to some people's intellect, challenging them to think of intelligent and creative ways to fit race into some political calculus of a well, racially-ordered society. They appeal to other people's sense of racial guilt or of racial hubris, challenging them to decide who of their own race should be made to pay what they regard as appropriate compensation or redress for racial wrongs committed by others of the same race. And they appeal emphatically to special interest groups as means of strengthening racial appeals, mobilizing votes and money on the one hand by seeking new racial shares, and on the other hand by appealing to fears of otherwise being left out of racial distributions. They generate a fecundity of racial administrative regulations and of invidious statutory choices, fixing fine distinctions of racial certification and gross distinctions of racial allocation which demean us all.

But even those most committed to the continuing use of race by government as a proper instrument for dividing and allocating civil rights in this country tend to hedge. Their enthusiasm for these "necessary" expedients is expressly temporary. They speak of today's duty, to fix racial shares anew, in order that sometime, someday, individuals will never again be certified by race and made anxious respecting whether they will be hurt by their own government for being white, or black, or brown, or red, and never again be stigmatized by the government's laws which, today, often tell them that they are in fact not regarded as well qualified or as excellent as others, but that they shall nonetheless be made to appear so as a matter of law if they will accept the government's irresistible way of treating them differently—by race.

With but a few aberrant exceptions, however, it has been the wisdom of Congress for the past two decades to forbid racial discrimination under law and never to tolerate the government's own sponsorship of racial discrimination. I support those laws, as I support also every variety of affirmative action that seeks to make certain that no citizen is either deliberately or merely gratuitously discriminated against by race. I support, too, affirmative action programs that do not ration eligibility by race but address the improvement of opportunity for disadvantaged persons without regard to race, whether in job training opportunities, family assistance funding, grants in aid of remedial education, or elsewhere. But consistent with all of these things, I also believe this Congress has one lesson to teach through the arrangement of our national law. It is not the "lesson" of the discreditable few decisions of the Supreme Court which sustained racial discrimination by government. It is the lesson of the larger number of decisions, both by that Court and by this Congress, which forbade government from using any person's race to any person's disadvantage. For much too long the following statement by the late Professor Alexander Bickel has not been fulfilled. Respectfully, this Congress, acting now, should make it true so far as it can by the example of its own law that would forbid any form of racial discrimination by the government of the United States:

"The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation; discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society."

Rites of Passage: Race, the Supreme Court, and the Constitution

William Van Alstyne†

From 1619[1] to 1979, the regulation and allocation of rights according to race has been among the most troubling uses of government in the United States. Entrenched in the Constitution of 1787[2] and sustained by the Supreme Court in 1857,[3] the original uses of race proved to be nationally intolerable and were overthrown by the Civil War. The enormous alterations resulting from that War were partly memorialized in three amendments to the Constitution, between 1866 and 1870. These effectively overrode the still extant provisions from the "accommodations" of 1787. They also provided the new text, which, from that time to this time, has fixed the ground of controversy respecting regulation by race. They are, of course, the thirteenth, fourteenth, and fifteenth amendments.

The first of these amendments prohibits all forms of involuntary servitude and allows Congress an ample power to police that ban through federal law.[4] The fourteenth amendment is far more lengthy than the thirteenth, but in its most essential parts it establishes a constitutional definition of citizenship and forbids the states to abridge the incidents of national citizenship. It also forbids the states to deny equal protection to any person or to deprive any person of life, liberty, or property "without due process of law," and it vests in Congress an ample power to enforce these protections.[5] The last—the fifteenth amendment—is more limited: it more explicitly protects the right to vote from abridgment "on account of race, color, or previous condition of servitude," again concluding with a section vesting in Congress ample power to vindicate that protection.[6] The extent to which these three amendments enacted a color-blind restriction on the recurring temptation of government to regulate or allocate by race, however, was a question plainly not settled between 1866 and 1870. It remains unsettled even now.

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† William R. Perkins Professor of Law, Duke University.

[1] 1619 is a late, inaccurate date, symbolically selected more because it marks the original landing of slaves at Jamestown, Virginia, than because it marks the first uses of race in America.

[2] The framers carefully avoided using terms such as "slavery" and "race." Nonetheless, several provisions in the original Constitution manifestly grant recognition to the legal existence of slavery. *E.g.*, U.S. Const. art. I, § 2, cl. 3 (defining state populations, for purposes of apportionment of Representatives and direct taxes, as the sum of "the whole number of free Persons" and, "excluding Indians not taxed, three-fifths of all other Persons"); *id.* § 9, cl. 1 (forbidding Congress to prohibit "Importation of such Persons" as states choose to admit before 1808); *id.* art. IV, § 2, cl. 3 (forbidding state law from altering the status of any escaping "Person held to Service or Labour" in another state, and requiring delivery of such persons on demand); *id.* art. V (forbidding amendment, before 1808, of the Senate representation formula or the importation-of-persons clause).

[3] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[4]

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. Const. amend. XIII.

At one level, the sheer stamina of the question, despite the passage of a century's opportunity for its resolution, is not surprising. The texts of these amendments are sufficiently unspecific that, even in the aggregate, with their obvious connections with one another and with the Civil War, they compel no single answer. Similarly, the welter of accompanying legislative history is amenable to more than one reasonable perspective. That people should disagree, and that mutually earnest scholars do disagree, is, therefore, rather to be expected even at this very late date.[7] The materials of enlightened constitutional interpretation permit us, I think, to treat the Constitution as repudiating the propriety of regulating people by race or allocating among people by race, but they do not compel that conclusion. It is oddly a matter of what we might wish to make of it. It has always been this way.

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[5] SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . . .

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Id. amend. XIV.

[6] SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

Id. amend. XV.

[7] *See, e.g.*, R. BERGER, GOVERNMENT BY JUDICIARY (1977); 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1083-1118 (1953); H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908); W. GILLETTE, THE RIGHT TO VOTE (1965); R. HARRIS, THE QUEST FOR EQUALITY (1960); J. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT (1956); J. MATHEWS, LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT (1909); H. MEYER, THE HISTORY AND MEANING OF THE FOURTEENTH AMENDMENT (1977); J. TENBROEK, EQUAL UNDER LAW (1965) (originally published as THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951)); Avins, *The Equal "Protection" of the Laws: The Original Understanding*, 12 N.Y.L.F. 385 (1966); Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131 (1950); Graham, *The Early Anti-Slavery Backgrounds of the Fourteenth Amendment*, 1950 WIS. L. REV. 479; Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV. 3 (1954);

What is less explicable, at least to nonlawyers, is that after a century of periodic judicial review there is still no formal resolution of the question. And this seems very odd. Laws regulating on the basis of race were in existence before the Civil War amendments were adopted; many were judicially examined in litigation prompted by the passage of these amendments. Other laws regulating on the basis of race were enacted after ratification of all three amendments, and still others are tenaciously put forward today; many of these have similarly been tested in the Supreme Court.[8] One would surely suppose that, for judicial purposes at least, so old and so obvious an issue would long ago have been settled to provide us with some steady impression of the extent to which government may regulate or allocate by race. But it is not so.

Rather, the Supreme Court has itself gone through two quite distinct rites of passage. Now—in the "minority contractors" case,[9]

Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 Sup. Ct. Rev. 33.

[8] For Supreme Court cases considering laws regulating by race in the generation after the Civil War, see, for example, Plessy v. Ferguson, 163 U.S. 537 (1896); Pace v. Alabama, 106 U.S. 583 (1883); Strauder v. West Virginia, 100 U.S. 303 (1880). For a modern example of a law dictating race-based allocation, see Fullilove v. Kreps, 584 F.2d 600 (2d Cir. 1978), *cert. granted*, 99 S. Ct. 2403 (1979).

[9] Fullilove v. Kreps, 584 F.2d 600 (2d Cir. 1978), *cert. granted*, 99 S. Ct. 2403 (1979). It involves an equal protection challenge to section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2) (Supp. I 1977). This casually added provision—that is, added and hardly discussed on the floor of the House, and not even considered in committee debates—provides that at least 10% of federal public works grants under the Act be expended for "minority business enterprises." Such enterprises are defined as businesses owned principally by "Negroes, Spanish-speaking, Oriental, Indians, Eskimos, and Aleut." For further discussion of this type of plan, see text at note 91 *infra*.

The constitutional question should not be influenced by the Court's recent decision (mis)construing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976), as not prohibiting a one-for-one minority quota for admissions to an on-the-job training program. United Steelworkers v. Weber, 99 S. Ct. 2721 (1979). Indeed, Justice Brennan declared for the Court: "We emphasize at the outset the narrowness of our inquiry. . . . [T]his case does not present an alleged violation of the Equal Protection Clause of the Constitution. . . . The only question before us is the narrow statutory issue . . . ." *Id.* at 2726.

Fullilove will, however, revive and challenge the four-one-four division of the Court in its review of a 16% racial minority minimum set-aside program at a state university medical school, under racially separate and unequal standards of admissions. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). There, four Justices (Brennan, White, Marshall & Black-before the Court this fall—it is considering still another. And what many had misled themselves into supposing had been the clear, best resolution of this matter during the last generation is on the edge of turning over once again.

In the past, the consequences of admitting race-based laws as a proper constitutional foundation for regulating and allocating have been overwhelmingly dismal. Race-based laws have so generally tended to yield by-products and side effects so vastly more divisive and wretched than the benefits that were supposed to be forthcoming, moreover, that a Court originally not predisposed to veto racial experiments subsequently reversed itself—despite the popular anger and resentment that were certain to follow. Now, however, having virtually captured the public morality after twenty-five years of leadership on this question, the Supreme Court is being importuned to let loose of it once again.

On the confident assurance that there are still important uses for race-based laws in the more perfect ordering of this society, the Court is invited into yet another rite of passage. The suggestion, which is not new but which was always a feature of even the oldest race-based laws, is that it is not the regulating or allocating by race that is wrong or too risky per se; it is, rather, who is thus regulated, what is thus allocated, what motivates the arrangement, and what time frame should be followed.

My own view of the matter is that the Court is being asked to permit not racial rectification (in reviving the licitness of race as an explicit device of government) but racial repetition.[10] I think it likely, moreover, that if the Court yields once again to the Lorelei, racism, racial spoils systems, racial competition, and racial odium will be fixtures of government in the United States even into the twenty-first century. My reasons for feeling this way are not original. Generally, moreover, they are not shared by the majority of

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mun) found the plan compatible with the fourteenth amendment; four (Burger, Stewart, Rehnquist & Stevens) declined to reach the question, finding the plan prohibited by 42 U.S.C. § 2000d (1976); the ninth Justice (Powell) concluded that the particular plan was not compatible with the fourteenth amendment. For discussions of the uncertainties arising from this case, see *A Symposium:* Regents of the University of California v. Bakke, 67 Calif. L. Rev. 1 (1979); Tribe, *Perspectives on* Bakke: *Equal Protection, Procedural Fairness, or Structural Justice?*, 92 Harv. L. Rev. 864 (1979); Van Alstyne, *A Preliminary Report on the* Bakke *Case*, 64 A.A.U.P. Bull. 286 (1978); *Controversy: More on the* Bakke *Decision*, 65 Academe 49 (1979).

[10] The point in using the term racial "repetition" is to stress that once the use of race becomes legitimate again, we shall repeat all of the problems that divided us before: solidarity collapses, consensus with respect to the impropriety of measuring by race dissolves, race becomes important once more, and all are diminished by the experience.

constitutional law professors who have written on this subject.[11] Even so, the sense of anxiety that what is now adrift before the Supreme Court deserves some added thought before it passes into history provides the occasion for these notes.

I. EARLIER RITES OF PASSAGE

> *The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.*
>
> Alexander M. Bickel[12]

This has been the lesson of "the great decisions" and of contemporary history. It is not the "holding" of a particular case; it is, as

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[11] The body of literature in this area is extensive. *See, e.g.*, B. Bittker, The Case for Black Reparations (1973); R. Dworkin, *Reverse Discrimination*, in Taking Rights Seriously 223 (1977); T. Eastland & W. Bennett, Counting by Race (1979); N. Glazer, Affirmative Discrimination (1975); Reverse Discrimination (B. Gross ed. 1977); R. O'Neil, Discriminating Against Discrimination (1975); Baldwin & Nagan, Board of Regents v. Bakke: *The All-American Dilemma Revisited*, 30 U. Fla. L. Rev. 843 (1978); Bell, Bakke, *Minority Admissions, and the Usual Price of Racial Remedies*, 67 Calif. L. Rev. 3 (1979); Blasi, Bakke *as Precedent: Does Mr. Justice Powell Have a Theory?*, 67 Calif. L. Rev. 21 (1979); Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1, 16-22 (1976); Dixon, Bakke: *A Constitutional Analysis*, 67 Calif. L. Rev. 69 (1979); Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723 (1974); Fiss, *Groups and the Equal Protection Clause*, 5 Philosophy & Pub. Aff. 107 (1976); Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 Colum. L. Rev. 559 (1975); Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 Calif. L. Rev. 87 (1979); Hastie, *Affirmative Action in Vindicating Civil Rights*, 1975 U. Ill. L.F. 502; Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 Nw. U.L. Rev. 363 (1966); Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 Harv. L. Rev. 1 (1977); Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 Va. L. Rev. 955 (1974); Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions:* DeFunis v. Odegaard, 49 Wash. L. Rev. 1 (1973); Nagel, *Equal Treatment and Compensatory Discrimination*, 2 Philosophy & Pub. Aff. 348 (1973); O'Neil, Bakke *in Balance: Some Preliminary Thoughts*, 67 Calif. L. Rev. 143 (1979); O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 Yale L.J. 699 (1971); O'Neil, *Racial Preference and Higher Education: The Larger Context*, 60 Va. L. Rev. 925 (1974); Posner, *The* Bakke *Case and the Future of "Affirmative Action,"* 67 Calif. L. Rev. 171 (1979); Posner, *The* DeFunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 Sup. Ct. Rev. 1; Ravenell, DeFunis *and* Bakke *. . . The Voice Not Heard*, 21 How. L.J. 128 (1978); Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. Chi. L. Rev. 653 (1975); Sedler, *Racial Preference, Reality and the Constitution:* Bakke v. Regents of the University of California, 17 Santa Clara L. Rev. 329 (1977); Seeburger, *A Heuristic Argument Against Preferential Admissions*, 39 U. Pitt. L. Rev. 285 (1977); Tribe, *supra* note 9.

[12] A. Bickel, The Morality of Consent 133 (1975).

Alexander Bickel said, the *lesson* of the great decisions, a lesson it required nearly eighty years of temporizing for the Supreme Court itself to absorb.

A. The Original Interpretation

The first passage for the Court came with the immediate adjudication of race-related cases on the heels of the Civil War amendments. With the exception of a few notable cases striking down the most egregious race regulations,[13] the Supreme Court adopted a wholly tolerant and deferential rendering of all three amendments, imputing to them only the most modest consequences.[14] Federal statutes flatly forbidding racial discrimination by commercial enterprises were held to be excessive, as acts of an unwarranted colorblind zeal. The thirteenth amendment would not sustain them, because mere commercial refusals to deal with people on racial grounds were regarded by the Court as too far removed from involuntary servitude. The fourteenth amendment provided no basis for such legislation, moreover, because that amendment reached only the government's own denials of equal protection, not those of private, commercial parties. The fifteenth amendment was not useful, of course, as it dealt solely with voting. The cases so disposing of this matter, decided by the Supreme Court in 1883, were ironically entitled *The Civil Rights Cases*.[15]

When regulation by race was the government's own, rather than the practice of private parties, the Court's decisions were nearly as tolerant of legislative discretion as they had been of commercial discrimination in *The Civil Rights Cases*. Allocation by race was not per se forbidden by the Constitution, the Court held, as the consideration of race might be thought by many reasonable persons as sometimes germane to a variety of important social concerns. Thus, the question was not whether political bodies regulated on the basis of race; it was the different question whether the particular regulation by race was constitutionally "reasonable."

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[13] *E.g.*, Strauder v. West Virginia, 100 U.S. 303 (1880) (exclusion of Negroes from juries unconstitutional). *Cf.* Virginia v. Rives, 100 U.S. 313, 319 (1880) (dictum) ("denial of [equal protection] rights, or an inability to enforce them, resulting from the Constitution or laws of the State" allows removal of case from state to federal court); *Ex parte* Virginia, 100 U.S. 339 (1880) (denying writ of habeas corpus to judge who was under indictment and in custody for excluding blacks from juries).

[14] *E.g.*, The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) (fourteenth amendment privileges and immunities clause reduced to a constitutional redundance).

[15] 109 U.S. 3 (1883). *See also* United States v. Harris, 106 U.S. 629 (1883) (section 5 of the fourteenth amendment, creating enforcement powers of Congress, very narrowly construed); United States v. Cruikshank, 92 U.S. 542 (1876) (same).

The Court's view—that the laws would be sustained if "reasonable"—genuflected to the wisdom of legislative bodies to sort out good from bad uses of race; the Court quite readily acquiesced in disclaimers that the fourteenth amendment meant no across-the-broad foreclosure of such experiments. Regulation by race was not condemnable or censurable as such; only unfair, one-sided, or unevenhanded race regulation or allocation was forbidden. If individuals could be equally protected, albeit racially regulated, then nothing in the command or ethos of the fourteenth amendment was deemed to deny the use of racial classification to the body of American politics.

This view of the matter steadily developed between 1873 and the twilight of the 19th century. It was cemented in 1896 in the "separate-but-equal" decision of *Plessy v. Ferguson.*[16] The decision upheld a state law requiring separate passenger cars for white and for black riders:[17] neither was worse off than the other in the quality of accommodations to be furnished to each; neither was more or less protected than the other (rather, each was equally protected) by the racial regulation a legislative body deemed reasonable in the public interest.

There was but one dissent that took a less measured view and would have imposed upon the fourteenth amendment a more categorical imperative. Less flexible than others on the Supreme Court at the time, Justice Harlan was prepared to read into the Civil War amendments what was, to be sure, neither explicitly provided by their terms nor compelled by their compromised legislative history. Proceeding from a more basic premise than that either of these considerations necessarily controlled the matter, Harlan put his finger on the lessons of his own contemporary history. Prior to the Civil War amendments, race was the basis on which status had been determined, worth assigned, entitlements settled, and legal rights measured. It had been iniquitous from the very beginning, and it subsequently proved to be a disaster for the entire country. He believed the enactment of the Civil War amendments should therefore be construed by the Court as altogether disallowing it. Government could not determine worth, assign entitlements, or measure legal rights by race *at all*:

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[16] 163 U.S. 537 (1896).

[17] In Louisville, N.O. & T. Ry. v. Mississippi, 133 U.S. 587 (1890), a similar statute survived an attack under the commerce clause, U.S. Const. art I, § 8, cl. 3; the Court made no reference to the equal protection clause.

The *Plessy* majority relied in part on a pre-Civil War Massachusetts school segregation case, litigated under a portion of the Massachusetts Constitution bearing some resemblance to the fourteenth amendment's equal protection clause. Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1850).

> The law regards man as man, and takes *no* account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. . . .
>
> . . . The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. . . .
>
> The sure guarantee of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, National and State, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States *without regard* to race.[18]

The point of emphasis here is fundamental. It is not that when race is used, all persons identified to each race must be as well regarded as all persons identified to some other race.[19] The thing condemned is not that members of each race must be "equally" protected under laws distinguishing them by their race, nor that they are assigned entitlements unequally on the basis of race. The thing condemned, rather, is the assignment of entitlements by race. It is the impropriety of the *basis* of assignment, not the modicum thus assigned, that constitutes the government's offense:

> These notable additions to the fundamental law [the thirteenth, fourteenth, and fifteenth amendments] were welcomed by the friends of liberty throughout the world. *They removed the race line from our governmental systems.*[20]

The Harlan opinion passed into history at the time, an artifact of mere dissent, discredited by the dominant view that the fourteenth amendment had not withdrawn from legislative bodies a political license to regulate by race. The outcome of the case was taken quite seriously, moreover, as legislatures enacted an ever-enlarging sprawl of race-based laws.[31] Indeed, a half-century later, the dominant legislative response to *Brown v. Board of Education*[32] was one of fury, precisely on this account. For however the Court might phrase the apologetics of that decision,[33] the message as it appeared from the outside was that what was not previously understood to be unconstitutional was now accused of being unconstitutional after all: the use of race to allocate—albeit equally—those facilities deemed most appropriate for persons of that race.

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[18] Plessy v. Ferguson, 163 U.S. 537, 559-60 (1896) (Harlan, J., dissenting) (emphasis added). Harlan had similarly dissented in The Civil Rights Cases, 109 U.S. 3, 24-62 (1883) (Harlan, J., dissenting). *See also* Berea College v. Kentucky, 211 U.S. 45, 67-69 (1908) (Harlan, J., dissenting). *But see* Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899) (Harlan, J.). *See generally* Westin, *John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner*, 66 YALE L.J. 637 (1957).

[19] *See* O'Fallon, *Adjudication and Contested Concepts: The Case of Equal Protection*, 54 N.Y.U.L. REV. 19, 34-38 (1979).

[20] Plessy v. Ferguson, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting) (emphasis added).

B. The Second Rite of Passage

In the swift consecutive series of per curiam decisions issued by the Supreme Court during the two years following *Brown*, the Court made no further use whatever—indeed, it made no inquiry—as to whether the particular race regulation disadvantaged some more than others. Neither did it ask whether the law stigmatized some more than others, or whether the law was enacted by whites and opposed by blacks, enacted by consent of some of each and opposed by many of each, or whatever.[34] Rather, that line of per curiam decisions appeared more completely to enact Harlan's view that the Civil War amendments altogether "removed the race line from our governmental systems."

Between 1955 and 1976, moreover, virtually every other race-related decision by the Supreme Court appeared to convey this same message. To the reasonably discerning, this appeared true even in instances involving highly controversial judicial decrees that paired racially identifiable schools, redrafted attendance lines, or mandated busing. In each instance, the fulcrum of judicial leverage was an *existing governmental* race line, which the particular judicial order sought to remove.[25] The object was thus to disestablish particular, existing uses of race, not to establish new ones. Indeed, decrees that would subsequently presume to require race-conscious decisions for any other purpose, for example, to maintain "proportions" or "balances" by race designation, were swiftly reversed.[26]

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[31] *See generally* C. WOODWARD, THE STRANGE CAREER OF JIM CROW (3d ed. 1974). *See also* Westin, *supra* note 18, at 706 & n.324.

[32] 347 U.S. 483 (1954).

[33] *See* D. BELL, RACE, RACISM AND AMERICAN LAW 452 (1973); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31-33 (1959).

[34] The particular case overruling *Plessy* (sub silentio) was itself without an explanatory opinion, Gayle v. Browder, 352 U.S. 903 (1956), *aff'g per curiam* 142 F. Supp. 707 (M.D. Ala. 1956). One district court interpreted certain dicta in *Brown* as not disallowing per se governmentally directed, racially separated schools, Stell v. Savannah-Chatham County Bd. of Educ., 220 F. Supp. 667, 677-78 (S.D. Ga. 1963), but was speedily rebuffed on appeal, 333 F.2d 55, 61 (5th Cir.), *cert. denied*, 379 U.S. 933 (1964). Alternative interpretations of *Brown* are, of course, numerous. For one listing, see H. HOROWITZ & K. KARST, LAW, LAWYERS AND SOCIAL CHANGE 203 (1969). For additional post-*Brown* decisions summarily dispatching other segregation laws, see, for example, State Athletic Comm'n v. Dorsey, 359 U.S. 533 (1959), *aff'g per curiam* 168 F. Supp. 149 (E.D. La. 1958) (athletic contests); Holmes v. City of Atlanta, 350 U.S. 879 (1955), *vacating per curiam* 223 F.2d 93 (5th Cir. 1955) (municipal golf courses); Mayor of Baltimore City v. Dawson, 350 U.S. 877 (1955), *aff'g per curiam* 220 F.2d 386 (4th Cir. 1955) (public beaches and bathhouses); cases cited in W. LOCKHART, Y. KAMISAR, & J. CHOPER, CASES AND MATERIALS ON CONSTITUTIONAL RIGHTS AND LIBERTIES 840 nn.a & b (3d ed. 1970).

This second rite of passage was accompanied by consistent developments in the 1960s in the Supreme Court and then, encouragingly, in Congress and the executive branch as well. For the Court's part, long dormant Reconstruction statutes were revived and given a reinvigorated and uniformly race-blind application. An early act of Congress had provided that all citizens shall have "the same" right as white citizens to acquire and to hold real and personal property.[27] It was applied to disallow race-based refusals to deal in real estate, even in the private sector.[28] A related Reconstruction act provided that all persons shall have "the same" right as white citizens to make contracts.[29] It was similarly read to disallow race-based refusals to contract.[30] In 1976, when a commercial employer treated an employee worse than another because of his race (this time the less favored employee was white and the more favored black), the Court held to the same view: "[T]he Act was meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, *any* race."[31]

Similarly, in adopting the omnibus Civil Rights Act of 1964, Congress appeared to regard the matter likewise: the race line was to be removed altogether. Title VI of that Act, applicable to all programs receiving federal financial assistance, states: "*No* person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[32] And Title VII, applicable to all large-scale employers, provides:

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[25] *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). *See also* Dayton Bd. of Educ. v. Brinkman, 99 S. Ct. 2971 (1979); Columbus Bd. of Educ. v. Penick, 99 S. Ct. 2941 (1979).

[26] *E.g.*, Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976). *See also* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977); Milliken v. Bradley, 418 U.S. 717 (1974); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

[27] Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (current version at 42 U.S.C. § 1982 (1976)).

[28] Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

[29] Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144 (current version at 42 U.S.C. § 1981 (1976)).

[30] Runyon v. McCrary, 427 U.S. 160 (1976); Johnson v. Railway Express Agency, 421 U.S. 454, 459-60 (1975) (dictum).

[31] McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 295 (1976) (emphasis added). *But cf. id.* at 280 n.8 ("Santa Fe disclaims that the actions challenged here were any part of an affirmative action program . . . and we emphasize that we do not consider here the permissibility of such a program, whether judicially required or otherwise prompted.").

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge *any* individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .[33]

Addressing the meaning of this provision in 1971, in the first case to come before it for review, the Court, in a unanimous opinion by Chief Justice Burger, said that "[d]iscriminatory preference for *any* group, minority or majority, is precisely and only what Congress has proscribed."[34]

Conformably, the executive branch of the national government appeared to understand matters in the same fashion. For in cutting and revising an Executive Order that regulated enterprises doing business with the federal government, the President framed the Order itself precisely and exclusively in terms of strict nondiscrimination. Federal contractors were advised to review their practices to determine whether, if even by neglect, racial discrimination figured in their businesses; if it did, the contractors would have to take affirmative action—to *eliminate* that racial discrimination and to insure that *no* racial favoritism was built into their operations. Thus, the revised Executive Order required the insertion of the following provision in most government contracts:

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[32] Title VI of the Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000d (1976) (emphasis added). Compare the several differing interpretations provided in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[33] Title VII of the Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1976) (emphasis added). This, of course, is simply what Congress said. *Compare* United Steelworkers v. Weber, 99 S. Ct. 2721, 2724-30 (1979) (Brennan, J.) *with id.* at 2734-35 (Burger, C.J., dissenting) *and id.* at 2736-53 (Rehnquist, J., dissenting).

[34] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (emphasis added). And reiterating that view in 1976, the Court declared: "We . . . hold today that Title VII prohibits racial discrimination against the white petitioners in this case upon the *same* standards as would be applicable were they Negroes . . . ." McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976) (emphasis added). *But see* United Steelworkers v. Weber, 99 S. Ct. 2721 (1979).

> The contractor will not discriminate against *any* employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment *without regard to their race*, color, religion, sex or national origin.[35]

In light of these several developments, it should have come as no surprise that in 1974, in the first case that came before the Supreme Court involving race lines deliberately drawn to place a racial disadvantage on white applicants—drawn out of fear that if no such disadvantage were imposed upon them, then fewer nonwhite individuals might be admitted than the faculty of a state university preferred to have—the one Justice of the Supreme Court who addressed the merits of the case said this:

> A DeFunis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. . . .
>
> . . . .
>
> . . . The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. . . .
>
> . . . So far as race is concerned, *any* state-sponsored preference to one race over another . . . is in my view "invidious" and violative of the Equal Protection Clause.[36]

Justice Douglas then directly addressed the law school's contention that the race-preferential admission of some students would be a salutary way of producing a larger complement of such racially identifiable professionals more likely to practice in racially identifiable communities. He rejected the propriety of the very idea underlying that contention: "The purpose of the University of Washington cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. . . . That is the point at the heart of all our school desegregation cases."[37] And neither was Justice Douglas persuaded that the deliberate selection of students by race, to produce a given cohort of racially identified students known to have been admitted with less excellent qualifications than the balance of the students, was by any means the gesture of generosity it purported to be. A segregated admissions process that seeks certain minimum proportions of racial cohorts, he said, "creates suggestions of stigma and caste no less than a segregated classroom, and in the end it may produce that result despite its contrary intentions."[illegible]

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[35] Exec. Order No. 11246, § 202, 3 C.F.R. 339, 340-41 (1964-1965 Compilation), *as amended by* Exec. Order No. 11375, 3 C.F.R. 684, 685-86 (1966-1970 Compilation), *reprinted in* 42 U.S.C. § 2000e, at 1233 (1976) (emphasis added). This, too, is simply what the President said. *Compare id. with* 42 Op. Att'y Gen. 405 (1969).

[36] DeFunis v. Odegaard, 416 U.S. 312, 337, 342, 343-44 (1974) (Douglas, J., dissenting) (emphasis added).

[37] *Id.* at 342-43 (Douglas, J., dissenting).

The refusal to permit rationing of opportunity according to the fortuity of racial proportion was not a novelty invented by Justice Douglas. In 1949, the Supreme Court had reviewed a case arising in

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[illegible] *Id.* at 343 (Douglas, J., dissenting). *See also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978) (Powell, J.): "[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."

Not all race-specific "preferential" government-utilized plans involve separate and *lower* standards of selection. Some (as illustrated by the *Bakke* case itself) plainly do. And these plans unquestionably impose a racial stigma on those who benefit by them, for reasons that cannot be avoided by the beneficiaries. This may be a cost that others would regard as utterly trivial when weighed against the benefits and overall good of such arrangements. Others may also say that this is a matter they do not wish to judge—that whether there is a stigmatizing effect and whether it renders such a plan undesirable is emphatically not for them to say. Such persons might feel that it is, rather, a matter to be determined by those eligible for the plan—and that these persons will show, by their participation, that they overwhelmingly regard the very material benefits, with whatever stigma may attach, to be vastly superior to the status quo ante. But the stigma is spread to others identified only by race, who are helpless to avoid it. Indeed, it will have been the government itself that fastened the stigma upon them, a new badge of implied inferiority, assigned as an incident of governmental noblesse oblige.

Explicit in state, local, or federal plans using separate and *lower* standards by race is a statement by government that certain persons identified by race are in fact being placed in positions they may be presumed not likely to hold but for their race (because they are presumed to be unable to meet standards the government itself otherwise requires to be met). The message from government is written very large when these plans proliferate: a double (and softer) standard for admission, a double (and softer) standard for hiring, a double (and softer) standard for promotion, a double (and softer) standard for competitive bidding, and so on. Without question, this is a systematic racial tagging by government—a communication to others that the race of the individual they deal with bespeaks a race-related probability, created solely by the government itself, of lesser qualification than others holding equivalent positions.

With respect to some such persons, the supposition will be true, *according to the government's own usual standards of "qualifications."* With respect to others of the same race, the proposition will be false; but outsiders dealing with them will not know it is false unless "affirmative action" beneficiaries are specially to be labelled as such—surely an unthinkable practice—and will, *solely because of the government's own practice,* be encouraged to subject them to a racial stereotype. In brief, the government's entrenched practices impose a label of inferior excellence that the government itself declares to be true of some persons; simultaneously, the government fastens a racial stereotype on all other persons of the same race holding similar positions, irrespective of their actual excellence. Whether this is unconstitutional remains to be seen. That it is not "stigmatizing" seems implausible.

California where public policy had already forbidden racial discrimination in private employment.[39] A racial group nonetheless brought economic pressure to bear upon an employer to disregard that policy and to hire employees "not on fitness for the work nor on an equal right of all, regardless of race, to compete in an open market, but, rather, on membership in a particular race."[40] The state supreme court granted an injunction to forbid picketing meant to induce racial hiring in proportion to the racial identification of customers. The court had observed: "If petitioners were upheld in their demand then other races, white, yellow, brown and red, would have equal rights to demand discriminatory hiring on a racial basis."[41] But the state supreme court said "it was just such a situation—an arbitrary discrimination upon the basis of race and color alone, rather than a choice based solely upon individual qualification for the work to be done—which we condemned"[42] in disallowing racial discrimination by employers in the first place. The Supreme Court unanimously affirmed the state court decision.[43]

Even when the sole use of race by government was to suggest that race is at least an important political datum—the government itself not presuming to say of what kind of significance—the Supreme Court disallowed the mere encouragement to be "race conscious." A case that expresses that view as well as any other case was *Anderson v. Martin*,[44] decided succinctly and unanimously in 1964.[45] The case involved a state statute that facilitated voter information respecting the racial identification of each candidate for local public office—by designating each candidate's race on each ballot, accurately and truthfully. Voters who might think that datum germane (as a white person to vote white, a black to vote black, a white to vote black, a black to vote white—as each might see a different, but steadfast significance in the idea) could hardly be kept from using it even in the absence of such specific ballot information. As the ballot designation by state law was nonetheless thought objectionable, it could not have been because any candidate was exempt from it, since all were equally subject to it. It must have been, rather, that each was being *individually* disadvantaged insofar as the state thought it appropriate to encourage voters to attribute at least *some* significance to every candidate's race—and that the morality of the Civil War amendments was opposed to the very idea of such encouragement. And this, indeed, was the foundation of the decision in *Anderson v. Martin*: not that a black candidate in particular might be victimized insofar as the state's "truth in candidacy" statute would gratuitously stimulate white bloc votes, but that the state could not thus encourage such racial disadvantaging of *anyone*, white or black.

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[39] Hughes v. Superior Court, 339 U.S. 460 (1950). The earlier California case establishing the policy of nondiscrimination was James v. Marinship Corp., 25 Cal. 2d 721, 155 P.2d 329 (1944), recently extended and applied in Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 24 Cal. 3d 458, 480-85, 595 P.2d 592, 606-09, 156 Cal. Rptr. 14, 28-31 (1979).

[40] Hughes v. Superior Court, 32 Cal. 2d 850, 856, 198 P.2d 885, 889 (1948), *aff'd*, 339 U.S. 460 (1950).

[41] *Id.*

[42] *Id.*

[43] Hughes v. Superior Court, 339 U.S. 460 (1950).

[44] 375 U.S. 399 (1964).

[45] *Compare id. with* United Jewish Orgs. v. Carey, 430 U.S. 144 (1977) (redistricting to favor Hispanics held permissible).

> [B]y placing a racial label on a candidate at the most crucial stage in the electoral process—the instant before the vote is cast—the State furnishes a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another. This is true because by directing the citizen's attention to the single consideration of race or color, the State indicates that a candidate's race or color is an important—perhaps paramount—consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot along racial lines. Hence in a State or voting district where Negroes predominate, that race is likely to be favored by a racial designation on the ballot, while in those communities where other races are in the majority, they may be preferred. The vice lies not in the resulting injury but in the placing of the power of the State behind a racial classification that induces racial prejudice at the polls.
>
> . . . .
>
> . . .We see *no relevance* in the State's pointing up the race of the candidate as bearing upon his qualifications for office.[46]

Race has "no relevance"? That could not have been the Court's literal understanding, as the Court knew that vast numbers of people regarded the race of political candidates as being not merely "relevant" but conclusive. Rather, its meaning was that race has "no proper relevance" for the state. The connection with the original Harlan dissent in *Plessy v. Ferguson* seems self-evident: "[T]he Constitution of the United States," he had declared, "does not, I think, permit *any* public authority to *know* the race of those entitled to be protected in the enjoyment [of civil rights, common to all citizens]."[47] The state may neither use race in its own business nor may it encourage others to take it into account. Both are equally divisive and equally wrong.

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[46] 375 U.S. at 402-03 (emphasis added).

Following almost at once on *Anderson v. Martin*, moreover, the Supreme Court had cemented its judgment that the fourteenth amendment foreclosed government from encouraging—much less compelling—individuals to treat some better than they treated others because of race. It did so in *Reitman v. Mulkey*.[48] In that case, the Court struck down a provision in a state constitution establishing the absolute right of each real property owner to sell or lease his property as he might personally, "in his own absolute discretion,"[49] choose. As thus enshrined in the California Constitution, the personal right to consider the race of others was equally as available to a developer preferentially selling or leasing to blacks as to a developer preferentially selling or leasing to whites. It was equally available as well to one desiring to use race to develop and to maintain an integrated racial balance in a given group of apartments. It was also available to black owners who wished not to deal with whites at all but who were resolved to reserve disposition of their property for persons of other races whom they might think to be more deserving—as it was available for every other imaginable permutation of racial dealing. But the strict indifference of the state constitutional privilege—its perfect governmental "neutrality" toward all racially predisposed private landowners—failed to save it under the fourteenth amendment. Rather, the California and United States Supreme Courts both held it to be a constitutional wrong for a state to encourage persons to act on racial grounds at all:

> The right to discriminate is now one of the basic policies of the State. The California Supreme Court believes that the section [of the state constitution guaranteeing that right] will significantly encourage and involve the State in private discriminations. We have been presented with no persuasive considerations indicating that these judgments should be overturned.[50]

In this twenty-year pattern of development, from 1954 to 1974, the Supreme Court's unambiguous "lesson" thus seemed to be that race was indeed constitutionally withdrawn from the incorrigible temptations of governmental use. The commitment was sufficiently strong, moreover, that the Court departed from its usual practice and struck down even surreptitious attempts by government to regulate or to allocate by race—though of course only when it was within the capacity of the judiciary to detect the matter.[61] The resolve to do so, despite the obvious difficulties, was a very old one. Even prior to *Plessy v. Ferguson*, furtive efforts by government to employ race impermissibly had been overturned by the Supreme Court.[62] The Court had readily recognized that any "irrebuttable presumption" of legislative good faith in these matters would be a disaster: the proclivity for race favoritism is so persistent that, unless the Court examined outside evidence that that proclivity did in fact account for the government's actions, the government would be encouraged to pursue its racial preferences in simple disguise. Thus, the Civil War amendments were held to nullify "sophisticated as well as simple-minded modes of discrimination."[63] As a consequence, if the metes and bounds of a municipal boundary were modified to enact the legislature's racial preferences, they would not stand.[64] And if ostensibly appropriate government employment standards could be shown to have been adopted because their application across-the-board would screen out larger numbers of racially identifiable persons than the lawmakers desired to have from that race in their work force, the employment standard would be expunged.[65]

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[47] Plessy v. Ferguson, 163 U.S. 537, 554 (1896) (Harlan, J., dissenting) (emphasis added).

[48] 387 U.S. 369 (1967).

[49] Cal. Const. art. I, § 26 (adopted 1964, repealed 1974).

[50] 387 U.S. at 381.

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[61] The awkwardness of this judicial superintendence is plainly very great. *See* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970). The ascertainability of racial purpose in legislative proceedings is much more elusive than in adjudicative proceedings. An employer or administrative agent may be closely examined in court with some realistic hope of determining whether a decision that has on its face nothing to do with race was made because it was expected (and desired) to produce differential effects by race. But members of Congress are shielded by the speech and debate clause, U.S. CONST. art. I, § 6, cl. 1, from any such examination, and ordinarily it is impractical to attempt to secure confrontation in court of other legislators. For the most recent case illustrating the protective scope of the clause, see United States v. Helstoski, 99 S. Ct. 2432 (1979). Indeed, for one brief moment the Court appeared to despair of permitting evidence to be admitted for the purpose of establishing that a legislative decision, nonracial on its face, was nonetheless taken precisely because it would produce racially differential effects. *See* Palmer v. Thompson, 403 U.S. 217, 224-26 (1971). *See also* United States v. O'Brien, 391 U.S. 367, 382-86 (1968).

[62] *E.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[63] Lane v. Wilson, 307 U.S. 268, 275 (1939).

[64] Gomillion v. Lightfoot, 364 U.S. 339 (1960).

[65] Washington v. Davis, 426 U.S. 229, 239-44 (1976) (dictum). *Cf.* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-68 (1977) (zoning for the purpose of discriminating against blacks forbidden).

Thus the lesson of the great decisions is, as Bickel said, not merely that regulation and allocation by race are wrong. Rather, the message is commendably even stronger. Laws that divide and index people to measure their civil rights by race are unconstitutional. Laws that encourage others to do so are similarly invalid. And laws attempting to advance either policy even in disguise will likewise be struck down whenever it is within the capacity of conscientious courts to see beneath their cellophane wrappers.[56]

II. OF TELEOLOGY AND DEONTOLOGY IN CONSTITUTIONAL LAW: FLIMFLAMMING THE SUPREME COURT

> *Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution.*
>
> Alexander M. Bickel[57]

> *If discrimination based on race is constitutionally permissible when those who hold the reins can come up with "compelling" reasons to justify it, then constitutional guarantees acquire an accordionlike quality.*
>
> Justice William O. Douglas[58]

> *It seems trite but necessary to say that . . . our Constitution was designed to avoid these ends by avoiding these beginnings.*
>
> Justice Robert H. Jackson[59]

At the time of *Plessy v. Ferguson*, the question before the Supreme Court in school segregation cases was whether state statutes requiring racially separate schools were constitutionally impermissible. For Justice Harlan, as we have seen, the question was easily answered. He insisted that the Civil War amendments had removed the race line as a basis of governmental action, and as the arrangement at issue—segregation—indubitably rested on the race line, it *was* constitutionally condemned. For the other Justices, however, as we have also seen, the question was by no means as readily answered. They did not suppose that the Civil War amendments had removed the race line as a predicate for governmental regulation or allocation; they asked, rather, whether the particular use of the race line was "reasonable." And, as we know, they concluded that it was.

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[56] The phrase is derived from the uncharacteristically aggressive dissent by Justice Frankfurter in United States v. Kahriger, 345 U.S. 22, 38 (1953) (Frankfurter, J., dissenting).

[57] A. BICKEL, *supra* note 12, at 133.

[58] DeFunis v. Odegaard, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting).

[59] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943). While *Barnette* was a freedom of expression case, the principle enunciated by Justice Jackson seems applicable in this context as well. *See id.* at 638:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. . . . [T]hey depend on the outcome of no elections.

Others, troubled by the frequency with which race lines were used deleteriously, have thought that the proper perspective is somewhere in between.[60] They would construe the Civil War amendments as evincing at least a rebuttable constitutional skepticism about the use of racial classifications. Thus, it has been suggested that the appropriate judicial attitude is one similar to that assumed with respect to prior restraints on speech:[61] laws utilizing the race line should be subject to a rebuttable presumption of unconstitutionality and nothing less than a compelling, or at least a very substantial, articulated public purpose should suffice to sustain them.[62] Despite Alexander Bickel's own notions respecting the lesson of the "great decisions," most who work with this subject think that, in fact, this is a more accurate description of the Supreme Court's current position.[63]

Suppose, however, we were to assume that this very formulation had itself been established and popularized prior to the date of *Plessy v. Ferguson*.[64] In that event, given the formulation of the cally on such suppositions is not to abide by the constitutional standard hypothetically formulated and popularized. Rather, it is to act on a flat, per se rule, albeit of a rather limited kind, that "no law requiring racially separate schools is constitutional." But this, of course, our more sensitive, less dogmatic, and more judicious standard of constitutional review forbids—although, in fact, it is exactly what the Supreme Court did in virtually all of the post-*Brown* per curiam decisions invalidating "separate-but-equal" laws. Our commitment to the flexible standard requires that we consider the matter further.

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[60] There is, however, very considerable disagreement respecting the proper perspective on "in between." *See* authorities cited note 11 *supra*.

[61] *E.g.*, Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."). The utility of the comparison is reviewed in O'Fallon, *supra* note 19, at 44-46.

[62] *See* authorities cited note 11 *supra*. The "test" dates from Korematsu v. United States, 323 U.S. 214, 216 (1944). It is full of irony. The Court, having erected this "protective" test, proceeded to apply it to the facts of the case and concluded that it was satisfied; in other words, the government met its burden of extraordinary justification. It turned out, however, that the government was pathetically mistaken in what it did. *See* E. ROSTOW, *The Japanese American Cases—A Disaster*, in THE SOVEREIGN PREROGATIVE 193 (1962). *Korematsu* is significant additionally: it is the last case to sustain an explicit governmental race regulation as applied to the facts. It is now thirty-five years later and the "test" has not appreciated in value with the passage of time.

[63] *See* authorities cited note 11 *supra*. *See also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 269-320 (1978) (Powell, J.); *id.* at 324-79 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part); Posner, *The* Bakke *Case and the Future of "Affirmative Action,"* *supra* note 11, at 173-74.

[64] The discussion in this section is a more developed statement of views touched on in

If the standard required that a very substantial public purpose appear on the face of the law itself, we concluded in the first instance that this law would have failed because the statute in question contained no such recitation. Yet, if that standard of judicial review were already well established and popularized at the time, we may expect that legislatures, advised of it, would explicitly state their purpose. Suppose, then, that this had been done. Is the law now constitutional, or is it unconstitutional? The question cannot be answered, of course, until we turn to see what the legislature said.

Suppose, then, that the statute had required racially separated schools and had further provided that this requirement was enacted "in order to perpetuate white supremacy and to degrade black people"—the purpose many declare was, in fact, at the root of all such laws.[66] In that event, of course the law will fail. Indeed, the Justices in the majority in *Plessy v. Ferguson* declared that had such a purpose been established in that case, that law too would have failed: "every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion for the public good, *and not for the annoyance or oppression* of a particular class."[67] And they rejected the attack on the law in question as being insufficient because it rested on "the *assumption* that the enforced separation of the two races stamps the colored race with a badge of inferiority," rather than in proof that such a stigma was intended.[68]

But given the established and popularized constitutional "standard" such legislation must meet—a well-connected substanquestion presented above, what would the Court's decision have been in our hypothetical *Plessy v. Ferguson* school case? Two approaches are possible. The first would interpret the Civil War amendments as requiring that laws using race lines not only be well connected to substantial (or even "compelling") public purposes, but that such purposes themselves be "articulated" on the face of the law in question.[illegible] Unless the legislature providing for racially separate schools declared such a purpose, then, the law must, a fortiori, be held invalid. But if, on the other hand, an articulated purpose is not required, then we are not yet in a position to determine whether the law using a race line overcomes the rebuttable presumption of unconstitutionality. Assuming that such a law must indeed be well connected to some very substantial public purpose, albeit the purpose need not be stated on the face of the law, it remains to be seen whether those called upon to explain the law will carry their burden of justification in court. If, but only if, the particular race line can be shown by them to be well connected with a very substantial public purpose is it to be sustained.

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[66] *E.g.*, Black, *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421 (1960).

[67] Plessy v. Ferguson, 163 U.S. 537, 550 (1896) (emphasis added).

[68] *Id.* at 551 (emphasis added). *See also* Black, *supra* note 66; Cahn, *Jurisprudence, 1955 Annual Survey of American Law*, 31 N.Y.U.L. Rev. 182 (1956); Cahn, *Jurisprudence, 1954 Annual Survey of American Law*, 30 N.Y.U.L. Rev. 150, 153-54, 157-68 (1955); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 106 U. Pa. L. Rev. 1, 24-31 (1959).

Under either view—that the law must on its face articulate the compelling public good it serves, or that those with the burden of justifying it must demonstrate its well-fitted connection with such an imperative public good—we may suspect that we already know the outcome of *Plessy v. Ferguson*: namely, that the law will most certainly be held invalid. But this conclusion may be incorrect; we must have supposed that no compelling public good *can* be well connected with such a law. Alternatively, we must have supposed that even if such a public purpose could (as an exercise in theory or imagination) be so connected, nevertheless it was not *in fact* connected with *that* law. Neither is necessarily correct. To act categori-

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Van Alstyne, *supra* note 9, at 292-94, and *Controversy: More on the* Bakke *Decision*, *supra* note 9, at 57-59.

[illegible] It is not quite clear from some suggesting this test whether the suitably justifying purpose(s) must be "articulated" on the face of the law, or whether a subsequent, credible "articulation" in court will do; for the moment, it is evidently the latter. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 361-62 (1978) (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part); Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976) ("When the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest."). *See also* Califano v. Goldfarb, 430 U.S. 199, 223 n.9 (1977) (Stevens, J., concurring in the judgment); Craig v. Boren, 429 U.S. 190, 199 n.7 (1976). For a discussion of why this should influence the standard of judicial review, see Christie, *A Model of Judicial Review of Legislation*, 48 S. CAL. L. REV. 1306 (1975).

tial public good articulated on the face of the law—it is unrealistic to suppose that the legislature enacting this law would have so declared itself, regardless of its actual motives. At least it is safe to suppose that no other legislature, observing the fate of this legislature's bill, would repeat the original error. Suppose, then, the face of the law articulated the very different purpose that fully equal but racially separated schools were to be established "in order to assure a historically disadvantaged racial minority an equal opportunity to develop educational curricula and programs more responsive to their needs, free from domination in schools in which their children might otherwise be overwhelmed by a racial majority." The "public good" is surely impressive, the expression of social contrition is moving, and the linkage between the compelling purpose of this law and the means chosen to advance it seems suitably tight. Is the law now to be upheld? Presumably it is, unless one suspects that the recitation is a fraud—that the recitation is for the benefit of anchoring its constitutionality, while the law is actually meant to perpetuate white supremacy.

One may suppose that if there is fraud here, it will easily be penetrated. But that assumption is remarkably cavalier. The Supreme Court has utilized "purpose" as one prop in its "test" in its administration of the religious establishment clause of the first amendment[78]—and since the inauguration of that test virtually *no* law has been held invalid for failure to meet the "purpose" part of the Court's own chosen test.[79] Even when few have doubted that the legislation in question was the product of sectarian self-interest, which the reigning "test" declares to be an improper purpose under the first amendment, recitations emphasizing other effects—"permitted" effects—have been taken as virtually conclusive in meeting the ostensible constitutional command that such laws have secular objectives as well as primary nonreligious effects. There is no reason to expect a different result here.

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[78] U.S. CONST. amend. I. The "test" was enunciated in School Dist. v. Schempp, 374 U.S. 203, 222 (1963) ("[W]hat are the purpose and primary effect of the enactment? If *either* is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.") (emphasis added). For an illustrative "application," see Board of Educ. v. Allen, 392 U.S. 236 (1968). *See also id.* at 254-66 (Douglas, J., dissenting); Note, *Sectarian Books, the Supreme Court and the Establishment Clause*, 79 YALE L.J. 111 (1969). Note also how the "purpose" part of the test was not applied in Lemon v. Kurtzman, 403 U.S. 602 (1971), and how mere legislative declaration of "purpose" effectively insulated statutes from meaningful review as to this part of the test in Wolman v. Walter, 433 U.S. 229 (1977); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Tilton v. Richardson, 403 U.S. 672 (1971). *See generally* P. KURLAND, RELIGION AND THE LAW OF CHURCH AND STATE AND THE SUPREME COURT (1962).

[79] *See* discussion and cases cited note 69 *supra*.

In the previous section of this article, we noted that under the constitutional standard that seems to have emerged during the past quarter century,"[71] a law will not be sustained under any of the following three circumstances:

> (a) if it overtly utilizes race as an index for determining civil rights;
>
> (b) if it expressly encourages others to do so; or
>
> (c) if it tends to produce either of these effects and if the expectation of that tendency can be shown to account for the law's enactment even when the law, on its face, says nothing whatever about race.

This judicial resolve to remove the race line from our public life has been the most credible and admirable position for the Court steadfastly to maintain, so far as we are under a Constitution and so far as that Constitution is what the judges say it is. But under the more flexible "test"—which allows allocation by race when certain criteria are met—to strike down a statute it is not enough to show that the law itself explicitly treats the rights of one person differently from those of any other by making race itself a sufficient reason for that difference. Rather, one must also "decide," even in every case arising in each of the above categories, two additional matters:

> (1) what kinds of public purposes are sufficiently compelling to justify explicitly treating some people less well than others on racial grounds; and
>
> (2) who is to say (and on what basis) that a law, which on its face is nominally very well connected with a sufficient public purpose, making its purposive racial discrimination "justifiable" under (1), was indeed enacted solely to promote that objective *rather than to enact some baser interest with which it is equally well connected?*

This is not, I think, a constitutional standard at all. It is, rather, a sieve—a sieve that encourages renewed race-based laws, racial discrimination, racial competition, racial spoils systems, and mere judicial sport. It is *Plessy v. Ferguson* all over again, in new and modish dress. In the revised *Plessy* case we have just been considering—facially rationalizing racially segregated schools for contrite, moral, and "minority-favoring" purposes—we have not yet noticed anything about the geographic, demographic, or political context in which the law appeared. Are such considerations germane, or are they to be ignored? Most plainly they must be treated as highly germane,[72] for otherwise our "test" becomes a farce and some atrocious uses of the race line will be sustained by our courts—as I suppose we would agree would be the case if the school segregation statute, with its pious accompanying recitation, were the product of an all-white southern state legislature *circa* 1900. But as a different possibility, suppose that the law were not one from a state legislature at all, but rather one promulgated by a city board of education—in a predominantly black school district with a majority of the school board members themselves black? Is this, too, to make some difference? What difference shall it be?[73]

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[71] *See* text and notes at notes 24-56 *supra*.

If it could be shown that the purpose was not as declared, but was rather to "degrade" black people, the statute must fall. Suppose, however, that it was a product of some of *each* purpose, so that some members of the state legislature supported it in fact and in good faith on the very grounds recited in the law, while others were pleased to go along because they simply wanted to separate black children from white children. Or, suppose that the "purpose" was nothing more sublime than the preoccupation of each legislator to retain his own elected position by voting for *whatever* measure seems most pleasing to the largest or most influential bloc of his constituents, some of whom, both black and white, favor this law (albeit not necessarily for identical reasons), some of whom oppose it (albeit for differing reasons as well).

All of these questions will recur, of course, even if it is not constitutionally required that the "substantial" or "compelling" public interest allegedly served by such race-line laws be recited on the face of the laws themselves. Indeed, assuming no such additional requirement, we may expect such recitations to appear anyway, insofar as they may be regarded by the Court as prima facie evidence of the law's actual purpose.[74] All this, and much more, awaits the Supreme Court once it leaves the lesson of the "great decisions" of the past twenty years and, indeed, the lesson not just of "contemporary" history, but of our whole history.

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[72] *Cf.* Ely, *supra* note 11, at 723 (arguing that majority discrimination against itself is per se legitimate). *But see* Posner, *The* DeFunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, *supra* note 11, at 19-26.

[73] For one view, see Bell, *Waiting on the Promise of* Brown, 39 LAW & CONTEMP. PROB. 341, 360-63 (1975).

[74] Exactly as did happen once this type of test was publicized for the first amendment's establishment clause. *See* cases cited note 69 *supra*.

I have used in this particular exercise of flimflamming the Supreme Court variations on *Plessy v. Ferguson.* It is not necessary, however, to be so wholly hypothetical. An actual example was well provided last year in *Regents of the University of California v. Bakke.*[75] The Regents' Supreme Court brief treated the case as though the use of race itself to establish separate and unequal admission standards at the Davis medical school were really not the issue. Rather, the issue was better to be seen as a revised, updated version of *Plessy v. Ferguson*: that it is not the use of race as a means of assigning students to different schools that is at issue, but the reason for making such assignments. Thus, the question as set forth in the Regents' brief in *Bakke* was framed in the following self-congratulating and self-validating fashion:

> When only a small fraction of thousands of applicants can be admitted, does the Equal Protection Clause forbid a state university professional school from voluntarily seeking to counteract effects of generations of pervasive discrimination against discrete and insular minorities by establishing a limited special admissions program that increases opportunities for well-qualified members of such racial and ethnic minorities?[76]

There was no impropriety in this framing of the question given the fact that even long after *Plessy* and notwithstanding *Brown*, dicta in Supreme Court decisions continued to encourage racial discrimination by government—that which might overcome a merely rebuttable presumption of unconstitutionality by being well connected with "compelling" public purposes.[77] Indeed, the joint opinion by Justice Brennan (writing for himself and for Justices White, Marshall and Blackmun) fulfilled those dicta in its treatment of the *Bakke* case itself.

After acknowledging that the effect of the equal protection clause is at least to reverse the usual presumption of constitutionality in instances where government presumed to regulate or to allocate by race, that joint opinion then went forward to explain how such actions might nonetheless be sustained. First, "an important and articulated purpose for its use must be shown."[78] "In addition," the opinion continued, "any statute *must* be stricken that stigmatizes any group *or that singles out those least well represented in the political process to bear the brunt of a benign program*."[79] If both of these "standards" are met—as they were met according to these four Justices in *Bakke*—then even separate and unequal ways of treating people by race are wholly constitutional. Given this kind of invitation to "accentuate the positive" benefits of racial discrimination, the Regents' attorneys would have been professionally derelict not to have rushed right in.

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[75] 438 U.S. 265 (1978).

[76] Brief for Petitioner at 2. Four members of the Court (Burger, Stewart, Rehnquist & Stevens) found it unnecessary to consider this question. It was plain to them that the use of racially separate and unequal admissions standards was forbidden by Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976); they therefore applied Title VI as forbidding *any* kind of racial discrimination and voted to affirm the California Supreme Court, which had held for Bakke on constitutional grounds, 438 U.S. at 408-21 (Stevens, J., joined by Burger, C.J., and Stewart and Rehnquist, JJ., concurring in the judgment in part and dissenting in part). Insofar as granting relief to Bakke was concerned, their votes were joined by that of Justice Powell. *Id.* at 271 (Powell, J.).

[77] For a discussion of how the presumption of unconstitutionality works in the analogous first amendment context, see text at note 61 *supra*.

Yet there are obvious difficulties with the revised proposed "test." If a 16% additional[80] racial set-aside can be provided because it "counteracts" effects of "discrimination" by increasing "opportunities" for "well-qualified members of such racial and ethnic minorities," there is no reason to think that the good to be accomplished is less impressive or that the connection with the plan would be less snug though the additional set-aside were 20%, 50%, 60%, or whatever; neither should it make any difference whether it were keyed to California population statistics, local population statistics, national population statistics, or world population statistics. If the ends are sufficient and the means well connected, moreover, surely it ought make no difference that the plan was adopted by a predominantly black city council—approving a self-favoring race-based additional set-aside for municipal employees—rather than adopted by a predominantly white medical faculty at a state university.[81] Insofar as the racial complexion of the government unit is seen as furnishing some probative evidence as to the "real" purpose of the plan, surely it would be objected that it is the worst sort of racism to suppose that a plan inaugurated by a predominantly black elected body is more suspect than an identical plan inaugurated by a predominantly white one. Indeed, as we have already seen, there is no reason in any case to suppose that whatever the "recited" purpose of the plan may be, that such purpose bears any necessary correspondence at all to the dominant political factors actually accounting for its adoption. The *Bakke* case is itself quite sufficient to display all of these difficulties, with no need to do much more than to notice the facts and match them against the "requirements" of the joint opinion's test pursuant to which separate and unequal standards are constitutionally approved for persons identified by race.

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[78] 438 U.S. at 361 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part).

[79] *Id.* (emphasis added). As to whether the Davis plan may have imposed such a stigma, see note 38 *supra*.

[80] Fourteen percent of the total regular admittees for the two years in which Bakke was rejected were of the minority groups favored *additionally* by the 16% racial set-aside. *See* 438 U.S. at 276 n.6 (Powell, J.).

[81] *See also* Craig v. Alabama State Univ., 451 F. Supp. 1207 (M.D. Ala. 1978); Detroit Police Officers Ass'n v. Young, 446 F. Supp. 979 (E.D. Mich. 1978); Ely, *supra* note 11. *But see* text at note 72 *supra*.

The plan involved in the *Bakke* case was approved by a predominantly white faculty. The "brunt" of the plan was borne by individuals like Allan Bakke—white applicants with reasonably good application portfolios, but not among the very best portfolios. White applicants with the very best portfolios would of course be unaffected by the plan, as the faculty perfectly well knew.[32] Were persons in Allan Bakke's position thus well represented in "the political process" that singled them out to bear the brunt of the program? Four Justices evidently believed they were, as their opinion says that that kind of representation *must* be present in order for such a plan to be upheld, even when the plan otherwise meets their proposed constitutional standards. But on what conceivable basis could such an assumption be made? Just because Bakke was white—as were the majority of the medical school faculty? But the majority of the medical school faculty were themselves *not* likely to have been "representatives" of the Allan Bakkes, that is, reasonably good, *but not among the best* medical school applicants. If we should assume anything about that faculty—as the four Justices acted wholly upon unexamined assumptions of political and sociological stereotypes—we might more safely assume that the faculty "represented" not persons in Bakke's position at all but only outstanding students, persons who do especially well in academic life, who do equally well through medical school, and who are thus sufficiently outstanding to have been granted academic appointments in a great university. We might also assume that their concerns are not likely to place them in natural empathy with an Allan Bakke in any other sense either—that their interest, in a highly civil rights sensitive university campus and atmosphere, is to be counted as being "racially sensitive" people.

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[32] Insofar as the faculty withdrew 16 seats from the original freshman-class total of 100 (reducing the number of openings to be filled by the regular admissions process to 84 and restricting eligibility for the 16 seats exclusively to disadvantaged nonwhites), the faculty certainly understood that applicants who would otherwise have been admitted pursuant to the regular admissions process but who would now be displaced would be white applicants with good—but not the best—portfolios. The "best" white applicants would be unaffected, as they would still be among the 84 best applicants within the regular admissions process.

Given these very troubling facts, then those who bore the brunt of the Davis program were not only not *well* represented in the political process that singled them out for its burdens—they were, rather, among "those least well represented." Yet this, the opinion of the four Justices declared, would be sufficient reason, entirely by itself, to regard the plan as constitutionally defective. Still, they failed to do so.

The plain point of all this will not, one trusts, be mistaken as an attack on the Davis medical school faculty. The point, rather, is that even as applied by those members of the Court most beguiled by the Lorelei of "right" racial uses by government, their own proposed standards of judicial supervision are not applied[83] and, in any serious fashion, are manifestly incapable of any useful applications. These "standards" will, rather, quickly reduce themselves to empty recitations that serve only to put the Supreme Court's own endorsement on new racial systems—many of which will doubtless be the spoils systems of pure racial politics—inviting persons again to "think racially," to "vote racially," and to band together in racial blocs as much from necessity as from any choice of their own.

In brief, this is the "accordionlike quality" of a Constitution construed to permit racial discrimination "when those who hold the reins can come up with 'compelling' reasons to justify it," anticipated and rejected by Justice Douglas.[84] Most certainly there is no feasible way of forestalling such consequences under the porous "standard" now beckoning the Supreme Court to its third rite of passage. Rather, as Justice Jackson declared in another context, "[i]t seems trite but necessary to say that . . . our Constitution was designed to avoid these ends by avoiding these beginnings."[85] And the only secure way to do that is to abide by the "lesson of the great decisions of the Supreme Court and the lesson of contemporary history. . . : discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society."[86]

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[83] For a recent case extending *Bakke*'s rationale to sustain discriminatory race and sex standards in the hiring, promotion, transfer, training, and work assignments of public employees, see Minnick v. California Dept. of Corrections, 95 Cal. App. 3d 506, 157 Cal. Rptr. 260 (1979).

[84] DeFunis v. Odegaard, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting).

[85] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943).

III. The Next Term of Court

When Alexander Bickel expressed his point, insisting on what he described as the lesson of the great decisions, it was a most uncharacteristic utterance. To be sure, Bickel had clerked on the Court during *Brown v. Board of Education* and had published an extremely compelling article in defense of that decision.[87] Yet, Alexander Bickel was far better known as a scholarly exponent of judicial restraint, an advocate of judicial conservatism. Not for him were there many "fundamental" truths that the Supreme Court should apply. Rather, "balancing" was the usual best course for the Court, and the Court ought not lightly overturn the action of a legislature.[88]

As this was so, a fair question is raised about Bickel's seeming inflexibility in the particular instance of explicitly racial laws. Quite plainly he did not think that to get "beyond" racism, it is useful or helpful first to undertake a new generation of racially discriminatory laws.[89] But apparently others believe that it is, and surely their beliefs are entitled to *some* weight. When their view is reflected in an act of government, moreover, ought it not be counted heavily in some "balance," deferred to unless manifestly irrational—or unless, though rational, somehow simply not relevant to the constitutionality of the practice? There is no obvious accounting for the exceptional rigor of Bickel's commitment to a firm, unwavering, single constitutional standard on this subject. There is, however, an obvious practical reason why the usual virtues of judicial conservatism could be extremely ill-served by anything other than a very consistent, very firm position that leaves nothing to further misunderstanding.

We have had three hundred years of national experience to notice that *whenever* race has been an admissible criterion of governmental action, its licitness left people in public office without shelter against the organized efforts of those who would demand that they have a duty to act on that licitness: that they carry the alleged "merits" of race into appropriate legislation. We are also not without example of the inevitable necessity, the instant such regulation or allocation by race has been understood to be acceptable to the Supreme Court, for the Court ultimately to have to decide several other things as well. Among the more obvious issues, as additional groups, people, agencies, and parties are inevitably drawn in, are these: *which* races, *how much* to each race, *by what test* is each of us to be assigned "our" race? When these things were proper—as they were before *Brown v. Board of Education*—it was enough to be the government-designated member of a given "race" by being one-eighth of that "race." That, as the Supreme Court itself will recall, was the manner of imputing "race" to Mr. Plessy for the *Plessy v. Ferguson* experiments in racial designation and racial allocation.[90] The odiousness of these issues will be no less should the Court now reopen this governmental license than it was some years ago.

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[86] A. Bickel, *supra* note 12, at 133.

[87] Bickel, *supra* note 7.

[88] *See, e.g.*, A. Bickel, The Supreme Court and the Idea of Progress (1970); A. Bickel, The Least Dangerous Branch (1962); Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 Harv. L. Rev. 40 (1961).

[89] For the contrary view, see Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., opinion of).

Should the government be upheld in its first unqualified efforts to revive its powers of regulation and allocation by race, in *Fullilove v. Kreps*,[91] before the Court for its consideration this fall, moreover, we may expect to be afflicted with this way of life for the balance of the century. Most certainly, once the Court admits the government's basic practice, it will be without any defensible ground to halt that practice or to roll it back within our own lifetime. Neither can it, I think, find any way whatever to police the inevitable cynicism and race politics explicit in our common future once the basic issue is decided, as evidently it shall be within a year.

By a very casually adopted amendment added to a bill, "Congress" has provided for a 10% strictly racial set-aside for certain kinds of federal contracts, exempting firms with appropriate racial "certification" from competing with other firms, and guaranteeing the certified firms that they need only compete among themselves for this share of the national business. The constitutional wisdom of sustaining this statute has been discussed almost entirely at an abstract level of compensatory jurisprudence. It has virtually left out of account entirely the more pedestrian realities. Once these inevitable realities are considered, it may not be in our common interest to urge the Supreme Court once more to pontiusly pilot its way through proposed heaps of federal, state, and local racial spoils systems, conferring the noblesse oblige of racial shares on the wretchedly shaky foundations of racial politics—deferring to "good faith" efforts, differing as they will (and as they already do) as to how big a share (10%, 20%, 50%), what groups to qualify for *their* "share" (blacks, Hispanics, women, Indians, Orientals, Aleuts), who comes within each group (all Hispanics or merely those from certain places, all blacks, or merely those from families of less than $15,000 annual income). There is not the slightest disrespect in confronting these matters in these terms, moreover, as they are the government's own way of confronting them, *its* way of governing. I find it very difficult to accept that serious students of constitutional law and of American history would truly desire the Supreme Court to approve these structures of government. I think Bickel understood all of this perfectly well and that that may be why, on this subject, for once he went to fundamentals and to absolutes.

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[90] Plessy was deemed to be "colored" (in the words of the state statute) for purposes of assigning him to a given car, although he was "of seven eighths Caucasian and one eighth African blood; . . . [and] the mixture of colored blood was not discernible in him . . . ." 163 U.S. at 538. The majority of the Court, once accepting the constitutionality of using the race line as a permissible way for legislatures to regulate and allocate, also recognized the sorts of decisions implicit in that determination: "The power to assign to a particular coach obviously implies the power to determine to which race the passenger belongs, as well as the power to determine who, under the laws of the particular State, is to be deemed a white, and who a colored person." *Id.* at 549. *See also* Posner, *The* Defunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, *supra* note 11, at 12-14.

[91] 584 F.2d 600 (2d Cir. 1978), *cert. granted*, 99 S. Ct. 2403 (1979), briefly described in note 9 *supra*.

The *Washington Post* of May 22, 1979, carries the following earnest report on the manner in which these matters run even now:

> A highly unusual and controversial proposal under consideration by a city agency would eliminate a large number of local ethnic groups from eligibility for lucrative minority contracts with the District of Columbia government.
>
> The proposal, by the staff of the Minority Business Opportunity Commission, would eliminate from minority status all Hispanics born in Europe and South and Central America, leaving only those Hispanics born in Mexico or Puerto Rico eligible for the contracts.
>
> The proposal also would eliminate from minority status persons born in Vietnam, India, China, Korea and Africa.
>
> Four major local Hispanic-owned companies have won a total of more than $20 million worth of the city's minority contracts in the last year. This represents 40 percent of the entire minority share of the local market.
>
> The recommendation requires the approval of the commission and Mayor Marion Barry. One commission member, Peter Taylor, said he supports the change.
>
> "Lots of people here are coming in with bags of money from Vietnam and other places and buying up corporations,"

Taylor said. "They are . . . killing the little guy."

. . . .

A commission staff member said the proposed shift in guidelines is part of an effort by the commission to increase the number of city contracts going to blacks and "disadvantaged minorities."

"We just want to make sure that [blacks] who were supposed to benefit get their fair share," the staff member said.

A staff member who helped draft the proposed guidelines said individual companies owned by minority applicants will be considered on their merits " '[*sic*] whether or not [the company] was historically disadvantaged in the United States" before a final decision on certification is made.

. . . .

The proposed change is not without precedent in federal minority programs. Congress recently dropped Asian Americans from the federal Small Business Administration program for minority contracting.

"Oh, my God," one influential Hispanic leader with ties to the Barry administration said when informed of the staff proposal. "If Marion agrees to do something like that, then it's really going to be a political war between Hispanics and blacks, and that would be terrible."

Carlos Rosario, acting director of the Office of Latino Affairs for the District, said he was not familiar with the proposal. But, he said, "I don't see why if they have Spanish heritage why they should lose their [eligibility for minority contracts]. If they are born minorities, they should have the same breaks as others."

"I've been working in the District of Columbia for 20 years," said Jose Rodrigues, who was born in Argentina and is co-owner of a major Hispanic company that does minority business with the District. "To be Rodrigues or black is the same thing. If there is [a minority program] in this country for blacks, it should be for Spanish people."

Rodrigues and his brother Francisco own Fort Myer Construction Corp. in Arlington, which he said does more than $3 million in minority business with the city. He said his business also does another $1.5 million in the regular competitive market.

. . . .

Angel Roubin, who was born in Spain, said: "It appears to me that if the city take that position, they are trying to discriminate against other minoriies [*sic*]."

> In support of the proposed change, Col. Milton Carey, president of Associated Minority Contractors of America, a District-based national organization representing primarily black contractors, said: "There are Spanish who have culturally lived as white persons all their lives and in recent years found it profitable to consider themlselves [*sic*] minority to take advantage of business in the minority community.
>
> "They are bringing in superior resources to bear so they are more competitive in the sheltered market."
>
> The key question, Carey said, is, "Have you been culturally disadvantaged in the United States. Have you been forced to live in a cultural bag? If the answer is yes, I say welcome."
>
> The original guidelines are spelled out in a 1976 D.C. law that entitles local minorities to 25 percent of the city's contracting dollars. The law stipulates that minorities must be certified as such by the commission. Once certified, minorities only compete with minority firms when bidding on District contracts.
>
> Commission staff members said the proposed changes in guidelines followed complaints by black contractors that many of those who were originally certified by the commission came from aristocratic classes of foreign countries.
>
> Another staff member said, "We were being besieged by applicants from all over the world and we had to do something about it."[93]

The fecundity of administrative regulation and of invidious choices, once race itself is reintroduced as an additional index of governmental action, are all present here in microcosm. The concrete example is the use of racially separate and racially unequal standards in the award of government contracts. It might just as well be racially separate and racially unequal employment standards, racially separate and racially unequal educational admissions standards, racially separate and racially unequal voting rights, tax credits, or some other: each contingent on race, racial authenticity to be ascertained and certified by government, with entirely earnest sorts of good faith controversy as to what one counts.

And so what, in all good faith, shall we say about these matters? Should it indeed be enough that one was born (distinguishably) into a "minority" race, or must one's race also have been "historically disadvantaged" as well? Is it insufficient that one be born of that race, however, unless people of that race were historically disadvantaged "in the United States" rather than merely in other places? If one qualifies by these standards, is he nonetheless to be disqualified from the reserved advantage of additional, racially designated shares if he is "Asian American," Vietnamese, Indian, Chinese, or Korean? Must one not merely be a certifiable member of one of the remaining "races," but also be born in the United States itself (so that being born in Africa, being born in Latin America, or being born in Spain will not count)? Yet, though not born in the continental United States, if one is "Hispanic" and is also born either in Mexico or in Puerto Rico (but not otherwise), may one compete not only with "Anglos" but, aside from one's business derived from that competition, have access to a special racial set-aside? In each instance, moreover, is the "appropriate" test of a company the determination of ownership of a majority of voting shares of the stock, or is it rather something else or something in addition (suppose the company is 51% "black" owned, yet the executives and majority of the employees are "white")? The necessity to make and to police fine distinctions is clear enough. The necessary consequences of encouraging racial competition and racial resentments are all quite manifest ("Oh, my God, . . . if [the mayor] agrees to . . . that, then it's really going to be a political war between Hispanics and blacks").

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[93] Thompson, *City Agency Weighs Restricting Some Ethnics' Minority Status*, Wash. Post, May 22, 1979, § A, at 1, col. 1 (insertions in original).

CONCLUSION

Nearly all who have urged the Supreme Court to readmit the legitimacy of race as an explicit basis of governmental regulation or allocation have done so with some reserve, some measure of diffidence, hedged about that, in any event, it should only be for a time.[83] But no means whatever have been forthcoming from this permissive jurisprudence to enable the Court, once it unlearns its own lesson of history, to avoid the resulting dilemma: either to attempt thereafter to superintend the products of the new learning with the considerable risk of being overwhelmed by the need to make distinctions so numerous and so rank as to find itself discredited, or to pronounce a benediction on the presumed rectitude of executive or administrative bodies, and the presumed superior capacity of legislative bodies to determine these matters, and retire from the field for another generation.

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[83] *E.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 403 (1978) (Blackmun, J., opinion of).

It has been very tritely observed that the Constitution is a "living" document. The observation is nearly always offered as a prelude for urging the Supreme Court to manipulate or disregard some rather unequivocal part of that document. In this instance, however, there is nothing in the Constitution that licenses the national government to establish racial shares, to legitimate measuring the worth of people by their race, or to tender entitlements by race. Keeping faith with the lesson of the great decisions of the Supreme Court during the past three decades, moreover, requires no new, manipulative use of any provision whatever. Quite the opposite is true: the novelty is in the explication of arguments to relicense governmental discrimination. The basic question before the Court is whether the Constitution shall again be "adjusted" to accommodate a new generation of racial spoils.

There is, even as the District of Columbia program illustrates, very little agreement in measuring racial eligibility for those spoils. There being no serious prospect for such agreement, and the Constitution itself providing no articulate basis for the Court simply to "declare" the proper eligibility, the natural expectation is that that racial eligibility will simply be the product of racial competition in the political process.[94] Incentives to make out cases of racial "mine" and "thine" are thus supplied, and doctrine is to be arranged in a fashion most calculated to stimulate race politics.

Ironically, the basic suggestion to relicense racial discrimination by government is put forward not despite its intrinsic tendency to set race against race, but as a good, benign, and thoughtful way to get beyond racism. But "getting beyond" racism in this fashion, we have reason to believe, is as little likely to succeed as the now discredited idea that in order to "get beyond" organized government, it is first indispensable to organize a virtual dictatorship that, once it extirpates the evils that made organized government necessary, will itself just naturally wither away. We have not seen governments wither by the paradox of assigning them even greater power. We shall not now see racism disappear by employing its own ways of classifying people and of measuring their rights.

Rather, one gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment *never* to tolerate in one's own life—or in the life or practices of one's government—the differential treatment of other human beings by race. Indeed, that is the great lesson for government itself to teach: in all we do in life, whatever we do in life, to treat any person less well than another or to favor any more than another for being black or white or brown or red, is wrong. Let that be our fundamental law and we shall have a Constitution universally worth expounding.

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[94] *See* note 90 *supra*. See also the conclusions reached on the same subject in B. Bittker, *supra* note 11, at 104.

Senator **Hatch**. I want to compliment you four gentlemen for the excellent statements you have made on various aspects of this issue.

I have spoken out on this issue, not despite but because I believe I share feelings with all of you concerning the need to eliminate racial discrimination and to enforce the Civil Rights Act of 1964, as amended.

I am especially concerned about some of the issues which have been raised today. I think those of you supporting affirmative action and those of you who have testified about its difficulties have all been eloquent. This committee is honored to have all four of you here.

Professor Van Alstyne, in your article in the University of Chicago Law Review, you assert that affirmative action will create "a racial spoils system, racial competition, and racial odium." Would you elaborate on these thoughts?

Then I would like the rest of our panel to comment upon what Professor Van Alstyne has to say.

Mr. **Van Alstyne**. I believe that there is rapidly developing evidence of that phenomenon quite concretely, Senator Hatch. Insofar as one or more of particular racial group has a certain fraction of Federal funds set aside for them, or seats in a State medical school set aside for them, to that extent, of course, it reduces the remaining share by the number set aside. And I am not particularly interested as to whether one calls it a fixed quota, a target, or something else, as long as we mutually understand that race is explicitly counted as such a significant plus factor that the remaining persons, whether it is for loan funds or seats in a medical school, understand that the net number has been reduced that is available to them.

Pressure is then put upon each of those remaining groups to subdivide themselves into other ethnic cohorts, and to press then for an equivalent set-aside share. One can observe this in the dissenting opinion by Judge Mosk of the California Supreme Court, for instance, in precisely the last go-around of the Davis Law School racial share plan.

Judge Mosk observed specifically that with regard to American Japanese citizens, even as has been observed by other witnesses at this proceeding, in terms of median income levels and the rate of professional success or degrees held, identifiable Japanese American citizens—despite all of the handicaps which come from the sordid history of anti-Japanese discrimination in my home State of California, Japanese American citizens do as well as anyone else in nonracial competition in higher education.

Yet, when the Davis Plan was put into effect, from an anxiety of being left out, a very successful organized effort was made to preserve the "Oriental" share of the racial set-aside, just as a different share was set aside for the Chicano students and a different share set aside for the American Indians.

Correspondingly, to the extent that the remaining pool has dwindled to a considerable extent, other groups who are able to make some facsimile of a similar claim are defensively pressed into their own form of particular lobbying. I see it quite seriously with regard to the claims made by women who compose 51 percent of the population.

If you multiply this device, which is not a natural device—that is to say, the introduction of one form of racial preference—it exerts collateral pressure on all other ethnic groups to disengage from cross-sectional politics and to reengage in racial politics to form their own lobbies, and you have structured a political system that puts a premium upon ethnic compactness, gathering into new racial cohorts and insisting upon one's equivalent racial share.

If you were to look specifically at the very kind of plan recently upheld by the California Supreme Court at the Davis Law School, I believe you would have first-rate empirical evidence confirming the prophecy that if you start down the line of indexing people by race and setting aside an advantage on that account, you do not leave other persons with any place to stand other than to regroup in similar divisive politics.

I regard that as truly the destruction of the civil rights movement. It breaks the bonds of solidarity that identified us for at least four decades.

Senator **HATCH**. Professor Sedler?

Mr. **SEDLER**. I think the concern for an alleged racial spoils system results from a failure to recognize that we are talking about blacks and whites. The objective of the equal participation goal is not a matter of proportionality between different ethnic groups, and we should not confuse ethnicity with race.

We are essentially talking about overcoming the present consequences of the social history of racism which has left black Americans in a societally inferior position vis-a-vis whites.

When I justify affirmative action, I justify it in favor of black Americans. I extend this justification to other nonwhite groups—groups which, I should say, have been perceived of as nonwhite and who have been subject to the same kind of victimization and discrimination as blacks and as to whom the present consequences of that discrimination remain.

I put in that category Native Americans who have had their own tragic history of discrimination paralleling that of blacks and of Hispanic Americans who have been perceived of by the dominant white majority as nonwhite. That is it. I do not include Asian Americans who, although they have been subject to such discrimination do not presently lack equal participation in the mainstream of American life.

Thus, when I talk about affirmative action or racial preference, I mean preference in favor of blacks, and I will define within that Hispanics and Native Americans. I think it becomes a legislative judgment as to how precisely to allocate that so long as it is reasonable.

I do not think we are talking about ethnicity; I do not think we are talking about proportionality; we are talking about racial equality in American society.

Indeed, one of the problems is that we have lost sight of the social history of racism and the fact that it has left blacks in a societally disadvantaged position. As I have emphasized, no other group except for Native Americans and perhaps Hispanics, has been subject to the kind of victimization to which black Americans have been subject.

Consequently, if we focus on the equal participation objective and focus on trying to achieve genuine racial equality in American society, I do not think we have any dangers of a racial spoils system. Let us not lose sight of the purpose of the equal participation objective.

Senator **Hatch**. Thank you.

Dr. Abram?

Mr. **Abram**. Mr. Chairman, I have very little to add. Professor Van Alstyne said precisely what I believe on this point. I would only add that history and even current history is replete with what happens when there are attempts by Government to set aside categories of people and permit their self-definition.

It is extremely difficult to imagine what in this heterogeneous society that we have would happen in terms of the balkanization of groups and subgroups and subgroups under groups.

Already my colleague, Mr. Sedler, has redefined "Hispanic" which is a term that appears in the EEOC regulations, not for Castilians, I assume, or people of Castilian origin, and defines them in terms of a racial characteristic.

I do not know how much race is required before a person of Hispanic background is considered to be black, which is the definitional element to which he would ascribe some kind of preference. I can only say this: Predictably, if this kind of business gets very far in America, with its very, very heterogeneous history and heterogeneous racial structure, we are going to have problems that are inherent in Lebanon and Ireland and which occupy so much of the news space duplicated, triplicated, quadruplicated to the tenth power in the United States.

Senator **Hatch**. Thank you.

Dr. Kilson?

Mr. **Kilson**. We have here a very perplexing issue—an incredible can of worms. I really wish I had two votes, as it were. I wish I could vote for my idealist side, which is the side so eloquently laid out by Professor Van Alstyne and so eloquently reinforced here today by Dr. Abram.

I wish I had a vote for my idealist side and a vote for my realist side in the postatomic age of American politics, as it really is, a world in which politics is a place of groups, a world in which we will never perfectly mediate all of the difficult conflicts associated with the real world in which politics is rooted in groups.

Therefore, I have to make a choice. I prefer to support my realist side. I prefer to run some of the risks—which I think are real risks, and I do not think we should underestimate them or understate them—that are associated with certain kind of racial preferences. But, after all, gentlemen, we have run these risks before.

The politics of distributing benefits and resources in American society has, of course, always been rooted in groups, rooted in ethnic groups, rooted in occupational groups, rooted in status and class groups, rooted in production groups, and so forth, and so on.

I just do not see how we can avoid some of the messiness with a notion of affirmative action that is, indeed, rooted in some kind of endproduct definition of what the needs, in this case, of blacks or in the case of women, might be and how they can be realized through affirmative action policies.

All I would like to say is that I am not certain of Professor Van Alstyne's position on perfectibility in mediating these messy boundaries between the groups that are at the root of the political process.

I would like to have a purely colorblind American social, cultural, political world. We are not there yet. And I somehow have the belief that affirmative action—yes—mediated through certain kinds of what I would like to consider creative goals, and semipreferential treatment processes—will ultimately get us to the point of colorblind behavior. Meanwhile, let us run some of the risks of a possible racial quagmire in this area. We have had worse racial quagmires, and I think we can run some of the risks.

Senator HATCH. Dr. Abram?

Mr. ABRAM. I just want to say one word. I have a great deal of admiration for Professor Kilson.

Senator HATCH. It is easy to see why.

Mr. ABRAM. As far as I am concerned, you can have two votes because you are from Harvard. [Laughter.]

Senator HATCH. I would never offer him that advantage.

Mr. ABRAM. What I am concerned about, Marty, is this. I am perfectly willing to agree—how could I disagree?—that we have got a messy stable. We had a really messy stable. But what we needed was a broom and not more mess.

Senator HATCH. Some people, Dr. Kilson, might say that you are unrealistic and idealistic by supporting affirmative action because it is so difficult to administer. It is administered through goals, quotas, numbers, timetables, targets, often in what many in the private sector consider an oppressive manner.

Professor Sedler, let me ask you this: A very prominent feature in your arguments on behalf of affirmative action is a belief that affirmative action does not represent "invidious" discrimination.

Justice Marshall made a somewhat similar distinction in the *Fullilove* case by referring to discrimination against groups that were not traditionally stigmatized.

What are your criteria for distinguishing between permissible and nonpermissible forms of discrimination? What is the textual basis in the Constitution for making this distinction? Again, I would like other members of the panel to comment upon what Professor Sedler has to say.

Mr. SEDLER. I have to relate this to constitutional values. The primal historical value of the 14th amendment was the value of black freedom and racial equality to overcome the consequences of the *Dred Scott* decision, that said that blacks were not persons within the meaning of the Constitution, and to insure genuine racial equality between blacks and whites in American society.

Race has always been extremely relevant in American society. It has been relevant to the disadvantage of black Americans.

The equality value of the 14th amendment permits the reasonable use of race-conscious criteria favoring blacks when this use advances a valid and substantial governmental interest.

Senator HATCH. On that point, as you know, one of our big legislative battles this year is whether or not to expand the concept of the 14th amendment to define when human life begins. We will be discussing in that context a number of theories of the 14th amendment developed in past civil rights cases.

Mr. **Sedler**. I think that relates to a question of legislation.

Senator **Hatch**. Do you think there is any difference between legislation and Executive Order 11246?

Mr. **Sedler**. No; it is not that. It is between either legislation or executive action and judicial action in interpreting the Constitution.

Senator **Hatch**. The executive and the judiciary can interpret it any way they want, but the Congress cannot? Is that what you are saying?

Mr. **Sedler**. The meaning of the Constitution can only be changed by constitutional amendment. It cannot be changed by a legislative redefinition of a constitutional concept.

Senator **Hatch**. Are you saying that the executive and the judiciary can define the scope of the 14th amendment but the legislature is unable to do that?

Mr. **Sedler**. No; I would not include the executive in that, and I would not agree with your characterization of expanded. Rather, I would say that it is the function of the Supreme Court in our constitutional scheme to give meaning to the values of the 14th amendment and to say what those values are.

In part, it gives meaning to the values based on the original understanding of the Framers. But, in part, it gives those values its own meaning. It infuses values into the Constitution. There are many constitutional scholars who contend that the Supreme Court should not do so but, in fact, it does.

The Supreme Court has interpreted the 14th amendment to permit the use of race-conscious criteria where it is related to advancing a valid and substantial governmental interest.

The 14th amendment invalidates raw racial discrimination—discrimination for discrimination's sake. It invalidates it whether it is practiced against whites or against blacks. I use a classic example: If a city with a black majority reserved all the public facilities for blacks, that would be just as unconstitutional as if the city with a white majority reserved all the public facilities for the exclusive use of whites.

But the Constitution does not prohibit, and should not prohibit, the reasonable use of race-conscious criteria designed to bring about the full and equal participation of blacks in all aspects of American life. I think that is the distinction to which Justice Marshall was alluding.

Senator **Hatch**. Professor Van Alstyne.

Mr. **Van Alstyne**. I think that is profoundly incorrect, Mr. Chairman. It is correct that currently the Supreme Court of the United States is divided into three groups on the extent to which the Government of the United States may use race to the disadvantage of any person.

Three Justices—Stevens, Stewart, and Rehnquist—would virtually never allow it. Three Justices take the position roughly represented by Mr. Sedler—that so long as, in the Court's view, it is being used only favorably to ethnic minorities, then almost any extent of that benign use—if it is, indeed, benign—is allowed. And the other three, quite seriously, disagree among themselves and hold the balance of power.

The Constitution right now, I assure you, as a dry, professional matter, is equivocal and unstable. It is simply unclear, and the Court is riven into three groups.

In both the *Bakke* case and the *Fullilove* case, the Court might have adopted the Halan colorblind view. It did not, and it is now divided. Because it is divided, Congress has considerable discretion in the matter. To that extent, then, there is a bona fide legislative prerogative.

But on the balance of the inquiry, we are all intelligent people and are privileged, at least, to second-guess the political wisdom of some of these things, as much as it is the Court's current deferential position to allow the Congress and, indeed, the State and local legislatures to continue almost indefinitely with racial experiments.

Even in the examples Mr. Sedler has given, they are very troubling. If the object, for instance, concretely, is to move as rapidly as possible so that we have an identifiable cohort of ethnic minority persons occupying certain income levels and certain jobs, after which we may then move on to a strict constitutional colorblind standard, every empirical argument would support the notion, then, that the quota ought to be correspondingly very large. It may be disproportionately larger than that body of people in a current population in order to bring them up very quickly.

There is no need then, in terms of constitutional analysis, that the quota need be 11 percent, or 16 percent, or 26 percent. Indeed, if the object is merely to raise the economic level, then the larger the share given for a short period of time, the shorter the period of time need be after which it can be terminated. The Court, no more than this Congress, has no logical basis upon drawing these particular lines.

It would be a very peculiar Constitution which would say that, because there is currently a black political majority in Detroit when the city of Detroit votes itself highly racial preferential shares—and that is the current situation—a racial majority votes itself preferential racial treatment in the city of Detroit, it is unconstitutional but that it would be constitutional if approved, instead, by a white majority.

The Supreme Court cannot stand back and say: "Well, because a black majority voted itself a racial advantage, it is now unconstitutional.

The Supreme Court is in no position to start looking at the ethnic composition of legislative bodies and upholding and striking down one or another plan depending upon what ethnic group holds majority and power in a local or State legislature, in a city council, or in a county board of commissioners.

It is a crazy system to try to revolve constitutionality on the ethnic complexion of those who hold public office, or the percentage of the self-serving racial advantage. It is not only invidious, but it is unadministerable as a matter of fact.

On the point of stigma, Mr. Chairman, the majority of the Court currently takes the view—and I think they are sadly mistaken to a certain extent in this area—that as long as the person who is injured is a white person—a Marco DeFunis who is simply the offspring of a Seattle, Wash., Jewish shopkeeper or an Alan Bakke who is the white offspring of a Coral Gables, Fla., postman—he ought not to feel stigmatized, even if he cannot go to that school or, indeed, any school. And they do not see that there is any stigma for those who are being preferred.

I am here to tell you that, in my view, respectfully and with the utmost sadness unfeigned, there is a stigma. This is, in my view, not much different than in the bad old days of the film industry where very few black people were allowed to work, but some were especially to be hired for certain kinds of roles—the "Stepin Fetchit" roles. It is demeaning to those who are urged to rely upon their color to be excused from competing with others.

People will give in to the irresistable temptation of governmental racial shares, even if it means that the Government is labeling them as "not as qualified" as other persons, and even if the Government thereby puts all of the rest of the body politic on notice that these people are holding positions by inferior standards less vigorous than those applied to all other persons different from them only in light of their race. But in my view, these are deeply stigmatizing, as a matter of fact.

I have begun to see it now with regard to the attitude that people take as they seek an intern at a university medical clinic. Twenty years ago, of course, if one were helped by a black physician at such a clinic the expectation would be that surely he was as good as anyone else. Now the expectation, because of governmental practices, is an expectation that race is linked with inferior quality. I regard that as deeply stigmatizing, a program of studied racial condescension which contributes to anxieties and to ugly sentiments of racial inferiority.

The fact that because these opportunities are so meaningful economically does not mean that the fact that people will take those advantages, if Government throws these irresistable temptations before them, is less stigmatizing.

Some members of the Court are just extremely myopic, and it is on that foundation, I assure you—in my view, at least—that Justice Douglas regarded all of these schemes that divide things in this way as deeply stigmatizing to those who receive as well as those who are denied.

This is not, moreover, an administrable kind of system. There is only one kind of principle that this Government can enforce without manipulation, and that is a principle of strict nondiscrimination with an attitude of benignness and compassion for all people who are disadvantaged in the innovation of additional, racially-neutral programs in their behalf to bring them up as an entire segment of our population.

Senator HATCH. Dr. Abram?

Mr. ABRAM. Mr. Chairman, I agree with Professor Van Alstyne as to the division in the Court at the present time, but I think the remedy is very simple.

You will recall in my original testimony that I referred to *Washington* v. *Davis* in 1975 decided by the Supreme Court in which they held that section 1981 of title 42 required in order to produce affirmative results for the plaintiff claiming discrimination that he had to prove discriminatory purpose. That was an interpretation of the Civil Rights Act of 1875 which says: "Whosoever under the color of law shall be deprived of a right secured to him under the Constitution, obviously meaning under the equal protection clause of the 14th amendment.

If the Court holds that—and this is the present Court—to be the thrust of the Civil Rights Act of 1875, which was addressed to the powers granted under the 14th amendment, what is desperately needed is for this Congress to say to the Court that subsequent civil rights statutes shall be interpreted in light of that meaning attached in 1975 by the Supreme Court to that Civil Rights Act enacted under that Civil War amendment. I think that is desperately needed.

I want to make an observation about what Professor Van Alstyne said about this business of diminishment of human beings by being cast as individuals who have not made it on merit but some preference.

In 1973—pardon the personal preference—I fell mortally ill. My life hung in the balance. I had six physicians—immunologists, immunotherapists, hematologists, hepatologists—I had the works. I could see that the records of these doctors were not being coordinated. They were all busy with other patients, and information was funneling into somewhere, but no one physician was my doctor in charge.

I finally said: "Look, I want a doctor." And I turned to a woman who was a little younger than I, but not much—and all of them were distinguished—and I said: "You are it." And I later told her why. I said: "You had to be extremely good to be a clinical professor of medicine at this great medical school in your time."

I would hate to see the time come—and it is coming—in which we will no longer have that confidence that the certification by distinction really means anything with respect to those who have a preferred status.

Senator HATCH. Dr. Kilson, let me ask another question?

Mr. KILSON. Could I make a comment on Dr. Van Alstyne's point?

Senator HATCH. Yes, of course.

Mr. KILSON. Again, it brings me back to my incredibly bifurcated position as an idealist and as a realist. I think Professor Van Alstyne is right—there are stigmata that will be and must be associated with some of these affirmative action processes which designate certain kinds of racial or gender outcomes. I think it is built in.

But stigmata are relative, not absolute. I think there are a lot of women, there are a lot of blacks, who will readily carry the burden of certain stigmata as a result of affirmative action as against the more onerous burden of stigmata associated with classical white supremacist exclusion of blacks from the end of Reconstruction to the 1960's. In other words, yes, there are stigmata. Blacks will carry some of the stigmata.

But mind you, Professor Van Alstyne, the blacks are not the only group who will perforce carry certain kinds of stigmata as a result of benefits and resources emanating through the public policy process.

There are Italian contractors in the State of Massachusetts for whom, everybody knows, 99.9 percent of capital that is a part of their construction business is from patronage and from patronage that is highly fouled, that is highly corrupt; they are paying someone in the political process to generate those contractual outcomes. They are willing to accept the stigma because the outcome relative to a successful construction firm is a relatively acceptable compensation or benefit for carrying the stigma.

All I am saying is that yes, there is stigma. I think it is important for the idealists on this matter like Professor Van Alstyne to stick to their position—somebody has to stick to it. We want to get rid of all the stigmata ultimately. But there are stigmata, and there are stigmata.

I suspect that if we took a survey of black recipients or female recipients of occupational and educational benefits resulting from affirmative action practices a good proportion will say yes, there is a stigma. They will be candid about it, they will have high reality testing—yes, there is something that is a bit diminished, but I'm glad I got into the medical school, or into this law school, or into this business school, and performed reasonably well enough, and they did not kick me out on my can, or on my ears, or on my head; I am through it, I have got credentialized, and I will go out and try to be the best lawyer, or engineer, or doctor, or whatever.

After all, there is always and shall always be gradations in performance, and certainly Dr. Abram would not want to be operated on, and neither would I, by the worst of those stigma-bearing products in medicine, and so forth, and so on. We still have a choice.

Again, it is the idealist and the realist kind of tension that is part of my perspective on this issue, and I grab Van Alstyne's hand on some of his, I think, incredibly cogent and, in some profound sense, correct, perspectives on these matters. On the other hand, I resist, because the real world is not quite that perfect.

Blacks, and women, and other groups that are properly included in affirmative action outcomes—affirmative action programs—are willing also to, as it were, walk this idealist/realist tightrope, and I am willing to walk it, and I think Congress should still help us to walk it.

Thank you.

Senator HATCH. Professor Sedler?

Mr. SEDLER. Mr. Chairman, I would just like to say something about the matter of stigma. I have been very troubled by that. I think this notion of stigma is a completely unjustified and unfair notion. I think it is typical of the kind of baggage that black people are forced to carry as a result of the history of racism in this Nation.

Blacks who are admitted to medical school or law school or any other school are held to the exact same standards of academic performance as whites. There are no second-class degrees. The blacks who are admitted to law schools today on the basis of affirmative action get racial preference only in the sense that they do not have the same LSAT scores or the same grades in college as, perhaps, white applicants as a group. But they have far better paper qualifications than white applicants who were admitted 15 and 20 years ago and who are now practicing lawyers.

At Wayne State, where I am, we are not a prestigious university like Harvard or Duke; we are an urban State university——

Mr. **Kilson**. You are all right. Do not downplay yourself. Do not get caught in your stigma.

Senator **Hatch**. Let us not feel inferior here. [Laughter.]

Mr. **Sedler**. We also have the largest enrollment of black students of any traditionally white university and do not feel stigmatized about that. We have an extensive affirmative action program. Approximately 10 percent of our graduating class every year are blacks. Many of those students go on to become very fine lawyers. One of those students is now clerking for a Federal judge and will be joining our law faculty after he completes his clerkship.

I want to emphasize that the black students are held to exactly the same standards as the white students. The only basis for racial preference—the only reason for it—is the educational gap that exists between blacks and whites.

While I agree that this stigma is an unfortunate byproduct, I think it is completely unjustified, and I think we ought to say so.

Senator **Hatch**. Dr. Abram, in that regard, proponents of affirmative action such as Professor Sedler constantly emphasize that such programs do not result in the deterioriation of standards because they are aimed only at insuring increased opportunities for "qualified" minority individuals. How do you respond to this particular defense of affirmative action programs, specifically in light of your prior example?

Mr. **Abram**. Factually, I just do not think it is the case. I am no au courant with what goes on at Wayne State, but let me tell you what I know from my own experience. I once was the president of a distinguished university.

I think we all like to say that what we do is that once we have admitted a person who may not be up to the admission criteria, the screening process works, and none comes out because although the quality of admission may be open, the hurdles at the end are the same.

In actual experience—and I am not able to give you a statistical analysis, but from my own experience—I do believe that open admission frequently results in the deterioration of the grades and the standards of those who are graduated, Senator Hatch. It is a result, I think, of the normal compassion of faculty. It is the desire not to have failed. It is the desire not to hurt a person. These are all laudable desires.

On the other hand, let me put it to you in terms of the Federal civil service. I know that there was promulgated—and I cannot say whether it was placed into effect, perhaps your staff knows, or you may know—as late as 1977, and I think reaffirmed in 1980, there was the proposition that black candidates do not have to take the written foreign service examination and that separate lists for appointment would be maintained.

The whites would have to take the written examination no matter whether they came from my home town—which was a fairly impoverished high school, by the way—or whether they came from a high school in Evanston, Ill., or Winnetka, Ill. Whites would be required to take written and oral examinations. Blacks would not.

I submit to you, sir, that no matter how one tries to cover this over, this is segregation maintained by the Federal Government in respect to appointment to the vaunted and valued positions of foreign service officers, and I do not believe that the waiving of a written examination was done with the idea of getting a thoroughly competent foreign service but was waived for the reason of getting a foreign service of a certain racial mix.

Those two things may be consistent, and they may be very inconsistent, but the idea that you are waiving a written examination on the grounds of race is, I think, unconstitutional, morally reprehensible, and, in answer to your direct question, I think it does not result in the same level of standard of appointment.

Senator HATCH. Dr. Kilson, one of the aspects of affirmative action that has troubled me very much has been its time dimensions. First, to the extent that affirmative action is a remedial measure, how far back in time do we look to determine the extent of a rights violation?

Second, is there any criterion to determine when affirmative action is no longer a necessary remedy, short of identifying absolute numerical and statistical equality?

In other words, to the extent that statistics are critical in identifying discrimination, how can we conclude that such discrimination has totally been rooted out, short of precise numerical equality?

Mr. KILSON. It is a difficult issue. I do not know what the time dimension is, Senator Hatch, any more than you or members of the committee know. I think it is something, as it were, you play by ear. You use the intuition of the concern and compassion you have with the primary issue, which is trying to do something about the bloody consequences of a century—four generations—of clearly invidious use of race relative to blacks' bid for parity of social mobility in American society.

I do not know what the time dimension is, and I think there are a lot of things like that. We cannot really precisely determine at what point we can define the worst incidents that are relative to the problems.

Senator HATCH. Of course, you know what I am driving at. It is pretty difficult for a steelworker, who has been deprived of a vocational opportunity, to have to forgo that position because 100 years ago his forbearers may have discriminated against blacks. It is even more difficult when his forbearers weren't even in this country at the time.

Mr. KILSON. Sure. I understand. I do not know. I do not have an answer to your problem. But I do not think we should treat this issue as some built-in enormous constraint on dealing with these issues through affirmative action. Similarly, when do we call an end to this business?

I suspect, if you want a time period placed on it, I would say after 15 years—something near a generation—20 years from now when I enter my seventies, let us see an end of all this stuff, and let us go back to the ideal position that we are in a colorblind world now, and if the brothers cannot cut it, well that is their problem.

Fifteen years of this kind of reinforcement, this effort at restitution, at compensation, would be enough. If the numerical or the generalized goal situations do not really add up well, so be it. My hunch is they will.

Blacks know opportunities when they see them. They have seen very few. The evidence is overwhelming that when opportunities are provided by this society, a significant proportion of those blacks who know how to cope and can cope will take advantage of them. In 15 years from now, I would say I would vote for you to get rid of all this affirmative action business. Meanwhile, let us continue it.

Senator **Hatch**. Professor Sedler, how do you feel about that 15-year concept?

Mr. **Sedler**. I think my answer is a little more complex. I would probably say we are at least talking about a generation.

But just as the present consequences of the social history of racism are self-perpetuating and self-reinforcing, the gains are self-reinforcing. When we eliminate the income gap between blacks and whites and the condition of black poverty, we will see educational improvement among blacks as a group. As we have greater participation in the economic system, we will see the employment opportunities increase.

After all, it has only been in the last 25 years, dating approximately since the *Brown* decision, that we have even begun to undo the consequences of that history. We had almost 100 years after the Civil War and over 200 years of slavery before that. So if you put it in a timeframe, affirmative action is a relatively recent phenomenon.

I agree with Dr. Kilson that we will know it when we see it—when we see a substantial number of black lawyers and black doctors, when we see a reduction in the income gap, when we see a reduction in the educational gap, we will know.

More concretely, one way to put a time frame—and this is something that the courts have required—is with respect to the particular affirmative action program.

Again, to use the city of Detroit's affirmative action program for police promotions and hiring, it has essentially been promotions on a 1-to-1 basis until such time as you approximately have 50-50. Once that goal is reached, then the affirmative action program will come to an end.

One way of doing this is to set timetables and goals. I think there is nothing wrong with goals and timetables. I think there is nothing wrong with quota-type programs as long as they are reasonable.

But built into each affirmative action program designed to achieve the equal protection purpose should be some rough definition of what equal participation is. At the time that equal participation is achieved, the particular program should terminate by its own force, and it is likely to possibly even be unnecessary before that time.

But I do think we are at least a generation away from having genuine racial equality in American society. There is no quick fix. This is not a temporary or short-term measure. We have a long and tragic social history to overcome, and it is going to take time to do it.

Senator HATCH. Professor Van Alstyne and Professor Abram, one thing that concerns me is this: I have seriously anguished over this issue before coming down as hard as I have against affirmative action.

It has been very difficult for me because I agree with the two of you, on the kind of discrimination that minority groups have suffered in the past.

This has been, I think, one of the best hearings that I have attended, if not the best, since becoming a Senator and a member of the Judiciary Committee.

One thing that does concern me is this: Not too long ago, shortly after the major battle that some of us, waged against what was called the Fair Housing Act Amendments during the lame duck session last year, I had one of the top civil rights leaders in the country come into my office—a man I have inestimable good feelings and respect for. I wanted to please him in every way I could.

He said in words to this effect: "Orrin, we know that you believe in civil rights. We have seen evidence of that as you helped lead the fight on the floor for the institutional civil rights bill."

Then he said: "We understand your fight against the fair housing bill. We will give you that. We can see your arguments on that bill." In effect, it came down to the argument of whether to use intent or disparate impact as a basis for determining discriminatory conduct under the act.

The other side would not budge, and frankly, I was not going to budge either. I suspect that one of the biggest issues in the entire area of civil rights law in the coming years will be the intent versus disparate impact issue.

However, he said: "One thing you are doing, which is causing irreparable harm to blacks, is your stand on affirmative action."

I said to him that while perhaps some of my comments on affirmative action were excessive—that I nevertheless felt equally strongly about this issue—my analogy of affirmative action to heroin addiction was a little bit tough.

Mr. KILSON. Yes, that is tough.

Senator HATCH. You thought that was too tough? I have acknowledged that.

What I am trying to do is to cause people to think about this problem. I have no desire to malign anybody who has an opposite opinion, especially on a subject as difficult as this one. And you have all articulated your positions beautifully here today.

However, my visitor indicated that affirmative action was the only way. He felt it was the single most important policy to help blacks, women, and other minorities, particularly blacks.

You on the panel have referred to hardly any other minority groups but blacks. It all comes down to blacks, doesn't it? Which is, I guess, one of the concerns of other minority groups.

The EEOC—if you examine what they have done—has been principally an organization devoted to black interests.

My question to you is this, and it is one that concerns me. I would like to see equality in our society. The strongest reason I am against affirmative action programs is that I believe in the original Civil Rights Act, as amended. I believe in nondiscrimination and colorblind policies.

Publicly sanctioned discrimination is simply wrong. In the end, it does not really do much good for anyone; it does, however, create more racial animosities and conflicts. That is my personal belief; it differs from at least two of you here and maybe all of you—I do not know.

We can all admit that there has been tremendous discrimination in the past. What can we do to right this short of these affirmative action programs? What are your suggestions?

Professor Kilson has indicated that Professor Van Alstyne and Dr. Abram are idealistic and not very realistic. I would not agree with this assessment; I believe that it is Professor Kilson and Professor Sedler who may be best described in this way.

I would like to know, however, what can I do, as chairman of the Labor and Human Resources Committee—which may have more ability to help blacks, Hispanics, women, Indians, and Asians, in America, than the Judiciary Committee. What can I do to better promote equal opportunities for and equal protection for all Americans under the Constitution? I would very much appreciate your suggestions.

Mr. VAN ALSTYNE. I have about four suggestions. They would begin by enacting a firm national policy of nondiscrimination.

Senator HATCH. How would you do that? We supposedly have that policy now.

Mr. VAN ALSTYNE. No, we do not, Senator. We are mutually aware that certain acts of Congress are race-explicit and, indeed, divide us now by setting aside explicit racial shares.

I do regard the dismantling of those things as politically important, quite frankly. So that would set a standard to return some sense of national solidarity—that none need fear in the innovation of additional programs that they are going to be victimized by their particular race—that they will have race cards or be indexed or be deemed eligible or qualified by one or another program.

I do regard the Government's explicit use of race in rationing opportunities for the disadvantaged as a device which tends to undermine the uniformity of political support for the kinds of programs which the country may very well be able to afford even in times of a straitened budget.

Before going on, let me add one international comparison, as a backward glance to your earlier question to Mr. Sedler.

There are countries which in their own constitutions—Malaysia is one, India is another—constitutionalize racial shares to a certain extent.

Senator HATCH. Lebanon is still another.

Mr. VAN ALSTYNE. We have watched those developments now for more than two decades. There is no suggestion at all that they show any prospect of being dismantled, Senator. To the contrary, the experience is that as a decade or two and then a generation of human existence goes by, people become used to the way things are done.

If the country gradually expands and multiplies a system of racial shares, my own forecast would be that the system will entrench itself, politics realign themselves, and dependencies are established according to those cohorts of shares, and they can never be given up.

The importance of the role of Congress now is that it is truly up to Congress to let the Nation know this is not the path the United States is going to take. It will not have a permanent future which puts incentives on regrouping persons into racial coalitions. There should be a strict, believable national policy of nondiscrimination.

Senator **Hatch**. Does it not bother you that there is very little dialogue on this? The Congress has rolled over and played dead on this issue because they are scared to death to bring it up for fear they are going to be labeled "racists." Yet this is such a profound moral, political, social, and economic issue.

Mr. **Van Alstyne**. There is no question but that that is true. You need not go back further than my own rather awkward apology in introducing my credentials for fairly good evidence that, even though we have been in the civil rights movement for some time, there is a sense of vulnerability to being insensitive or uncaring people.

My position is, however, that one who cares wants to put the Nation at ease—all of its people—that they do not stand in peril of being victimized by the fortuity of their own race at the hands of their own Government.

To the extent, then, that we want to talk nationally in a larger dialogue even about my colleague's sense of national restitution—amortizing the debt of a grievous past, if you will—the development of programs of a kind that the country has been quite generous in, but not perhaps adequately, to assist the disadvantaged at levels of education, at levels of day care assistance, at levels of family assistance, on lines of nonracial eligibility, you cannot possibly break the cycle of lack of qualification or lack of educational aptitude merely by sprinkling produce in the higher echelons of hiring by the Government or eliminating piecemeal certain standards and validated tests or admission standards to universities.

You will never get rid of the problem merely by putting into place the cosmetics of these gratuitous racial preference programs at the top.

If you want to attack this problem insofar as it is economically linked with regard to race, as it is not with regard to gender—and I do not regard these programs as important, frankly, to the improvement of opportunities for women who have the good fortune of being born each generation economically scattered in the same vertical axis as are men—there ought to be a renewed nonracial emphasis upon the kinds of programs—some of them under the superintendence of your own committee—which enable persons to improve their skills and improve the conditions of their family life such that then they are, indeed, able to compete fairly with unrigged tests of admissions and skills with all other persons.

That is the approach taken by a country that has a sense of racial solidarity and does not seek to divide its people against one another so that the separate cohorts look jealously at each proposed program as to what racial share they shall derive from it rather than how it will help the Nation overall.

My own view, I assure you very soberly, is that a sense of renewed solidarity in assisting upward mobility for all the people in the United States requires as the keystone of that program a credible policy of nondiscrimination—that none will lose out on account of their race insofar as the country renews its sense of generosity in that regard.

Senator HATCH. Professor Abram?

Mr. ABRAM. Mr. Chairman, I think you have asked an extremely pertinent question, and I would like to give you two specific objections and two that are less specific.

I think and I, who certainly were involved in public affairs in the mid sixties, know that this was a much more generous country in the distribution of the pie at a time the pie was growing. It is very difficult for people to be generous and to have a greater distributive justice when the pie is shrinking.

The pie has not been growing in the United States, for a variety of reasons, and I think it is of paramount importance that the productive engine of the United States be reignited and start throwing off more to be distributed.

Senator HATCH. I agree with that.

Mr. ABRAM. It is also important that inflation be controlled because I do not know of a worst tax upon the poor than inflation. I can beat inflation in the sense that I can buy in quantity. I have a certain mobility and can therefore move from one place to another to acquire something that is available at a lower price. There are many things that those who have a middle-class life can do that the impoverished cannot do in a period of inflation.

The third thing I would like to say is that we have got to straighten out the educational system of this country. The public schools in the small towns and even in some of the larger, but nevertheless not the great metropoli, are functioning fairly well, but the public schools are not functioning well and are not turning out literate persons who are capable of entering this extremely service-oriented labor market in many of the great metropoli of this country.

Professor Coleman has just put out a report from the University of Chicago, and it has been read in various ways by various people, but I have read it, and I want to say what I think he says. He is not saying private schools do better than public schools or public schools do better than private schools. He is saying that schools do well—public or private—which have a hard-core curriculum and, which have peace rather than disorder within the classroom and the halls, and which have teachers who assign homework and hold up standards.

Until we get a school system—public and private alike—that does that, we are not going to be turning out people who are really competent to enter this labor market, and we are going to continue to have a decline in productivity in this service-oriented economy, and we are going to continue to clutch or grab for each other's share rather than having enough shares to go around.

Finally, Mr. Chairman, I want to take Bill Van Alstyne's point, and I want to turn it just a little bit. He speaks of having a society without any legal discrimination. I want to say that America should have a confidence that a society in which there is no discrimination is a society that will work for everybody—black, white, Hispanic, Jew, and Gentile men and women. I do this on faith and also on history.

To these shores there came a group of people who had very diverse religious beliefs, and they were at war in Europe. They would have been at war on this continent had there been one preferred religion. There are many religions, none of which is preferred.

The American principle has been that you, sir, may have one religion, I another, but I will leave you alone, and you will leave me alone, and the Government leaves both of us alone and does not recognize any distinction between us.

I like to speak, and I like to hear people like Bill speak, with whom I agree, and I disagree with my brother on my right, though I must listen to him under the principles of this country because he must listen to me. Consequently, in this babble of religions and these babbles of ideas, we have had a Government which recognized no distinction in the right of any idea to be supreme or to have preference or any religion. And it has worked. We have had relative religious peace in this country and relative freedom of speech in this country without terrible disorder, which has disrupted other countries.

You would have thought by not preferring one religion or one kind of speech we would have had trouble. But, quite to the contrary, we have had peace. We will also have peace if we do not invert the racial principle in this country and treat everybody—as Bill has just said—alike, without distinction. That is the way to harmony, peace, productivity, good schools, and a better America.

Senator HATCH. Thank you.

Dr. Kilson and Dr. Sedler, Dr. Thomas Sowell, a noted black economist, who has come under much attack, has studied affirmative action from the point of view of the minority individual. He has concluded that there are a number of costs exacted upon minority members by such policies—diminution of self-esteem, white backlash, the ratcheting of many blacks into educational institutions and into jobs for which they are not equipped.

I would elaborate on this by suggesting that affirmative action programs generally increase the dependence of minority groups upon the majority by making them perpetually dependent upon the political process for the apportionment of social benefits rather than upon the permanent equal protection guarantees of the Constitution.

Do you have any thoughts on either of these perspectives? Let us start with Dr. Kilson.

Mr. KILSON. Yes; I have closely followed the incredibly intelligent and cogent critiques of affirmative action by Prof. Thomas Sowell and have a lot of regard for them. I simply disagree with them.

As I said earlier, I have no doubt about this claim on the stigma issue, but as I said earlier the stigma can be endured because stigmata are relative, and relative to earlier stigmata when America was a fiercely white supremacist and racist society those stigmata associated with today's affirmative action kickbacks, as it were—payoffs—for blacks—let us put it in good old American political savvy language—those stigmata are, I think, endurable, and I do not agree with Professor Van Alstyne's notion that they are, in fact, totally devastating and disastrous; I do not believe that—not for a minute.

There is, I think, a very important issue here that Professor Sowell has dealt with. And that will tie me into a couple of things just recently said here by Dr. Abram. That is the issue of affirmative action programs tending to skew benefits to segments of blacks already relatively well off to the middle and upper strata of the black social stratification pyramid. I think that is a terribly important point. That is true.

But somehow I am not overly concerned at this stage of the game—maybe a decade from now—but I am not overly concerned with the middle and upper segments of blacks running away with extra bits of the cookies.

I am, however, concerned with the fact that we do need a Marshall plan type of attack on the conditions of the 35 percent of black American households that are poor—near or below the poverty line. If your committee and the rest of the Senate and Congress is going to impose a worst case scenario on us—which you might do, you have the power to do it, and I cannot prevent it—and we have to scrap the affirmative action that we have had since 1970 and start anew with something else, then I say give us a Marshall plan also for the marginal working class—which is about 15 percent of black American households—those we tend to call among white ethnics the working class white poor.

We have a comparable group among blacks who go to work every day. They tend to be husband/wife households. They work hard to keep their mortgage payments up, but they really find it incredibly difficult to keep their heads above water. We need a Marshall plan for that segment and for the other 30-odd percent of blacks, putting about 40 or 45 percent of black population households now in pretty hard-bitten circumstances. A worst-case scenario, if you are enforcing it on black America or intend to enforce it, should be a Marshall plan as the way in which you conservatives express your concern with the long-run goals of what civil rights has been about.

The middle classes and the upper strata—some 50 to 55 percent of black American households—will somehow find their way and, I think, will come out relatively well in the end.

So there are some important things in Sowell's critique—this class emphasis he has been pounding on. The almost monopolization, as he sees it, of affirmative action outcomes by the middle and upper segments of blacks is an important issue.

Therefore, the implication from that—that public policy should be directed to conditions of the marginal working class and the lower strata blacks, getting inflation under control, getting American productivity going, and the issues that Dr. Abram just referred to. If we have a worst-case scenario imposed upon us and we can leave here on the assumption that affirmative action is going down the drain—down the pissoir, as the French would say—fine, then give us a Marshall plan for the marginal segments.

Senator **HATCH**. Some would say that $350 billion in transfer payments that we have expended in the cities may be much more than a Marshall plan. Yet, the blacks and poor in our urban areas are not very much better off today than they were 40 years ago. Indeed, in some areas some blacks may be worse off.

Mr. KILSON. Then we need more.

Mr. SEDLER. Dr. Sowell's remarks merely pointed out that affirmative action inflicts certain pain on blacks as it inflicts pain on whites. The real problem is that this generation must come to grips with the consequences of our history of racism and, I would add, of the consequences of our history of sexism.

A physician could let a patient die in peace, or the physician could inflict some pain on the patient in the hopes of curing the patient. I think, given the choice, most patients would prefer to have the pain inflicted on them so that they may ultimately be cured.

I fully agree with the necessity for programs to overcome social disadvantage. We need social justice as well as we need racial justice. But in the final analysis what we need is equality.

Racial preference has been our whole history. It has been preference for whites. This is nothing new that has come up. We have always preferred whites. As a result, we have white supremacy and black inequality. We need the same kind or better—I hope—a more just, a more reasonable racial preference for blacks only to the extent of redressing the history of preference for whites.

What this country needs is an end to white supremacy. I believe that is the most important issue facing the Nation at this time. We will forever be a racially divided Nation until we end white supremacy, until we no longer have two societies—black and white, separate but unequal. That is what affirmative action is all about. That is why it is necessary. That is why it is justified.

Senator HATCH. I have kept you longer than I intended, but this has been one of the more stimulating sessions I have attended.

What I would like to do is give each of you the opportunity, maybe in just a minute or two, to summarize your views.

Let us take you first, Professor Abram; then you, Dr. Kilson; then you, Professor Van Alstyne; and finally, Professor Sedler.

Mr. ABRAM. You have been, sir, extremely patient, and I am very grateful that an important subcommittee of an extraordinary committee should have taken the time to deal with this subject which, I can tell you, has been very much on my mind.

I think I am going to say what I have to say in perhaps three or four sentences. I stand precisely as I have always stood all of my adult life in support of a colorblind interpretation of colorblind words in the American Constitution.

I do not believe that a color-conscious interpretation of those words was justified when it was a policy that reigned from the beginning of the Republic until relatively recent times, and I do not believe that it is justified now.

I think the rendition of a color-conscious interpretation of the Constitution and the laws of this country has inflicted immeasurable damage upon us, is divisive, and in the end presents, as Mr. Justice Jackson said, a loaded weapon to those who wish to use it for some other urgent purpose at some other time.

I urge you, sir, to introduce legislation requiring that any civil rights act presently on the books or any that would be subsequently enacted require as a method of proving the right of the plaintiff as asserted that there was a discriminatory purpose in the action complained of. That, I think, would redress the wrong which I think has been inflicted.

Senator HATCH. Thank you so much.

Dr. Kilson?

Mr. KILSON. I have no particular policy recommendation, legislation, or suggestion. I am very pleased that you and your staff, Senator Hatch, have composed here today a highly variegated panel of testimony before you, and I think it has been terribly important to have the difficulties and the incredible complexity of affirmative action laid out here.

I want to say that I have become more aware of the long-run risk to the very character and nature of our politics associated with affirmative action, but I think we can run those risks. We have run comparable and even worst risks with other policy positions, which one could go into—we do not have the time. We have run such risks in the past; we can run those risks today.

I have no doubt you are going to shave off something from affirmative action—I have gathered as much from that smile on your face, Senator Hatch—but do not shave off too much.

Senator HATCH. Thank you. You should never interpret my smiles. [Laughter.]

Professor Van Alstyne?

Mr. VAN ALSTYNE. I have no closing statement, Senator. I want to thank you very much and join Professor Kilson especially. It has been a privilege to appear before you.

I have been before Senate and House committees peripatetically, I guess, over the last 12 years. But you are owed our mutual high regard for the careful diversity you have built into this one. I have no sense that this has been a rigged, biased, or predestined panel. You have been very gracious in giving us each an adequate opportunity to explain our points of view. If I have not been effective until now, another hour would not suffice.

I thank you very much for the opportunity to come here.

Senator HATCH. Thank you.

Professor Sedler?

Mr. SEDLER. I would join my colleagues in expressing my high regard for the hearings that you have held, Senator. I think the presentations that all of us have made have served to clarify the different viewpoints on affirmative action.

Perhaps it is well to recall, as we do in so many contexts, that often that which unites us is greater than that which divides us.

I think we all would like to see an end to white supremacy. I think we all would want to bring about societal racial equality. I think we all would want to bring about true gender-based equality for men and women. We would want to see blacks and other nonwhite minorities and women be full and equal participants in American society.

People of good will in good faith can disagree about the methods to bring about the kind of society—the kind of equality—that I think all of us would like to see in America.

There are benefits to affirmative action. There are costs to affirmative action. I think the real point of disagreement with all of us is whether the benefits outweigh the costs. I can only reiterate my view that they do.

There are problems with affirmative action programs. I would hope that the first direction of the committee and of all the committees within the Senate would be to look at the particular Federal affirmative action programs, not with the view toward dismantling them but with the view to improving them, to eliminate injustices in the programs, to minimize and distribute the burden insofar as is possible, to make sure that affirmative action programs are, in the words of Justice Powell, "precisely tailored to advance valid and substantial interests."

Thank you.

Senator HATCH. Thank you.

I am particularly pleased to have had all of you distinguished gentlemen with us today. It has been an extremely well-balanced panel.

I think this particular panel—I want to commend you all—has been both provocative and enlightening.

This is a particularly difficult area for me. I assure my minority friends that I have nothing but the desire to do the very best legislatively I can for them and for our society generally.

I feel deeply—and I have expressed myself deeply—with regard to affirmative action programs. I have to confess that I agree with Professor Van Alstyne and Dr. Abram here today, although I admire the articulate statements that each of you have made. They have been profound and will add much to the discussion.

However, the thing that concerns me more than anything else is that so many people in our society are terrified to even discuss this issue for fear of being labeled "racists"; I think that is a pretty pathetic state of events.

The reason we filed the Equal Protection Amendment—S.J. Res. 41—is that we want to create some dialog here just like this so that both sides can be heard, with people not afraid to express their positions.

If those who really do feel strongly about civil rights, but may have opposite opinions to yours, Dr. Kilson and Dr. Sedler, do not speak out, then our country will continue to pursue a public policy—a very important public policy—that has had the benefit of extremely little congressional debate.

I have to admit, I feel strongly about affirmative action, and I have expressed it in no uncertain terms. I would feel deeply hurt if anybody thought from that that I had feelings against any minority group, because I do not. I do not think I ever have had.

I worked as a young man, as a lather in the building construction trades unions. When it was considered demeaning to work with blacks, I worked with blacks and was proud to do so. They always did the most back-breaking, difficult, hard work; they were always assigned to do that. We only had three black lathers in the whole local, as I recall, and I worked regularly with them.

All I am saying is that I think it is a pathetic thing that when we speak out—because we differ—some think it is because of ulterior motives rather than motives of promoting the more traditional conception of civil rights in this country—colorblind treatment under the law.

I acknowledge that there are strongly held views on this issue contrary to my own. I just hope that the other side would acknowledge the same thing.

We will have a second and third day and perhaps a fourth day of hearings in June—hopefully of this same caliber—so that we can continue the dialog.

With that, we will recess these hearings untii June 11.

[Whereupon, at 1 p.m., the hearing was recessed, to reconvene on June 11, 1981.]

AFFIRMATIVE ACTION AND EQUAL PROTECTION

THURSDAY, JUNE 11, 1981

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 9:30 a.m., in room 6226, Dirksen Senate Office Building, Senator Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senators Thurmond and Grassley.

Staff present: Stephen J. Markman, general counsel; Peter Ormsby, professional staff assistant; Claire Greif, clerk.

Senator HATCH. The hearing will come to order.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. This marks the second in a series of hearings by the Subcommittee on the Constitution on the subject of affirmative action and equal protection. This represents the first attempt on the part of Congress to explore thoroughly the issue of affirmative action and its impact on our country.

During these hearings, we will continue to explore the constitutional, the legal, the social, the philosophical, and the economic implications of affirmative action programs and policies.

During our first day of hearings, we heard testimony from four of the Nation's leading academics on affirmative action. Prof. Martin Kilson of Harvard University argued the case that there were strong historical antecedents for current affirmative efforts.

Prof. William Van Alstyne of the Duke University Law School argued simply to the effect that "racial discrimination by the Government of the United States should be forbidden without exception and entirely without qualification."

Prof. Robert Sedler of Wayne State University contended that affirmative action programs are thoroughly justified as a result of the past history of discrimination toward both blacks and Hispanics.

Finally, Morris Abram, the former president of Brandeis University, claimed that affirmative action represented a rejection of everything that the civil rights movement had fought for for so many years.

Let me clarify once more my own definition of affirmative action. For the purposes of these hearings, I am talking about public policies and programs which accord preferential treatment to individuals on the basis of their race, color, sex, or national origin.

This means policies which require or permit quotas, timetables, goals, rations, or numerical objectives on the basis of race, color, sex, or national origin. This means policies which identify discrimination on the basis of statistics and numbers rather than on the basis of some demonstration of discriminatory intent or purpose.

In short, in my opinion, this means color-conscious public policies.

Affirmative action is not intended here to cover the development of public programs administered totally without racial categorization that may be anticipated to result in improved opportunities for deprived individuals, a disproportionate number of whom may be minorities.

There are few more important and more potentially divisive issues that face our Nation today than affirmative action. My own view of affirmative action, and I will not dwell upon it at this point, is that it represents a retreat from the constitutional mandate of equal protection, a retreat from the 1964 Civil Rights Act, as amended, and a negation of some of the most enduring values of our Nation: the merit principle and the principle of individual treatment. These were, or so I once thought, the equally enduring objectives of the civil rights movement in this country.

The Subcommittee on the Constitution today will focus upon the testimony of several organizations that have played a leading role in the growing national debate on affirmative action: the Mexican American Legal Defense Fund, the NAACP Legal Defense Fund, the American Jewish Congress, and the University Center for Rational Alternatives.

Before we proceed further, I would also like to announce that we will be meeting again next week at this time in room 2228 of the Dirksen Building on the subject of affirmative action. We will hear the testimony and discussion of four more of the Nation's leading authorities on affirmative action: Prof. Thomas Sowell of the Hoover Institution, Prof. Ralph Smith of the University of Pennsylvania, Prof. Thomas Nagel of Princeton, and Dr. John Bunzel, former dean of San Jose State University.

We are trying to get as many and varied viewpoints as we can of experts and authorities in this field. Hopefully, we can all arrive at a greater knowledge of what affirmative action really is and whether it is the type of program we should have in this country under our Constitution.

Today, our first witness will be Vilma Martinez from the Mexican American Legal Defense Fund. Vilma Martinez is the president and general counsel of the Mexican American Legal Defense Fund. She has been active in much of the most important litigation in the area of affirmative action in recent years including the *Luevano* v. *Campbell* case involving the PACE examination.

The Mexican American Legal Defense Fund is a national and legal educational organization devoted to legal issues relating to Mexican-Americans.

We are very happy to have you here today with us.

All full statements will be placed into the record following oral statements. We would like you to summarize your statement. If you can do it in less than 10 minutes, it will give us more time for questions and dialog on this.

We will now turn the time over to you, Ms. Martinez.

STATEMENT OF VILMA MARTINEZ, MEXICAN AMERICAN LEGAL DEFENSE FUND

Ms. MARTINEZ. Thank you very much, Senator.

Affirmative action quite clearly is a matter which directly or indirectly affects the life of virtually every American. Yet despite its pervasive impact, it is a concept which is widely misunderstood.

Specifically, I use it to refer to those race and sex conscious measures which are designed to insure that minorities and women participate in representative numbers in all aspects of our society.

However, I want us to be equally clear as to what affirmative action is not. It is not a system of inflexible quotas or mechanical formulae designed to give preference to minority or female candidates regardless of qualification.

It is fundamentally a remedy to redress the continuing effects of past discrimination. I think that the legality of such race and sex conscious remedies can no longer be questioned, particularly when you look at Supreme Court decisions such as *Regents of the University of California* v. *Bakke* and the *United States Steelworkers* v. *Weber,* which held that racial and ethnic quotas were permissible under title 7 of the 1964 Civil Rights Act where they were used in a manner which promoted the integration of an employer's work force.

Recently, we saw *Fullilove* v. *Klutznick,* where the Court upheld the provision of the Public Works Employment Act which provided that at least 10 percent of Federal funds granted for local public works must be used by State or local grantees to procure services or supplies from minority-owned businesses.

Despite its clear legality, however, affirmative action has been the subject of considerable controversy. Its detractors allege that it is inconsistent with the fundamental principles of American society, that its implementation is too costly, and that it results in reverse racism.

I would like to briefly address those three arguments.

First, the critics of affirmative action argue that it breaks with this Nation's fundamental commitment to assess individuals according to merit rather than their racial or ethnic characteristics. However, such an assertion is naive. It fails to consider the extent to which merit factors in any society are invariably tied to the social order.

As Terry Duster, a sociologist at the University of California at Berkeley, indicated, measures of merit have varied throughout history, and virtually without exception, they have been intrinsically connected to maintaining the position of the privileged members of the particular society.

The preoccupation with merit assumes that our Nation has historically functioned as a meritocracy. Such, of course, is far from the case. As Justice Blackmun stated with respect to school admissions programs in his opinion in *Bakke:*

> It is somewhat ironic to have us so deeply disturbed over a program where race is an element of consciousness, and yet to be aware of the fact, as we are, that

> institutions of higher learning . . . have given conceded preferences up to a point to those possessed of athletic skills, to the children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous, and the powerful.

Indeed, the espoused concern of affirmative action's detractors with the purity of the merit system seems somewhat disingenuous. One must remember that up until quite recently racial and ethnic considerations were utilized with impunity to deprive minorities of an equal share of the fruits of our society.

Another argument raised against affirmative action is that of exorbitant cost. I believe that argument to be overstated. While the University of Michigan may have spent $350,000 to develop an affirmative action plan, it spent $7.2 million to comply with regulations for the handicapped. The University of Illinois spent over a half a million dollars to correct a violation of the Occupational Safety and Health Act.

We do not contend that affirmative action programs are free of cost or that they need to be. We submit, however, that the costs attendant to affirmative action programs are quite insignificant when one considers the societal benefits generated.

Finally, the notion that affirmative action has resulted in reverse racism can be summarily dismissed, I think. Today's white males might be quick to protest that they should not be penalized for the oppression wreaked upon minorities by their grandparents or the grandparents of others. They are not so quick to recognize that they continue to benefit daily from those past acts of oppression.

In my judgment, the most significant shortcoming of the critics of affirmative action lies not in the logic of their arguments but in their apparent inability to see the long-range societal benefits of affirmative action.

We have cited in our testimony specific examples of modest progress that has been made because of affirmative action programs, for example, at the University of California at Santa Barbara.

These gains are truly modest. Yet their value should not be underestimated. Through mechanisms such as affirmative action, Hispanics and other minority members have been given a stake in this Nation's societal institutions.

However, even if one chooses to ignore these long-range benefits, it is clear that affirmative action must remain a viable concept so long as racism and discrimination continue to plague our society.

For the Mexican American and other Hispanic people, that moment has not arrived. The tradition of prejudice and discrimination against persons of Mexican descent is deeply rooted throughout the Southwest.

As the Supreme Court's 1954 decision in *Hernandez* v. *Texas* makes abundantly clear, systemic discrimination against Mexican Americans in the administration of justice has long been the rule. Similarly, segregation in public accomodations and facilities has also been quite commonplace.

In employment, discrimination has been equally pervasive. I cite in my testimony specific examples that I will not go into now to keep my presentation short.

Educational discrimination has also been an accepted fact of life. This legacy of bigotry and discrimination is far from being overcome. The gains of the last decade, although tangible, have not been sufficient to overcome the prejudice and discrimination which continue to permeate our society.

Thus it is clear to me that we must encourage, and in many instances require, the continued use of race and sex-conscious measures to promote the integration of our society. In doing so, I would hope we would keep intact the effects test articulated by the Supreme Court in *Griggs* v. *Duke Power*. It must remain as the cornerstone of Federal civil rights enforcement efforts.

In addition to the effects test, it is equally clear that future affirmative action efforts must continue to involve numerical goals and timetables so that we can measure whether or not there has been any significant progress.

I want to underscore again the difference between goals and quotas. It is more than merely a semantic distinction. The numerical goals to which I refer are essentially targets for the selection of otherwise qualified minority and female candidates. They are not rigid formulae which require the selection of protected class group members without regard to merit.

In sum, we believe there is a continued need for aggressive affirmative action efforts to insure that minorities and women are accorded equal treatment in our society.

In closing, I would like to say that you have been quoted, Senator, as saying about affirmative action that:

> If the Government officials and politicians who presided over its genesis had injected heroin in the bloodstream of the Nation, they could not have done more potential damage to our children and our children's children.

I would say to that that you are overlooking the Mexican-American and other Hispanic and minority children whose intellectual potential was wasted in inferior schools, who were condemned to lives of poverty, peonage, and prejudice. This is the damage that is done when there is no affirmative action. These are the injustices that will plague Chicanos and other minorities if you cut off one of the very few avenues to equality that minorities have gained in this country.

Thank you for your time.

[The prepared statement of Ms. Martinez follows:]

PREPARED STATEMENT OF VILMA S. MARTINEZ

My name is Vilma S. Martinez, and I am President and General Counsel of the Mexican American Legal Defense and Educational Fund (MALDEF). MALDEF is a national legal and educational organization devoted to protecting the civil rights of Mexican Americans. Currently, we have offices in San Francisco, Los Angeles, Denver, Chicago, San Antonio and here in Washington, D.C.; our primary areas of involvement include education, employment, immigration and voting rights. Given the nature of our work, we are keenly aware of the significance of the issues before this subcommittee today and appreciate the opportunity to testify at these hearings.

Affirmative action is, quite clearly, a matter which directly or indirectly affects the life of virtually every American. Yet despite its pervasive impact, it is a concept which is widely misunderstood. Initially used by Congress in 1935 to describe remedies for unfair labor practices, the term "affirmative action" did not become part of the lexicon of civil rights until the 1960's. At that time, it was primarily used to refer to a responsibility on the part of employers and educational institutions to affirmatively seek out minorities and women in order to ensure a representative applicant pool. Gradually, however, the concept has become more and more result-oriented, focusing upon the use of goals and timetables to guarantee adequate representation of minorities and females in the actual work force or student body rather than simply in the applicant pool.

It is in this latter, more result-oriented sense that I use the term "affirmative action" here today. Specifically, I use it to refer to those race and sex conscious measures which are designed to ensure that minorities and women participate in representative numbers in all aspects of our society. These measures entail more than merely assembling a representative applicant pool; they involve active consideration of race or sex as a positive factor in decisions with respect to minority or female candidates. Additionally, these efforts have usually been accompanied by some form of numerical assessment of an employer's or educational institution's progress toward integration.

From the outset, however, we should be equally clear as to what affirmative action is not. It is not a system of inflexible quotas or other mechanical formulae designed to give preference to minority or female candidates regardless of their qualifications. Even the most stringent of judicially or administratively ordered efforts, premised upon express findings of discrimination, do not require employers or educational institutions to disregard applicants' qualifications. Similarly, affirmative action is not a series of requirements which is arbitrarily imposed upon employers and educational institutions without regard to their past history vis-a-vis minorities and women. Rather, it is fundamentally a remedy to redress the continuing effects of past discrimination. In the final analysis, affirmative action is a collection of race and sex conscious remedies designed to ensure that otherwise fully qualified minorities are allowed to participate in those institutions in our society which have historically been closed to them.

The legality of such race and sex conscious remedies can no longer be questioned. To the contrary, in recent years, the United States Supreme Court has consistently held that such measures are both constitutionally and statutorily permissible. For example, in Regents of the University of California v. Bakke, the Court held that although Title VI of the 1964 Civil Rights Act does not permit the use of racial or ethnic quotas in the admissions policies of a state-operated medical school, the statute does permit the consideration of race or ethnicity as one of many factors in the admissions process. In United States Steelworkers v. Weber, the Supreme Court went even further, holding that racial and ethnic quotas were permissible under Title VII of the 1964 Civil Rights Act where they were used in a manner which promoted the integration of an employer's work force. Most recently, in Fullilove v. Klutznick, the Court upheld the constitutionality of a provision of the Public Works Employment Act which provided that at least 10% of federal funds granted for local public works must be used by state or local grantees to procure services or supplies from minority-owned businesses.

Despite its indisputable legality, however, affirmative action has been the subject of considerable controversy. Its detractors allege that it is inconsistent with the fundamental principles of American society; that its implementation is far too costly; and that it only results in "reverse racism" against white males. None of these arguments, however, will withstand close intellectual scrutiny.

For example, critics of affirmative action often argue that it breaks with this nation's fundamental commitment to assess individuals according to their merit rather than their racial or ethnic characteristics. Such an assertion, however, is at best naive. Initially, it fails to consider the extent to which "merit" factors in any society are invariably tied to the social order. As has been pointed out by Terry Duster, a black sociologist at the University of California at Berkeley, measures of merit have varied throughout history, and virtually without exception, they have been intrinsically connected to maintaining the position of the privileged members of the particular society.

Additionally, this preoccupation with merit assumes that our nation has historically functioned as a meritocracy. Such, of course, is far from the case. One need only take note of the influence which has long been exercised by "old boy" networks in order to understand that our society has traditionally allowed a variety of extrinsic factors to enter into employment and school admissions decisions. As Justice Blackmun stated with respect to school admissions programs in his opinion in Bakke:

> "It is somewhat ironic to have us so deeply disturbed over a program where race is an element of consciousness, and yet to be aware of the fact, as we are, that institutions of higher learning . . . have given conceded preferences up to a point to those possessed of athletic skills, to the children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous, and the powerful."

Indeed, the espoused concern of affirmative action's detractors with the purity of the merit system seems somewhat disingenous.

Most notably, we question whether their apparent unwillingness to consider racial and ethnic characteristics is a function of dearly-held principles or merely historical convenience. One must remember that up until quite recently, racial and ethnic considerations were utilized without impunity to deprive minorities of an equal share of the fruits of our society. Yet, it is only more recently, when racial and ethnic factors have been used to favor minorities, that many have found them incongruous with the American tradition.

The other arguments which have been raised against affirmative action can be refuted with even greater case. The contention, for example, that compliance with affirmative action regulations invariably occasions exorbitant costs is quite clearly overstated. Thus, while the University of Michigan may have spent $350,000 to develop an affirmative action plan, it spent $7.2 million to comply with regulations for the handicapped. The University of Illinois, for its part, spent over one-half of a million dollars to correct a violation of the Occupational Safety and Health Act.

No one would contend that affirmative action programs are free of costs. The regulatory process inevitably results in the imposition of financial burdens upon the regulated. We submit, however, that the costs attendant to affirmative action programs are quite insignificant when one considers the societal benefits generated.

Finally, the notion that affirmative action has resulted in "reverse racism" against white males can be summarily dismissed. As has been noted by a number of reputable social scientists, it is difficult to comprehend how affirmative action has generated such reverse discrimination when, in fact the vast majority of opportunities continue to go to white males. Moreover, while today's white males are quick to protest that they should not be penalized for the oppression wreaked upon minorities by their grandparents or the grandpartents of others, they are not as quick to recognize that they continue to benefit daily from those past acts of oppression.

The most significant shortcoming of the critics of affirmative action, however, lies not in the logic of their arguments but in their apparent inability to see the long-range societal benefits of race and sex conscious remedies. Although perhaps flawed, affirmative action programs have, in fact, become a valuable tool in our efforts to build a fully integrated society. For example, in a study of affirmative action in admissions at the University of California at Santa Barbara, Chicano sociologist David Leon found that in 1965, the number of blacks and Chicanos on that campus could be counted on the fingers of one hand. By the 1979-1980 fiscal year, however, 1,159 minority students, over or 7.4% of all undergraduates on that campus, had entered the institution through its special admissions program. Similarly, affirmative action programs launched in 1974 to improve the representation of Hispanics in California state employment have had significant effects. In that year, Hispanics comprised less than 5% of California's state employees. The latest state census, however, shows that Hispanics now comprise roughly 9.1% of such state employees.

Although these gains may appear modest, their value should not be underestimated. Through mechanisms such as affirmative action, Hispanics and other minority group members have been given a stake in this nation's societal institutions. One need only recall the violence and turmoil which rocked the inner-cities of this nation during the late 1960's to comprehend that such a stake is vital not only to the well-being of our minority communities but to the welfare of our nation as a whole.

Even if one chooses, however, to ignore these long range benefits, it is clear that affirmative action must remain a viable concept so long as racism and discrimination continue to plague our society. As previously mentioned, affirmative action is primarily designed to remedy those societal ills, addressing them on both an individual and an institutional level. As long as these problems persist, we see no basis for asserting that the time for race and sex conscious remedies has passed.

Clearly, for this nation's Mexican American people, that moment has not yet arrived. The tradition of prejudice and discrimination against person's of Mexican descent is deeply-rooted throughout the Southwest. As the Supreme Court's decision in Hernandez v. Texas makes abundantly clear, systemic discrimination against Mexican Americans in the administration of justice has long been the rule. Similarly, segregation in public accomodations and facilities has also been quite commonplace.

In employment, discrimination has equally been pervasive. For example, from the 1870's until the 1960's, copper mining companies in Arizona classifed laborers of Mexican orig. "Mexican labor" and paid them uniformly lower wages than those paid to their white counterparts. A 1930 study conducted in California found that jobs in which Mexican Americans tended to be employed were primarily seasonal in nature, had little potential for advancement, and were largely in undesirable locations.

Educational discrimination has also been an accepted fact of life. For example, Mexican American children, until relatively recently, were educated in separate and inferior "Mexican schools." A 1948 report by the Mexican Chamber of Commerce of Harlingen, Texas, describes one such Mexican school as characterized by broken windows, rooms without light, three inch cracks in the side of the building and loose celings "just about ready to fall". Additionally, public schools throughout the Southwest did little to adjust to the limited English language skills of many of their Mexican American pupils.

This legacy of bigotry and discrimination is far from being overcome. To the contrary, recent data continues to reflect the relative deprivation of Mexican Americans in our society. The United States Bureau of the Census, for example, reports that as of March, 1979, the overall unemployment rate for our nation was 6.1%; for Hispanics, it was 8.7%. For white youths, the unemployment rate was 12.5%; for Hispanic youth, it was 17.2%. In 1978, the median earnings figure for all non-Hispanic males was $12,300; for Hispanic males, it was $8,900. In that same year, the median earnings figure for all non-Hispanic females was $5,300; for Hispanic females, it was $4,700. Sadly, even today, over 20% of all Mexican Americans continue to live below the poverty level.

As these statistics make clear, the gains of the last decade, although tangible, have not been sufficient to overcome the prejudice and discrimination which continue to permeate our society. We must come to understand that a decade of remedial efforts is simply not enough to compensate for generation after generation of bigotry and deprivation.

In light of this situation, it is clear that we must encourage and, indeed, in many instances require, the continued use of race and sex conscious measures to promote the integration of our society. If we are to solidify and build upon the progress of the last few years, we must guarantee that affirmative action remains a viable concept. In particular, we must ensure that we strengthen those elements of affirmative action which have been pivotal to its success.

In this regard, I refer specifically to the continued need to utilize statistical measures of compliance, goals and timetables, and voluntary affirmative action programs.

The "effects test" articulated by the United States Supreme Court in Griggs v. Duke Power Co. and related statistical measures of compliance with federal nondiscrimination provisions must remain the cornerstone of federal civil rights enforcement efforts. Discrimination in its most overt forms is becoming increasingly rare in our society. Rather, it now more commonly manifests itself in the form of elaborate selection criteria and procedures which bear no real relationship to actual performance. The end result, however, is unmistakably the same--minorites and women are denied available opportunities.

Given these realities it is essential therefore, that the effects test, with its emphasis upon the relative statistical impact of particular practices upon minorities and women, remain a vital part of our jurisprudence. To impose upon plaintiffs the burden of proving motive or intent in this era of sophisticated, covert discriminatory practices would be tantamount to repeal of many federal nondiscrimination provisions.

Additionally, we should not lose sight of the fact that the effects test considers more than the statistical impact of a given practice upon protected class groups. Even those practices which have an adverse impact upon minorities or women can be utilized where an employer can, in fact, demonstrate that the practices in question bear a relationship to the responsibilites of the particular position. As such, any retreat from statistical measures of compliance would not only hinder the elimination of discriminatory policies, it would generate no real benefits for employers and the business community.

In addition to the effects test, it is equally clear that future affirmative action efforts must continue to involve numerical goals and timetables. Indeed, we doubt that affirmative action can function effectively without them. As a practical matter, such goals and timetables are the primary, and often the sole mechanism by which to ensure that employers and educational institutions are held accountable for their efforts in this area. Without them, the well-meaning will be left to flounder without any real measure of their progress toward integration while the more invidiously motivated will be allowed to evade their responsibilities by hiding behind such vague standards as "good faith" and "best efforts".

In this regard, we should also understand that the difference between "goals" and "quotas" is more than merely a semantic distinction. The numerical goals to which I refer are essentially targets for the selection of otherwise qualified minority and female candidates. They are not rigid formulae which require the selection of protected class group members without regard to merit.

Additionally, we stress that it is not unrealistic to expect that any given work force or student body contain a representative sample of minorities and women. To the contrary, we believe that in a society free of discrimination such a result would follow as a matter of course.

Finally, we note that if affirmative action is to remain a viable mechanism, voluntary programs must be allowed to continue effectively. To limit affirmative action efforts to those instances where a court or an administrative tribunal has made a formal finding of discrimination would only hinder its effectiveness. Essentially, such a restriction would only stifle the creativity of socially responsible employers and educational institutions while generating needless litigation and related legal proceedings.

In sum, we believe there is a continued need for aggressive affirmative action efforts to ensure that minorities and women are accorded equal treatment in our society. The problems which affirmative action was intended to remedy--prejudice and discrimination--are still very much with us, and so long as they remain, we see no reason to abandon what has, in effect, become the one workable mechanism in achieving their elimination. We would not argue that affirmative action is a simple solution or, indeed, that it is a perfect one. Undoubtedly, it has resulted in instances in which employers and educational institutions have had to contend with unrealistic bureaucratic demands. These isolated instances, however, should not lead us to lose sight of the fundamental soundness of affirmative action. In the final analysis, it has served as an effective tool in the integration of our society, and we should by no means abandon it in favor of patently less effective solutions.

Senator HATCH. Thank you. We appreciate your excellent statement, and the effort that you have put into it.

Clearly, however, the history of Hispanics in the United States and the history of discrimination against Hispanics in the United States is different, for example, from the history of blacks and discrimination against blacks. Yet you are urging that the same kinds of affirmative action programs be available to both blacks and Hispanics.

How precisely do we determine which minority groups are entitled to which kinds of affirmative action programs? Why Hispanics and not Poles, or Asians, or Armenians, or any number of other groups that we could come up with?

Ms. MARTINEZ. I would like to respond to those questions.

You have stated that in your judgment the discrimination against Mexican Americans is different from that against blacks.

Senator HATCH. Discrimination is discrimination, but I am saying I do think the history and the experience are different.

Ms. MARTINEZ. Yes, I want to address that because it is a very important point. I will address it by citing you to what our experience was in litigating school desegregation cases in the State of Texas.

Texas was a part of the Deep South and mandated the segregation of the children of the white and colored races by law. When MALDEF came into existence in the late 1960's, we went into court to try to desegregate the schools. We argued that by a State mandate we had been segregated and that under *Brown* v. *Board of Education* we were entitled now to a desegregated education.

The lawyers for the school board went into court and said, "Your Honor, we have always considered them white." However, we proved that they might have considered us white, but they had treated us colored. We proved that in every instance in which the segregation of Mexican race students into separate schools was challenged.

I submit, and I have argued this before in these halls, that the discrimination suffered against Mexican Americans is not considerably different from that suffered by blacks.

To your question of how does one determine what minority group is entitled, I would say there is a simple and yet difficult way to decide that. One can look to the rulings of the Supreme Court as to who have been the oppressed, discriminated against members of our society.

I am unhappy to report to you that one of those groups that has been so found to be an oppressed, discriminated against group is the Mexican-American group in the *Hernandez* v. *Texas* decision.

The Chief Justice of the Supreme Court in that decision held that:

> Persons of Mexican descent constitute a separate class distinct from whites and are consequently entitled to the aid of the courts in securing equal treatment under the laws.

He noted that:

> For many years, children of Mexican descent were required to attend a segregated school for the first four grades; that at least one local restaurant prominently displayed a sign announcing "No Mexicans Served;" and that on the court house grounds, there were two men's toilets, one unmarked and the other marked "Colored Men" and "Hombres Aqui."

There are other similar U.S. Supreme Court decisions which document the de jure pervasive systemic discrimination against Mexican race people.

Senator **Hatch**. I think we have to agree that that is so. However, do you not believe that the Civil Rights Act alone could remedy those problems? I personally believe strongly in the Civil Rights Act of 1964, as amended. Is that not sufficient to remedy the discrimination that you have been talking about?

Ms. **Martinez**. That is certainly part of the way. You are talking about the 1964 Civil Rights Act?

Senator **Hatch**. Yes.

Ms. **Martinez**. Clearly, but I gather that you would give that act a different interpretation from the one that I would give it.

Senator **Hatch**. I don't know about this. I just do not believe that that act, its spirit, its tenor, its legislative history or any other of its aspects indicates that preference can be shown to any particular class of people. That act says there should be no discrimination based on race, sex, national origin, religion, or whatever. No discrimination, period.

That is my point. I think we ought to enforce the Civil Rights Act of 1964; we should not make exceptions by giving preferential treatment to some groups.

However, I am listening to you. You have raised some good points.

Let me ask another question. In recent years, I recall reading stories in the newspapers about individuals who have made great efforts to adopt Spanish surnames, for example, the surname of their mother—in order to qualify for various affirmative action programs. I think you may have read some of those reports also.

Could you tell me precisely who is a "Hispanic" in the sense that he or she would qualify for Government affirmative action programs? How important are surnames? Must both parents be Hispanic? Must there be a Mexican heritage, or is any country south of the U.S. border sufficient? Who determines this definition?

Ms. MARTINEZ. I think the Government has taken an effort at determining the definition. They have used the term Hispanic. It has been interpreted to include Mexican Americans, Puerto Ricans, and Cubans. In some instances, many people have used Spanish surnames. I agree there has been some misuse of that in terms of people all of a sudden changing their name. I do not condone that, Senator.

However, I would have to say that I would not be in favor of an apartheid system and definition of who belongs to what race of the sort that you see in South Africa. I am in favor of letting people self-designate even though there is a potential for some abuse.

Senator HATCH. Is MALDEF satisfied by the administration of affirmative action programs by agencies such as the EEOC, the OFCCP, and the Justice Department's Civil Rights Division? Are there any major recommendations that MALDEF would make about the past policies of these agencies?

Let me tell you what prompts that question. I have had a number of Hispanics come into my offices both here and in Utah, and tell me that they do not feel that the EEOC operates to protect their interests. They feel that the EEOC exists primarily to protect blacks and not them.

Are you satisfied that there is fair treatment by these agencies? Even if we assume that present affirmative action programs work, and are for the benefit of society, do you feel that the EEOC has treated Hispanic Americans fairly with the other minority groups?

Ms. MARTINEZ. Let me answer by saying that the EEOC, the Department of Justice, and the OFCCP are not perfect institutions. Yet that is what we as a society have been able to fashion to redress real wrongs in our society. There have been tensions and it would be foolish of me to deny tensions between the various protected groups, women included. Yet I think all of us would come to the defense of the EEOC, the Department of Justice, and the OFCCP even though on occasion we might say we are less than satisfied with their performance with respect to one particular group.

To answer you more fully, if I may, I would prefer to write you my thoughts and supplement my record because I think you have asked me a very important question and I do not want to dismiss it lightly.

Senator Hatch. I appreciate that. It is an important question. I have had a number of complaints from various groups that there is simply not equality of treatment in the administration of affirmative action programs; even though they support affirmative action, they believe that preferences are shown among "protected groups."

One of the problems I see with affirmative action programs is that they seem to apply only to those groups that have enough political influence to receive the preferences.

Is that fair to minority groups that do not have the influence?

By 1990, or maybe a bit later than that, Hispanic Americans will outnumber blacks in this country. Does that mean that the blacks are going to be increasingly dissatisfied with affirmative action programs? Will I have many blacks coming into my office saying that the EEOC or OFCCP act primarily in the interest of other minority groups?

These are problems; aren't they?

Ms. Martinez. Absolutely. No one is here saying that affirmative action has worked equally fairly, justly, administratively well, or beautifully. No one would say that. We are all too experienced and seasoned to say anything like that.

However, we are contending that affirmative action is necessary to mainstream minorities. I want to differ with your analysis that only those with political swat get covered.

Senator Hatch. I did not mean to say it precisely that way.

Ms. Martinez. We do not have much political swat. We did not have any in 1954.

Senator Hatch. That is not precisely what I meant.

Ms. Martinez. That is how it sounded to me.

Senator Hatch. I am sorry if that is the way it sounded. What I am saying is that there has been a great deal of criticism by minority groups themselves that those who have the most political influence seem to receive the best treatment. This is not primarily my own criticism, but that of minority groups themselves—although they believe, as you do, that affirmative action may be the best way to resolve social inequities.

Ms. Martinez. What you just said is really what I wanted to say. We believe that this is the way to resolve the inequities. The system is itself imperfect. The administration of it is imperfect. I would be happy to work with you, to work with the EEOC, the DOJ, and the OFCCP to make it a more nearly perfect system. We all want that. I think the entire society would benefit from that.

In closing, I would like to say that you have spoken a lot about the Civil Rights Act and preferences for special groups. I would like to say that I disagree with your analysis of preference and disagree with your analysis of what the Civil Rights Act is and how it should be interpreted.

You would give it a more restrictive interpretation than I. I think that is why lawyers are in such great demand in this particular area.

Senator Hatch. This may be. My view is that there should be no discrimination or preferential treatment: and we ought to treat all people equally and we ought to enforce existing civil rights laws.

That is my present thinking. I am listening to and am interested in hearing other views.

I do not claim to be the fount of all wisdom in this area. Nor am I absolutely positive that my position is absolutely correct. A major purpose of these hearings is to promote debate and dialogue—debate and dialogue among all points of view.

On the Labor Committee in addition we are going to hold oversight hearings of the OFCCP next month.

I have seen the polls and you have seen the polls. As in any poll, it depends on the questions. I am not that caught up in polling unless I am pretty sure the questions have been fair. However, I have seen the polls where even a majority of minorities are against affirmative action programs.

I think affirmative action is something we have to continue to discuss. I want to commend you for being willing to come here and express your views. I think you have done so forthrightly and effectively.

I cannot however say that you have been persuasive to me personally, but I am willing to keep listening. I would appreciate the additional materials that you are going to send to me. Thank you very much.

Ms. **Martinez**. Thank you.

Senator **Hatch**. Senator Thurmond?

Senator **Thurmond**. I am in another committee and I just dropped by for a few minutes. I will read the testimony. We are very pleased to have all of you come and testify as we wish to hear both sides of the question and get all views.

Ms. **Martinez**. We appreciate it.

Senator **Thurmond**. Thank you.

Senator **Hatch**. Thank you, Mr. Chairman.

Did you have one other comment?

Ms. **Martinez**. I just wanted to say to you, Senator Hatch, that I appreciate your invitation. I appreciate our dialogue. I want to say that I agree that the Government should not discriminate. If we had a perfect society, then we could ignore racial characteristics and ethnic origin. However, I did not grow up in such a world or country. I do not believe we have such a country now.

Senator **Hatch**. I do not know that we will ever achieve perfection.

Ms. **Martinez**. Since we do not have this perfect world, I think we still need to find a way to redress past discrimination against racial and ethnic groups. You need to be race conscious to be able to do that, pragmatically speaking. That is where I think you and I differ and fail to persuade one another.

Senator **Hatch**. You have been very effective in your comments this morning. I do appreciate them. I have been active in raising the affirmative action issue primarily for the purpose of establishing dialogue and debate. I intend to continue to do so. To the extent that people who support affirmative action can help me answer some of my concerns, I would be appreciative. I am very sensitive to the history of discrimination in this country, and the need to overcome its effect.

My own preference is to enforce the Civil Rights Act of 1964 as amended—colorblind public policies. I say let us do it that way. However, there are those who are saying that this is inadequate and will simply perpetuate discrimination and social inequities. These are difficult issues that I am still very concerned about.

I acknowledge that the quote you attributed to me was somewhat excessive. Its purpose was to communicate my view that the longer that affirmative action policies continue the more that their beneficiaries look upon them as entitlements, and the more difficult it is to reverse or eliminate them.

Ms. MARTINEZ. Thank you. I do appreciate that.

Senator HATCH. It was somewhat excessive. I do see some value, however, in generating a focus upon this issue. I think you have done well here today and I appreciate your coming.

Ms. MARTINEZ. Thank you, but I think people are already excited about it.

Senator HATCH. Maybe you are right. For any misunderstanding, I apologize.

Ms. MARTINEZ. Thank you.

Senator HATCH. Thank you.

Our next witness will be professor Miro Todorovich. Professor Todorovich is the executive secretary of the University Center for Rational Alternatives, an organization of university professors concerned about the growth of affirmative action programs and policies. Many of the leading academic thinkers in the United States are sponsors of the center.

Professor Todorovich is a professor of physics at the City College of New York. We are very happy to have you with us and we will be interested in your comments here today.

STATEMENT OF MIRO TODOROVICH, UNIVERSITY CENTER FOR RATIONAL ALTERNATIVES

Mr. TODOROVICH. Senator, I prepared something that is much longer than the time allows.

Senator HATCH. I notice that you have put a lot of effort into this. We appreciate that, as we do for all our witnesses. Your complete statement and attached documents will be put into the record following your oral statement.

Mr. TODOROVICH. Thank you. I will try to pare it down to 10 minutes. Of course, as you know, for professors, that is somewhat difficult. We talk in spurts of 50 minutes and then the bell rings, but I will try to do my best.

I thank you for inviting me to speak about affirmative action today. To begin with, I have to explain why I, Miro Todorovich, an immigrant from Yugoslavia and a physics professor at City University of New York, should testify before a Senate subcommittee considering the reevaluation of affirmative action, a principle that has grown up around the effort of the Federal Government to extend equal opportunity to all.

During the political and social turmoil in my native country, the prospect of unlimited opportunity in the United States served as a beacon for my own hopes and aspirations. I followed that beacon and I am a living testimony to the fact that the United States is not a closed society but does extend opportunities to all who are willing to reach for them.

I will be forever grateful for a chance to raise my family and to pursue my career in political and social freedom. There are numerous reasons why I should be for a Government policy as high minded and idealistic as affirmative action in order to make sure that no minorities, either racial or religious, disadvantaged groups, or other victims of our competitive and complex society are excluded from opportunities.

First, my whole concept of education in theory and practice and the years I have spent teaching physics in the City University of New York revolve around the process of seeking out and helping students of all ages, races, nationalities, and creeds to understand the scientific explanations of the universe.

Second, the future of my two college-age children, a girl and a boy, depend on their right to the educational opportunities they can earn with their dedication and hard work. I want to be very sure that no door will close on them because of their ancestry, and that they will be treated no differently from any other candidates for whatever they aim for.

Third, any acceptable theory of education will have at its roots the idea of reaching out to inspire all developing individuals. As education is practiced today at our colleges and universities, affirmative action is part of every professor's daily routine.

Why then am I before this committee testifying against current affirmative action policies when I have such powerful reasons as a recent immigrant, as a father of two children, and as a college professor to support affirmative action? Why then am I here?

My reason is that affirmative action, as currently practiced, violates all the ethical presuppositions that inspired its initial promulgation. It substitutes for the invidious discrimination of the past new forms of discrimination in the present.

Instead of recognizing that merit should be the basic criterion of consideration in selection and appointment, it makes a mockery of merit by insisting that quotas, miscalled numerical goals and based on race and sex, guide selection, appointments, and even interviews.

Mr. Chairman, I would support a policy of forcing college students to wear body suits with only a slit open at the top to breathe and ask questions in class in order to make sure that they all get treated equally before I would agree to the remedies and regulations hatched by the EEOC and the countless other bureaucratic agencies of this fair city.

I hope that this strong language brings the point across. I would like to assure you, Mr. Chairman, that I have put more than a decade of unremitting thought and effort into this issue in active consultation with some of the Nation's finest and fairest academic minds.

This condemnation of the current policies promulgated in the name of affirmative action is based on a reaffirmation, not repudiation of the principle of equal treatment under just law.

Thus I speak for a much broader consensus as executive secretary of University Centers for Rational Alternatives, an organization of university professors active in educational policy since the late 1960's. To my personal reasons for being here, I now have to add an explanation of the organization I represent at these hearings.

UCRA was formed in a climate of intense pressure to combat campus violence and disruption and to provide faculty members concerned with maintaining academic order in universities with a rallying point and organizational structure.

Under the leadership of Sidney Hook, Paul Seabury, Abba Learner, and others, and with the support of then Professors Hayakawa, Moynihan, Brzezinski, Ackley, Friedman, Bettleheim, and many others, UCRA managed to unite a considerable number of distinguished scholars and teachers behind the principle that academic values, particularly the freedom to learn and the freedom to teach, should have primacy over radical politics.

UCRA can proudly claim partial credit for the categorical rejection by responsible faculty of attempts to close universities, or to transform them into beachheads for extremist thought.

After the violence subsided, UCRA put to good use the brainpower it had organized. It sponsored a series of conferences to reexamine the basic assumptions of the academy.

Yet while we were defending the viability of the academy after the firestorm of student activism in the volatile political climate of the early 1970's, a new and unexpected threat to the university appeared on the horizon in the guise of the concerned Federal regulator.

The university, which had withstood the onslaught of radical students quite well, was no match for the awesome power of the governmental bureaucrats who started dictating specific educational policies and manipulating purse strings as early as the first Nixon administration.

With a growing sense of horror, many of us in the academy watched what can only be called systematic educational vandalism against the universities. Although we saw it coming, our combined academic weight was powerless against the Federal apparatus, not that we did not put up a good fight.

It was, for example, the resolute opposition of the university faculties which prevented one of the most onerous bureaucratic dicta such as the infamous "least qualified incumbent clause" of the revised order No. 4.

As early as 1971, Prof. Sidney Hook warned us of the coming danger. In assessing the role of HEW in regulatory excesses, Professor Hook states:

> Its activities in the field of higher education are not only a waste of time, effort, and taxpayer's money but debasing educational standards as well. It is bringing confusion and conflict into an area where, prior to its intervention, the issues were well understood and where voluntary efforts to hire qualified women and members of the minorities were being made with increasing success.

Would that we could see the issues as clearly today after a decade of experience with them as we saw them at that time.

We were steam rollered by the Labor Department, HEW, the Office of Federal Contract Complance, the EEOC, and other, and last and least by Stanley Pottinger and Eleanor Holmes Norton.

As Greek and Roman bones bleached at Thermopylae and the Teutoburgerwald respectively, so the bones of academic traditions bleach between the gleaming towers of our newly regulated universities.

From this material that I included in the testimony, you can see that UCRA's early warning system was functioning quite well. Fair warning, alas, was not enough to prevail in *Bakke, Weber,* and *Fullilove,* or to win any number of other legal and bureaucratic skirmishes. Perhaps now, in a dramatically altered national political climate, we can be dispassionate about political ideas and attempt a sober assessment of current affirmative action policy.

The debate has been raging for 13 years, and in its course promises were made about the ultimate effect of these policies. At the same time, predictions were made about the ultimate effect of these policies that contradicted these promises.

My friend and colleague from Kenyon College, Professor Baumann, calls this the six false promises and practices of affirmative action, and I want to give credit where credit is due since it is an unusually clear formulation of the problem.

I am listing them in order. One, the promise was made that affirmative action will demand only that we act without regard to race, gender, and ethnic origin, and does not mean preference and quotas. Practice has established that affirmative action, as defined by the bureaucracy, necessarily means preference and quotas.

Two, the promise was made that affirmative action will effectively and swiftly correct imbalances in opportunity. Practice has established that affirmative action is ineffective unless enforced with so draconian measures as to be unconstitutional.

Three, the promise was made that affirmative action is justifiable because temporary. Practice has established that affirmative action is far from temporary. Groups and bureaucrats have developed a professional interest in its preservation.

Four, the promise was made that affirmative action will be limited to the most obvious and morally justifiable cases, particularly that of blacks. Practice has established that by nature of interest group politics, the privileges of affirmative action spelled out in the Federal regulations are sought and gained by all groups willing to practice confrontation politics.

Five, the practice was made that affirmative action will expand the rights of individuals and it will not involve arrogation of unjustified authority by the State. Practice has established that affirmative action has necessarily led to the arrogation of power by all levels of government since it necessarily results in the ultimate destruction of equal opportunity and its replacement by privileged access to Governmental favor.

Six, the promise was made that affirmative action is a necessary tool to combat a racist society and it will lessen racism. Practice has established that affirmative action has created racism where there was none and discredited the civil rights and equal opportunity movement in the eyes of former sympathizers.

We are lacking the time here to consider each point in the detail it deserves. Perhaps I should now focus on specific examples from my own professional field. In the testimony, we describe at some length the *Dinnan* case, which many of you have already heard. It really generates from affirmative action demands that the faculty be adjusted so to reflect certain predetermined numbers.

As most of you know, Professor Dinnan spent 3 months in jail for this reason and is now still in legal limbo.

In many respects, the *Dinnan* case represents only the tip of the proverbial regulatory iceberg. For example, the Time article on Dinnan also discusses the Berkeley negotiations with the Labor Department about the confidentiality of university records, again mandated by affirmative action. The university was left with less than a figleaf protection, particularly if one remembers that governmental files have become accessible to everyone via the Freedom of Information Act.

For example, few institutions of higher learning have tried to do more in the affirmative action area than my own CUNY system in New York. Yet a discovery proceeding has been initiated by a disappointed candidate for tenure despite statutory institutional safeguards that are extravagent by any measure.

The *Dinnan* case figures prominently in the arguments of the plaintiff, and the question of discovery of confidential vote is now before a New York Federal judge.

What is the relationship between the constitutional and statutory guarantee of equal opportunity and all these examples of unnecessary and expensive and vengeful litigation?

For almost two centuries, well-established peer procedures have served institutions of higher learning and the profession very well and have propelled American education and science to a recognized level of excellence.

How come then do professors have to waste so much time, and even risk their personal liberty these days, for matters which have little connection with their educational process? I shall venture the hypothesis that a combination of ambiguous laws, regulation happy officials, and an errant judiciary operating on constitutional quicksand have produced the current nightmare.

How was this possible? We can only wonder. The language of the various titles of the Civil Rights Act of 1964 would seem to limit enforcement to cases of overt, clear-cut, and provable racism.

The Executive Order 11246, which deals with affirmative action and which reads in its significant part:

> The contractor will take affirmative action to ensure that all applicants are employed, and that employees are treated without regard to their race, creed, color, or national origin * * *

Specifies only that race, sex, creed, color, or national origin shall have no part of employment decisions.

Legal practice, however, managed to create a climate of guilt, leading often to an open presumption of guilt on the part of employers, supervisors, and the institutions they represent based on factors and arguments that have nothing to do with civil rights.

The framers of the Civil Rights Act of 1965, and especially its opponents, foresaw this possibility and did their best, both in the actual language of the act and in the debate in Congress, to forestall the very abuses which I am in the process of describing.

The Smathers doctrine, which was enthusiastically endorsed by the late Senator Hubert Humphrey and even lauded as the "philosophy behind" significant titles of the Civil Rights Act of 1964, was formulated by opponents of the act specifically to forestall the imposition of onerous burdens on those who will operate under the act.

The relevant passage bears repeating although I fervently hope that this language is indelibly etched in the memories of anybody concerned with affirmative action:

> Nothing contained in this title shall be interpreted to require any employer to grant preferential treatment to any individual or any group on account of an imbalance which may exist with respect to the total number of persons of any race, color, religion, sex, or national origin employed by any employer.

In retrospect, we must admit that Senator Smathers was right, prophetically right, about how the act would eventually be used. Unfortunately, he was apparently dead-wrong when he thought that clear language would fix anything. Even the Weber court did not want to take the good Senator and his colleagues at their word.

This example should teach us something about putting legislation in place with appropriate safeguards by which to control its ramifications. We should learn that at this time legislators appear powerless, their political skills notwithstanding, in the face of legal strategies that can turn a law that merely prohibits certain action into a law that mandates the same actions.

Thus a simple prohibition against racism and bigotry in the workplace and in public institutions was turned into a mandate for quotas, goals, and timetables. Again, the rhetorical question: How was this possible?

I hope that I am giving you a clear picture that the legal ramifications of the laws are giving us trouble. Thus it does no good to go back to the law and orders, to look at the language and say that they are good enactments that ring true, and then rest easy, secure in the knowledge that all is right in the Nation with such reasonable and wise laws.

Similarly, it does no good to say that affirmative action is a compassionate idea that we all should support without looking at the pernicious nonsense that is promulgated with those laws and orders.

What can be done? Today I will restrict my comments to a few ideas on possible remedies of the harm that has been visited on the academy and, by extension, the Nation with these policies.

There is no alternative but to return to the proper and original policy of equality of opportunity and justice, the affirmation of color-blind equality of individual rights. This is so very true because much of our difficulties result from the wrong premises of the bureaucrats that equal opportunity is not enough to overcome the evil effects of past discrimination.

Indeed, numerous properly conducted studies show that genuine equal opportunity, while its results may not be overnight and while equality of result is never mathematical, does work as well for blacks as it has for whites.

What we need is a concentration on more opportunity, not goals and timetables, since it was opportunity and opportunity alone that has brought about the assimilation of disadvantaged groups of the past into the mainstream of our complex society.

Only then can we show the racists in our society up for the selfish, dishonest, political radicals that they are. Only then do we have a chance to come to the argument with clean hands.

This, in turn, means a return to the proper, Lincolnian traditions of constitutional democracy where rights are a barrier against the omnipotent state and not a subterfuge for the omnipresent state.

May I digress just for a moment from the text to again refer to the statements that are often made—I heard them again today—about the proverbial white males. I mentioned to you that I am a newcomer to these shores from a faraway state in the Balkans. I also remember that at a time the Balkans were suffering under a foreign oppressor when navies guided by people under Spanish surnames were ruling the world.

Mr. Chairman, you mentioned the Armenians before who were subjected to many atrocities which should be well-known to everyone.

All of them can be classified as white males. How come then that I have, in a certain sense, to come to this chamber and be pointed at with a finger as if the myths that are being promulgated about males and whites being always privileged and that others were not are true? I would feel very comforted if at some point some of these thoughts would permeate some of the debates that are later published in the Federal Register or the Congressional Record.

I also want to note that some of the most famous court cases of these days, the *Bakke*, the *Weber*, and the jailing of Dinnan, are not named by people whom some claim are the victims today. I would rather say that it is people who are the victims of these thoughtlessly expanded regulations are those who have to resort to the courts and try to get some justice.

Coming back to the possible remedies, they do not necessarily require a constitutional amendment. For example, one has only to do away with the revised order No. 4, and the executive order of the President could stand with slight modification.

Does this mean doing away with affirmative action entirely? Of course not. The original 1965 requirements, while philosophically debatable, are quite reasonable and can be readily implemented; for example, the requirements to cast the net as broadly as possible when looking for candidates.

As far as the universities are concerned, UCRA has on numerous occasions offered suggestions which might be useful on formulating an approach that places the best of the present cogerie of programs into the context of a genuine nondiscrimination plan. These proposals are outlined in considerable detail in my testimony.

Let me just conclude. It is very unfortunate that to a large extent the present difficulties may have originated from a spirit of implacable mistrust which expresses itself in the belief that no group of expert academics can be trusted to be fair to women and minorities.

In truth, however, this objection is without merit. The very fact that Federal guidelines speak of remedying underutilization and not of correcting discrimination indicates that the problem all along has been one of inadequate supply. The absence of substantial pools of unemployed academic women and minorities in the past, in contrast to significant numbers of un- or under-employed white male Ph. D.'s, substantiates this.

Even where it can be presumed that there was a department or a dean who discriminated or would like to on the basis of, but not limited to, race, sex, religion, or national origin, it is wholly unrealistic to think that among the range and scope of American academics, none can be found who will be fair to a complainant.

The thoroughgoing suspicion that refuses to cooperate with those who are to be regulated and which seeks to treat them as guilty in principle cannot possibly lead to nondiscrimination in an area in which so much depends on consideration of professional merit as judged by peers. It is absolutely necessary for the future that regulations be replaced by a spirit of mutual respect, trust, and cooperation.

I would like to close with a peculiarly striking bit of logic that Prof. Sidney Hook offered to the Office of Federal Contract Compliance during hearings on the revised order No. 4 some years ago:

> If universities are urged to select the most qualified candidates, regardless of race, sex, or ethnic origin, how in heaven's name can they strive to achieve numerical goals? The most qualified person is always an individual person. How can one guarantee any particular numerical distribution? Suppose we were to proclaim, as we should, that in tryouts for any position on any team we shall select the most qualified person regardless of race, sex, or ethnic origin? And suppose we did so? Would that lead to any proportional representation whether racial, sexual, or ethnic? Obviously not. The implication is clear that whoever defends quotas or numerical goals of any variety cannot sincerely or consistently believe that universities should "select the most qualified candidates, regardless of race, sex, or ethnic origins."

My friends and colleagues in UCRA and I sincerely hope that the Congress will muster the necessary wisdom and resolve to remove the noneducational impediments from our educational process and thus permit us to resume with all our faculties our scholarly work.

As citizens, of course we are dutybound to obey all laws of the land, and the devotion of our profession to equality and equal opportunity has been amply demonstrated. We are convinced, however, that there need not be any conflict between good citizenship and superior scholarship. I trust that the senators share this view.

Thank you very much for your attention.

[The prepared statement of Mr. Todorovick and additional material follow:]

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PREPARED STATEMENT OF PROF. MIRO TODOROVICH

Ladies and Gentlemen, I would like to thank Senator Hatch for inviting me to speak to you about Affirmative Action this morning.

To begin with, I have to explain why I, Miro Todorovich, an immigrant from Yugoslavia and a Physics Professor at City University of New York should be testifying before a Senate Subcommittee considering a reevaluation of "Affirmative Action," a principle that has grown up around the effort of the Federal Government to extend "Equal Opportunity" to all. During the political and social turmoil in my native country the prospect of unlimited opportunity in the United States served as a beacon for my own hopes and aspirations. I followed that beacon and am a living testimony to the fact that the United States is not a closed society, but does extend opportunities to all who are willing to reach for them. I will be forever grateful for a chance to raise my family and pursue my career in political and social freedom. There are numerous reasons why I should be for a government policy as high-minded and idealistic as "Affirmative Action" in order to make sure that no minorities, either racial or religious, disadvantaged groups or other victims of our competitive and complex society are excluded from opportunities. First, my whole concept of education, in theory and practice, and the years I have spent teaching physics in the City University of New York, revolve around the process of seeking out and helping students of all ages, races, nationalities and creeds to understand the scientific explanations of the universe. Second, the future of my two college age children, a girl and a boy, depend on their right to the educational opportunities they can earn with their dedication and hard work. I want to be very sure that no door will close on them because of their ancestry, and that they will be treated no differently from any other candidates for whatever they aim for. Third, any acceptable theory of education will have at its roots the idea of reaching out to inspire all developing individuals. As education is practiced today at our colleges and universities, affirmative action is part of every professor's daily routine. Why then am I before this committee testifying against current Affirmative Action policies, when I have such powerful reasons as a recent immigrant, as a father of two children and as a college professor to support Affirmative Action? Why then am I here?

My reason is that Affirmative Action as currently practiced violates all the ethical presuppositions that inspired its initial promulgation. It substitutes for the invidious discrimination of the past new forms of discrimination in the present. Instead of recognizing that merit should be the basic criterion of consideration in selection and appointment, it makes a mockery of merit by insisting that quotas miscalled numerical goals, based on race and sex, "guide" selections and appointments and even interviews.

Mr. Chairman, I would support a policy of forcing college students to wear body suits with only a slit open at the top to breathe and ask questions in class in order to make sure that they all get treated equally before I would agree to the remedies and regulations hatched by the EEOC and the countless other bureacratic agencies of this fair city. I hope that this strong language brings the point across. I would like to assure you, Mr. Chairman, that I have put more than a decade of unremitting thought and effort into this issue, in active consultation with some of the nation's finest and fairest academic minds. This condemnation of the current policies promulgated in the name of Affirmative Action is based on a reaffirmation, not repudiation of the principle of equal treatment under just law.

Thus I speak for a much broader consensus as Executive Secretary, of University Centers for Rational Alternatives, an organization of university professors active in educational policy since the late sixties. To my personal reasons for being here I now have to add an explanation of the organization I represent at these hearings. UCRA was formed in a climate of intense pressure to combat campus violence and disruption and to provide faculty members concerned with maintaining academic order in universities with a rallying point and organizational structure. Under the leadership of Sidney Hook, Paul Seabury, Abba Lerner and others, and with the support of then professors Hayakawa, Moynihan, Brzezinski, Ackley, Friedman, Bettleheim and many others, UCRA managed to unite a considerable number of distinguished scholars and teachers behind the principle that academic values, particularly the freedom to learn and the freedom to teach, should have primacy over radical politics.

UCRA can proudly claim partial credit for the categorical rejection by responsible faculty of attempts to close universities or to transform them into beachheads for extremist thought. After the violence subsided, UCRA put to good use the brainpower it had organized: it sponsored a series of conferences to reexamine the basic assumptions of the academy. Yet while we were defending the viability of the academy after the firestorm of student activism in the volatile political climate of the early seventies, a new and unexpected threat to the university appeared on the horizon in the guise of the "concerned" federal regulator.

The university, which had withstood the onslaught of radical students quite well, was no match for the awsome power of the governmental bureaucrats who started dictating specific educational policies and manipulating purse strings as early as the first Nixon administration. With a growing sense of horror, many of us in the academy watched what can only be called systematic educational vandalism against the universities. Although we saw it coming, our combined academic weight was powerless against the federal apparatus.

Not that we did not put up a good fight. It was, for example, the resolute opposition of the university faculties, which prevented one of the most onerous bureaucratic dicta such as the infamous "least qualified incumbent clause" of the Revised Order No. 4. As early as 1971, Prof. Sidney Hook warned us of the coming danger. In assessing the role of HEW in regulatory excesses, Prof. Hook states: "...its activities in the field of higher education are not only a waste of time, effort, and the taxpayer's money but debasing educational standards as well. It is bringing confusion and conflict into an area where, prior to its intervention, the issues were well understood and where voluntary efforts to hire qualified women and members of minorities were being made with increasing success." Would that we could see the issues as clearly today, after a decade of experience with them as he saw them back then.

We were steam-rollered by the Labor Department, HEW, the Office of Federal Contract Compliance, the EEOC _et. al_., and last and least by Stanley Pottinger and Eleanor Norton Holmes. As Greek and Roman bones bleached at Thermopylae and the Teutoburgerwald respectively, so the bones of academic traditions bleach between the gleaming towers of our newly regulated universities.

At this point I would like to enter into the record a series of articles on Affirmative Action, written by Prof. Hook in the early seventies for UCRA's publication, Measure, since I feel that the consistency of his viewpoint and his long years in the academy make him a unique chronicler of the evolution of the issues. (YOU WILL FIND THESE DOCUMENTS IN APPENDIX A AT THE END OF THIS TEXT.)

From this material you will be able to see that UCRA's early-warning-system was functioning quite well. Fair warning, alas, was not enough to prevail in Bakke, Weber, and Fullilove, or to win any number of other legal and bureaucratic skirmishes. Perhaps now, in a dramatically altered national political climate, we can be dispassionate about political ideas and attempt a sober assessment of current Affirmative Action policy. The debate has been ranging for thirteen years, and in its course, promises were made about the ultimate effect of these policies. At the same time, predictions were made about the ultimate effect of these policies that contradicted these promises. My friend and colleague from Kenyon College, Professor Fred Baumann calls this the "Six False Promises and Practices of Affirmative Action," and I want to give credit where credit is due since it is an unusually clear formulation of the problem that I would not mind seeing on the editorial page of the New York Times tomorrow morning:

The promise was made that Affirmative Action will demand only that we act without regard to race, gender, and ethnic origin and does not mean preference and quotas.
Practice has established that Affirmative Action, as defined by the bureaucracy, necessarily means, preference and quotas.

The promise was made that Affirmative Action will effectively and swiftly correct imbalances in opportunity.

Practice has established that Affirmative Action is ineffective unless enforced with so Draconian measures as to be unconstitutional.

The promise was made that Affirmative Action is justifiable because temporary.
Practice has established that Affirmative Action is far from temporary. Groups and bureaucrats have developed a professional interest in its preservation.

The promise was made that Affirmative Action will be limited to the most obvious and morally justifiable cases, in particular, blacks.
Practice has established that by nature of interest group politics, the privileges of Affirmative Action spelled out in the Federal Regulations are sought and gained by all groups willing to practice confrontation politics.

The promise was made that Affirmative Action will expand the rights of individuals; it will not involve arrogation of unjustified authority by the state.
Practice has established that Affirmative Action has necessarily lead to the arrogation of power by all levels of government since it necessarily results in the ultimate destruction of Equal Opportunity and its replacement by privileged access to governmental favor.

The promise was made that Affirmative Action is a necessary tool to combat a racist society; it will lessen racism.
Practice has established that Affirmative Action has created racism where there was none and had discredited the Civil Rights and Equal Opportunity movement in the eyes of former sympathizers.

I will not keep the panel in suspense; all six promises have evaporated and have been replaced by pernicious bureaucratic practices. However, we are lacking the time here to consider each point in the detail it deserves, and perhaps, I should now focus on specific examples from my own professional field.

History is boring, especially if it is a list of missed opportunities, and I do want to be an interesting witness and serve you up a nice bureaucratic/judicial atrocity, carried out in the name of Affirmative Action. Thus I hope to focus your attention and to clarify the problems with this legislation not with abstract arguments about obscure principles, but by presenting a specific case. This example, in particular, clearly shows how a superficially simple complaint concerning a tenure decision can mushroom into a legal tornado, because of bureaucratic and regulatory involvement of government, a tornado which touches down in the most unlikely places, creating havoc for individuals, families and institutions. Thus I wish to bring to your attention a specific outrage perpetrated by the EEOC and by a NEA financed attorney, with the anxious compliance of the local and national AAUP and under the auspices of a Federal District Judge who was unwilling to grant professional competence outside his own embarrassingly narrow sphere, to a professor from the University of Georgia. You can take this case, Gentlemen, and multiply it time and again - different circumstances - the same result: a routine employment decision becomes a federal case by regulatory fiat. The effort of warding off hostile attorneys, measured in money, time, noxious publicity and stressful emotions, once one has entered the arena, voluntarily or not, is one of the great risks of positions of responsibility today. I am referring to the jailing for three months last summer of Prof. James Dinnan for refusing to reveal his vote in a confidential tenure decision which acquired Affirmative Action overt[illegible]. By thinking through the implications of this case, the committee may establish how far our social policies, as enforced by the courts, have strayed from sensible handling of sensitive academic issues.

At this point I would like to add several items to the record (I hear all Senators are speed readers and sleep only three hours a night). However, this is important, and I want the Senators and their staff to have easy access to the documentary material. (SEE APPENDIX B)

The facts of the case are simple: Prof. Dinnan sat on one of thirteen faculty committees that were part of the quite elaborate promotions process at the University of Georgia that elected to deny tenure to a female aspirant in the College of Education.

He was called as a witness by the attorney for the disappointed candidate and was asked to give testimony about his role in that committee decision. In the course of the interrogation, Professor Dinnan felt that certainly his rights as an official of the University of Georgia were violated, and also his rights as a citizen protected by the Constitution were on the line. The actual vote of these committees at the University of Georgia and at other universities are by secret ballot. After discussion is closed on a particular question, each member writes a yes, no, or abstain on a piece of paper and the chairman records the votes. That is how we do it in the academy, and it has served us and the country well. After the vote, each member of the committee can return to his role as one among equals without political recrimination. We are scholars and teachers, not politicians. And we are talking about universities, Ladies and Gentlemen, not Congress, not political organizations or law firms. The core of the faculty that sits on these committees has made a lifetime commitment to their institution, and despite anecdotal stories to the contrary, a great majority of our faculties are trying to keep the system honest and fair.

Professors are the institutions, and the buildings, the non-academic employees, and the administrators (and certainly the disbursers of money and regulations), are merely support facilities. The universities are vested in the integrity of its faculties. The essence of the institution lies in the teacher and scholars who are the stewards of knowledge and skills. These stewards serve masters older by far than even the political institutions of this great democracy. This democracy, in fact, has a great debt to pay to generations of academic thinkers who dared to emancipate the human spirit from superstition and institute the rule of reason. We would never have reached our level of civilization without the academy and the traditions that made the advancement, not merely the indoctrination of knowledge possible. This treasure, guarded by our scholars, researchers and teachers is more vast and precious than the entire accumulated G.N.P. of the century - it is the key for the future.

So let there be no mistake about the seriousness with which Prof. Dinnan and the vast majority of his colleagues take their responsibilities. Prof. Dinnan took his responsibility so seriously, that when the plaintiff's attorney quizzed him on how he cast his vote, he refused to answer, though he gladly offered a lengthy explanation about the reasoning and the criteria which could have affected his vote. A vote of conscience is still a formidable value in the academy, thank God.

A concern for the integrity of the academic process is shared by many of our colleagues who have signed petitions in support of Professor Dinnan contributed to his legal fund. For example, in recognition of the importance of the conscience of the academic professional, Prof. Dinnan was awarded an honorary doctorate by the University of Scranton. I would like to read the dedication (FOR THE COMPLETE TEXT SEE APPENDIX C) in order to put the facts of the case in the proper perspective. "In the deeply personal and highly professional challenge to fairness posed by deliberations on rank and tenure, faculty members must evaluate, judge, and vote in confidence and according to conscience. The integrity of this process depends on the secrecy of the ballot cast. When the integrity of the process is threatened, even by a well-intentioned court, someone from inside the university must say no. One strong man - a teacher, author, educational consultant, former faculty member here at the University of Scranton, professor now at the University of Georgia - said no, and went to jail to protect his university, his colleagues and the teaching-learning process itself. His heroic concern for one university amounted, in fact, to loving care for the entire system of higher education in America."

In many respects, the Dinnan case represents only the tip of the proverbial regulatory iceberg. For example, the Time article on Dinnan also discusses the Berkeley negotiations with the Labor Department about the confidentiality of university records. The university was left with less than a figleaf protection, particularly if one remembers that governmental files have become accessible to everyone via the Freedom of Information Act.

For example, few institutions of higher learning have tried to do more in the area of Affirmative Action than my own CUNY system in New York. Yet a discovery proceeding has been initiated by a disappointed candidate for tenure despite statutory institutional safeguards that are extravagant by any measure. The Dinnan case figures prominently in the arguments of the plaintiff, and the question of dicovery of confidential votes is now before a New York federal judge.

Ladies and Gentlemen, what is the relationship between the Constitutional and statutory guarantee of Equal Opportunity and all these examples of unnecessary and expensive and vengeful litigation? For almost two centuries, well established peer procedures have served institutions of higher learning and the profession very well and have propelled American education and science to a recognized level of excellence. How come then, do professors have to waste so much time and even risk their personal liberty for matters which have little connection with the educational process? I shall venture the hypothesis that a combination of ambiguous laws, regulation-happy officials, and an errant judiciary operating on constitutional quicksand have produced the current nightmare.

"How was this possible?" we can only wonder. The language of the various titles of the Civil Rights Act of 1964 would seem to limit enforcement to cases of overt, clear-cut, and provable racism. The Executive Order 11246, which deals with Affirmative Action which reads in its significant part: "The contractor will take affirmative action to ensure that all applicants are employed, and that employees are treated without regard to their race, creed, color, or national origin," specifies only that race, sex, creed, color, or national origin shall have _no_ part of employment decisions. Legal practice, however, managed to create a climate of guilt, leading often to an open presumption of guilt, on the part of employers, supervisors and the institutions they represent, based on factors and arguments that have nothing to do with Civil Rights.

The framers of the Civil Rights Act of 1964, and especially its opponents foresaw this possibility (closer to a high probability) and did their best, both in the actual language of the act and in the debate in Congress, to forestall the very abuses which I am in the process of describing. The Smathers Doctrine which was enthusiastically endorsed by the late Senator Hubert Humphrey and even lauded as the "philosophy behind" significant titles of the Civil Rights Act of 1964, was formulated by opponents of the Act specifically to forestall the imposition of onerous burdens on those who will operate under the Act. The relevant passage bears repeating although I fervently hope that this language is indelibly etched in the memories of anybody concerned with Affirmative Action: "Nothing contained in this title shall be interpreted to require any employer...to grant preferential treatment to any individual or any group...on account of an imbalance which may exist with respect to the total number of persons of any race, color, religion, sex, or national origin employed by any employer." In retrospect, we must admit that Senator Smathers was right, prophetically right about how the act would eventually be used. Unfortunately, he was apparently dead-wrong when he thought that clear language would fix anything. Even the Weber Court did not want to take the good Senator and his colleagues at their word!

This example should teach us something about putting legislation in place without appropriate safeguards by which to control its ramifications. We should learn that, at this time, legislators appear powerless, their political skills notwithstanding, in the face of legal strategies that can turn a law that merely prohibits certain actions into a law that mandates certain actions. Thus a simple prohibition against racism and bigotry in the workplace and in public institutions was turned into a mandate for quotas, goals and timetables. Again the rhetorical question: how was this possible?

I hope that I am giving you a clear picture that the legal ramifications of the laws are giving us trouble. Thus it does no good to go back to the law and orders, to look at the language and say that they are good enactments that ring true and then rest easy, secure in the knowledge that all is right in a nation with such reasonable and wise laws. Similarly, it does no good to say that "Affirmative Action" is a compassionate idea that we all should support without looking at the pernicious nonsense that is promulgated with those laws and orders.

What can be done? Today I will restrict my comments to a few ideas on possible remedies of the harm that has been visited on the academy, and by extension, the nation with these policies. There is NO alternative but to return to the proper and original policy of equality of opportunity and justice--the affirmation of color-blind equality of individual rights. This is so very true because much of our difficulties result from the wrong premises of the bureaucrats that: Equal Opportunity is not enough to overcome the evil effects of past discrimination. Indeed, numerous properly conducted studies show that genuine Equal Opportunity, while its results may not be overnight, and while equality of result is never mathematical, does work as well for blacks as it has for whites. What we need is a concentration on more opportunity, not goals and timetables, since it was opportunity and opportunity alone that has brought about the assimilation of "disadvantaged" groups of the past into the mainstream of our complex society. Only then can we show the racists in our society up for the selfish, dishonest, political radicals they are; only then do we have a chance to come to the argument with clean hands. This in turn means a return to the proper, Lincolnian traditions of constitutional democracy, where rights are a barrier against the omnipotent state and not a subterfuge for the omnipotent state.

Specifically, this does not necessarily require a constitutional amendment. For example, do away with the Revised Order #4 and the Executive Order itself could stand with slight modification. Does this mean doing away with Affirmative Action entirely? No. The original 1965 requirements, while philosophically debatable, are quite reasonable and can be readily implemented--e.g. requirements to cast the net as broadly as possible when looking for candidates.

As far as the universities are concerned, UCRA has, on numerous occasions, offered suggestions which might be useful on formulating an approach that places the best of the present cogerie of programs into the context of a genuine nondiscrimination plan.

1) Colleges and universities should be asked to comply with clearcut nondiscrimination directives in the areas of recruitment, hiring, promotion, retirement, salary and adjudication of grievances. These would reflect the spirit as well as the letter of Executive Order 11246 which seeks to cast the net widely for qualified candidates of various backgroundsand seeks to guarantee that all are treated without regard to their race and sex. Such directives clearly would have to preclude the existence of any double standard, either substantive or procedural. Thus there would be no room for such exercises as the Chancellor of the State University of New York's hiring policy. This policy requires voluminous documentation if a white male is to be hired, including letters of disinterest from women and members of designated minorities invited to consider job offers, and often already holding other jobs. On the other hand, if a member of one of the preferred groups is to be hired, comparatively little paperwork is required. Such a policy discourages the hiring of qualified white males just as surely as grandfather clauses and poll taxes once discouraged blacks. Such differential approaches, if accepted for use against any group can be used against all.

2) Antidiscrimination directives applicable to educational institutions should be the joint product of educators and government officials aided by the relevant corps of experts. In the future there must be much greater cooperation between bureaucrats and academics on projects of common concern. An office in the Department of Education, centralizing the development of Affirmative Action programs in education should be staffed by personnel which is substantially more knowledgeable about the nature of universities than was the case in the past.

This may bring to an end the complaints heard from university administrators and faculty about the unreality of bureaucratic programs.

3) Educational autonomy should be strongly reaffirmed in the fields of curriculum, staffing and teaching. The attempts by government officials to interfere with academic structures and content out of a desire to facilitate the fulfillment of the programs they oversee, is one of the more alarming side effects of the present melange of programs. Government officials are there to see that discrimination is halted, not to determine teaching qualifications, course requirements or academic standards. As a corollary, one would expect that overall government intervention would be held at a minimum compatible with the actual task at hand.

4) A limit should be set on the time a bureaucratic agency may take in considering a submitted plan. As pointed out by many university administrators, at present, months can go by without word from the federal government on whether or not a plan has been accepted. This procedural custom has the substantive effect of transforming the judicial function of bureaucrats into a tormenting and harassing one, since one's case is always pending before a judge who periodically sends his emissaries to make further demands.

In addition, the power to deprive a university of funds should not be given to any official graced with a telephone and an intention to do so. A breathing space should be required before any funds are cut off. The regulations should provide for a reasonable and sufficient amount of time for the university to discuss and appeal the administrative decision.

5) A system of graded sanctions should be adopted to punish breaches of obligations in various degrees. The either/or of cutting off federal funding is an exceptionally clumsy way of meting out punishment. If the NCAA can control its member colleges through graded sanctions, it is hard to see why the United States Government cannot.

6) The present practice that essentially the same group of officials produces regulations investigates their application, passes judgement of possible noncompliance, metes out punishment and dictates the remedies should be abolished and the various functions should be vested in mutually independent entities. In particular, the determination of institutional noncompliance and the subsequent imposition of sanctions should be done by forums (commissions, tribunals, boards of inquiry and the like), which would include distinguished and knowledgeable members of the academic community.

7) The present requirement of affirmative action programs that colleges and universities maintain effective and reliable grievance procedures should be retained. Such a system of grievance procedures throughout academia may do much to deal with the complaints of discrimination that do arise. Of course, it is understood that there should be an appellate system outside the given institution to which unsatisfied grievants may bring their case. Such an appellate system should be at the heart of a genuine antidiscrimination program. Such boards could be set up in a number of ways. One possibility would be for the professional associations to develop a list of professionals willing to serve, on retainer, on such boards.

* * *

It is very unfortunate that to a large extent the present difficulties may have originated from a spirit of implacable mistrust which expresses itself in the belief that no group of expert academics can be trusted to be fair to women and minorities. In truth, however, this objection is without merit. The very fact that federal guidelines speak of remedying 'underutilization' and not of correcting discrimination, indicates that the problem all along has been one of inadequate supply. The absence of substantial pools of unemployed academic women and minorities, in contrast to significant numbers of un- or under-employed white male Ph.D.'s substantiates this. Even where it can be presumed that there were a department or a dean who discriminates or would like to, on the basis, but not limited to race, sex, or religion, or national origin, it is wholly unrealistic to think that among the range and scope of American academics none can be found who will be fair to a complainant.

The thoroughgoing suspicion that refuses to cooperate with those who are to be regulated and which seeks to treat them as guilty in principle, cannot possibly lead to nondiscrimination in an area in which so much depends on consideration of professional merit as judged by peers. It is absolutely necessary for the future that regulations be replaced by a spirit of mutual respect, trust and cooperation.

I would like to close with a peculiarly striking bit of logic that Prof. Sidney Hook offered to the Office of Federal Contract Compliance during hearings on Revised Order #4 some years ago, "If universities are urged to 'select the most qualified candidates, regardless of race, sex, or ethnic origin,' how in Heaven's name can they strive to achieve numerical goals? The most qualified person is always an individual person. How can one guarantee any particular numerical distribution? Suppose we were to proclaim, as we should, that in tryouts for any position on any team we shall select the most qualified person regardless of race, sex or ethnic origin. And suppose we did so. Would that lead to any proportional representation whether racial, sexual or ethnic? Obviously not. The implication is clear that whoever defends quotas or numerical goals of any variety cannot sincerely or consistently believe that universities should 'select the most qualified candidates, regardless of race, sex or ethnic origins.'"

My friends and colleagues in UCRA and I sincerely hope that the Congress will muster the necessary wisdom and resolve to remove the noneducational impediments from our educational process and thus permit us to resume with all our faculties our scholarly work. As citizens, of course, we are duty-bound to obey all the laws of the land, and the devotion of our profession to equality and Equal Opportunity has been amply demonstrated. We are convinced, however, that there need not be any conflict between good citizenship and superior scholarship. I trust that the Senators share this view.

Thank you very much for your attention.

[From the University Centers for Rational Alternatives, October 1971]

DISCRIMINATION, COLOR BLINDNESS, AND THE QUOTA SYSTEM

(By Sidney Hook)

Every humane and fair-minded person must approve of the Presidential Executive Order of 1965 which forbade discrimination with respect to race, religion, national origin or sex by any organization of group that receives financial support from the government in the course of fulfilling its contractual obligations with it. The difficulties in enforcing this order flow not from its ethical motivation and intent, but in establishing the criteria of evidence that discrimination has been practiced. Very rarely are the inequities explicitly expressed in the provisons guiding or regulating employment. They must be inferred. But they cannot be correctly inferred form the actual figures of employment independently of the availability of different minority groups, their willingness to accept employment, and the objective qualifications of those able and willing to apply. To be sure the bigoted and prejudiced can distort these considerations in order to cover up flagrant discriminatory practices. But only the foolish and unperceptive will dismiss these considerations as irrelevant and assume that reference to them is an obvious sign of prejudice.

There is, unfortunately, evidence that some foolish and unperceptive persons in the Office of Civil Rights of the Department of Health, Education, and Welfare are disregarding these considerations and mechanically inferring from the actual figures of academic employment in institutions of higher learning the existence of discriminatory practices. What is worse, they are threatening to cancel Federal financial support, without which many universities cannot survive, unless, within a certain period of time, the proportion of members of minorities on the teaching and research staff of universities approximate their proportion in the general population. Further, with respect to women, since it is manifestly absurd to expect that universities be staffed in a equal sexual ratio in all departments, the presence of discrimination against them is to be inferred if the composition of the teaching and research staffs does not correspond to the proportion of applicants—independently of the qualifications of the applicants.

In the light of this evidence, a persuasive case can be made that those who have issued these guide lines and ultimata to universities, whether they are male or female, black or white, Catholic, Jewish, or Protestant and unqualified for the offices they hold and therefore unable properly to enforce the Presidential Executive Order. For they are guilty of fostering the very racialism and discrimination the Executive Order was issued to correct and forestall.

It is not hard to demonstrate the utter absurdity of the directives issued by the Office of Civil Rights of the Department of Health, Education, and Welfare. I shall use two simple instances. A few years ago it was established that more than 80 percent of the captains of tugboats in the New York Harbor were Swedish. None was black. None was Jewish. And this in a community in which blacks and Jews outnumbered Swedes more than a hundred to one. If one were to construe these figures along the lines laid down by the Office of Civil Rights of HEW, this would be presumptive proof of crass discrimination against Negroes and Jews. But, it is nothing of the sort. Negroes and Jews, for complex reasons we need not here explore, have never been interested in navigating tugboats. They have not applied for the positions. They have therefore never been rejected.

The faculties of many Negro colleges are overwhelmingly black out of all proportion to their numbers in the country, state, or even local community. It would be a grim jest therefore to tax them with discriminatory practices. Until recently, they have been pathetically eager to employ qualified white teachers, but they have been unable to attract them.

The fact that HEW makes a distinction between women and minorities, judging sexual discrimination not by simple proportion of women teachers and researchers in universities to their proportion in the general population, but only to their proportion among applicants, shows that it has a dim understanding of the relevant issue. There are obviously various occupational fields—military, mining, aeronautical, etc., for which women have, until now, shown little inclination. Neither the school nor the department can be faulted for the scarcity of female applications. But the main point in this: no matter how many applicants there are for a post, whether they are male or female, the only relevant criterion is whether or not they ar qualified. Only when there is antecedent determination that the applicants, with respect to the job or post specifications are equally or even roughtly equally qualified, and there is a marked and continued disparity in the relative numbers employed, is there legitimate ground for suspicion and inquiry.

The effect of the ultimata to universities to hire blacks and women under threat of losing crucial financial support, is to compel them to hire unqualified Negroes and women, and to discriminate against qualified nonblacks and men. This is just as much a manifestation of racism, even if originally unintended, as the racism the original Presidential directive was designed to correct. Intelligent, self-respecting Negroes and women would scorn such preferential treatment. The consequences of imposing any criterion other than that of qualified talent on our educational establishments, are sure to be disastrous on the quest for new knowledge and truth as well as subversive of the democratic ethos. Its logic points to the introduction of a quota system, of the notorious numerus clausus of repressive regimes of the past. If blacks are to be hired merely on the basis of their color and women merely on the basis of their sex, because they are under-represented in the faculties of our universities, before long the demand will be made that Jews or men should be fired or dismissed or not hired as Jews or men, no matter how well qualified, because they are over-represented in our faculties.

The universities should not yield to the illiberal ultimata of the Office of Civil (Un) Rights of HEW. There is sufficient work for it to do in enforcing the Presidential Directive in areas where minorities are obviously qualified and are obviously suffering from unfair discrimination. It undoubtedly is true, as some members of UCRA who have long been active in the field of civil rights have long pointed out, that some educational institutions or their departments have been guilty of obvious religious and racial discrimination. The evidence of this was flagrant and open and required no elaborate questionnaires to establish. The Office of Civil Rights could cooperate with the Department of Justice here. Currently, its activities in the field of higher education are not only wasting time, effort, and the taxpayer's money but debasing educational standards as well. It is bringing confusion and conflict into an area where, prior to its intervention, the issues were well understood and where voluntary efforts to hire qualified women and members of minorities were being made with increasing success.

[From the University Centers for Rational Alternatives, October 1972]

UNCERTAIN PROGRESS

(By Sidney Hook)

UCRA has cause for congratulation in the leadership it has given to the struggle against the attempt to impose discriminatory "quotas" or, to use the euphemism of

HEW, "numerical targets" on the colleges and universities of the nation. The recent revision of the guidelines of the Office of Compliance of HEW, may be considered a direct consequence of the mobilization of reflective opinion in universities, colleges and elsewhere by UCRA—working independently at the outset against great difficulties, and later on, in concert, with the Anti-Defamation League. The Executive Secretary of the UCRA was the principal figure in organizing the Committee on Academic Nondiscrimination and Integrity.

Although HEW has been compelled to retreat, the damage to higher education resulting from its intervention and earlier guidelines has been quite extensive. Our file shows case after case in which departments and colleges, under pressures and threats from the Regional Office of HEW, have either turned down highly qualified applicants on the ground that they did not fit the numerical goals of the local affirmative action program or have frankly broadcast their intentions to hire primarily from among HEW-defined minority ethnic groups and women, in order to achieve "proper proportionate representation in relation to the overall constituency." Confronted with cases in which a kind of discrimination in reverse was being practiced, officials of the HEW protested that their guidelines were being misunderstood by administrators in fear of threats that their Federal subsidies would be cut off. They brushed aside criticisms that such misinterpretations were natural in view of the reliance of HEW upon purely statistical tables of employment, promotions, and salaries.

The new guidelines issued by HEW still retains the fiction that "quotas" of employment in universities are not being sought, although some partisans of HEW, outside the academic community, frankly acknowledge that they are, and see nothing undersirable in it. The guidelines also play down the emphasis upon fulfillments of numerical targets and goals although the demand is made that they be explicity formulated. To outflank mounting criticism of the affirmative action programs, stress is now placed on evidence of "good faith" on the part of university administrations in rectifying the alleged statistical imbalance of ethnic and sexual representation. This imbalance is defined not by the disproportions between equally qualified candidates for positions, but by criteria not related to qualifications for the post. Since the best evidence of "good faith" is, of course, the achievement of numercial targets or goals, psychologically there is every expectation that administrators will continue to provide this evidence out of fear that, otherwise, their efforts to find the "proper" number of women blacks, chicanos, and other ethnics will be rejected as not in good faith and their receipt of Federal monies jeopardized.

How can "good faith" that candidates for a position are being selected solely on the basis of their qualifications and not on the basis of sex, color, religion or national origin be tested? The rational and just answer is: only if the best qualified person for a post is selected. The fact that a succession of appointments of the best qualified results in statistical disproportions among ethnic groups, is *not* prima facie evidence of the absence of good faith requiring explanations and apologies.

Where there is bad faith in distributing positions to applicants on grounds of merit, this must be established in individual cases, not by statistical inference. If we are choosing the best qualified players for a basketball team, the fact that all of most of them turn out to be black is *not* prima facie evidence of discrimination or bad faith in the process of selection. Only if white players equal to, or superior than, those accepted were rejected, would such an inference be taken seriously. Yet, au fond, this is the kind of thinking HEW has been applying to universities.

The great damage that has already been done is the result of over-fearful administrative compliance and the failure of the universities to take a unified and militant stand of non-compliance. Instead, they have, singly, feebly protested against the bureaucratic intervention and threats of HEW and have been compelled to yield one by one.

It is time now to escalate the opposition and demand that the burden of proof be on HEW to establish that a college or university is guilty of discrimination rather than to place on them the onerous burden of affirmative action programs in order to establish that it is free of any discriminatory practice. After all, in most areas of life the difficulty of proving the absence of guilt in any degree is almost invariably greater than proving guilt. In addition, HEW should not hold colleges and universities responsible for the supply of a predetermined number of a designated type of qualified applicants, thus expecting them to correct single-handedly social situations for which they cannot be held accountable.

It is reasonable to require, in the interest of justice and equal opportunity, that colleges and universities advertise openings available, in the way English universities do and Civil Service. It is unjust to make awards or to withold them on the basis of membership in any group rather than on the basis of individual merit (or individual need wherever this is a relevant criterion).

Mr. J. Stanley Pottinger who has played the chief role in prosecuting cases against universities on grounds of alleged discrimination, is very much on the defensive these days. He concludes a set speech he has given on many occasions with and anecdote to point a moral for universities. He relates the story of a Southern Postmaster who explained to a badgering Post office Inspector that there were no qualified blacks whom he could hire. To which the Post office Inspector who is himself black makes the response: "I am not asking you to hire unqualified blacks, I am asking you to use as much ingenuity to get us in as you have used to keep us out."

Nothing so glaringly evinces Mr. Pottinger's ignorance of educational conditions at the universities whose funds he had threatened to cut off—whether Michigan, Harvard, or Columbia. He begs the whole question about the nature of their practices, in implying that they followed a deliberate policy, like Southern racist postmasters, in keeping Negroes, women, and other ethnics out. He is advocating a new procedure—different in direction but not in principle—i.e., the use of "ingenuity" to effect discrimination in reverse. Although there undoubtedly have been—and still are—cases of discrimination by bigoted individuals, who have been prejudiced against members of some groups, it is simply absurd to imply that universities ever adopted policies to exclude qualified blacks and women.

There is some evidence that HEW, unable to make a reasoned defense against criticisms marshalled by UCRA, has become a little more placatory in manner towards the academy without abandoning its campaign to enforce compliance with its bureaucratic regulations. All it requires for colleges and universities to win freedom from programs requiring in effect, if they are to be implemented, "discrimination in reverse," is for the faculties to speak up and bring pressure on administrators. It is understandable, if not commendable, that in some administrative quarters, budgets these days take priority over educational principle. But, the administrators should be made to understand that if they are united, HEW will be compelled to withdraw its threats since many valuable programs essential to the security of the country would be affected. However, if they do not unite, each will be humbled in turn.

Appointments made now merely to establish "proper" numerical goals and ratios—as if there were any such thing as a "proper" racial or sexual ratio in the affairs of the mind!—will not only defraud the students of the services of the best qualified teachers, regardless of race or sex, but will burden the universities for decades. It is easy to appoint unqualified teachers and scholars, but it is difficult to replace them with those who are qualified—sometimes so difficult that the experience is traumatic. This explains why so many incompetent teachers, grown grey in their sinecures, abound. To each institution we can say de ta fabula narratur.

[From the Time, October 1980]

GROWING ROW OVER "PEER REVIEW"

IN GEORGIA AND CALIFORNIA, FACULTIES TANGLE WITH THE FEDS

Campus cries of inteference from Washington and the courts are all too familiar. But last week the leval of lamentation rose to a new crescendo in the wake of two incidents. First there was the jailing, for contempt of court, of University of Georgia Education Professor James A. Dinnan, 50; second there was Washington's announcement that the University of California at Berkeley risked becoming the nation's first university to lose federal contracts in a dispute over affirmative action. Under attack in Georgia, as well as California, was one of the academic world's most sacred traditions, the deep confidentiality that shrouds "peer review," the free-spirited appraisal of faculty members up for tenure.

Georgia's Dinnan was one of nine faculty members who voted, 6 to 3, to deny tenure to Psycholinguish Maija Blaubergs, 33, a teacher in the college of education since 1972. It was the third time in as many years that Blaubergs had been denied promotion and tenure, and she sued the University of Georgia, charging sexual discrimination. During pretrial interrogation, Dinnan refused to disclose how he had voted. Instead he asked: "If academic freedom is not the right to judge one's peers free from outside pressure or intimidation, then what is it?"

As Federal District Court Judge Wilbur Owens Jr. saw the matter, Dinnan was withholding evidence from the court, since under the Civil Rights Act of 1964 it can become the courts' responsibility to decide whether junior faculty members like Blaubergs have been given fair consideration. Said Owens: "This court can't determine whether or not you did that unless you explain to the court what you individually did and why you did it." To pressure Dinnan to testify, Owens fined him $100 a day for 30 days, and then sentenced him to 90 days in jail. Faculty colleagues raised most of the $3,000 to pay the fine. To sharpen the issue, Dinnan wore his full academic robes when surrendering to begin his prison term.

This week Dinnan's 90 days are up. He may be returned to the courtroom to face Judge Owens again. And his case is also being reviewed by the Fifth Circuit Court of Appeals in New Orleans. Meanwhile he has remained in prison at Florida's Eglin Air Force Base. In a one-page broadside, New York University Philosopher Sidney Hook blasted Judge Owens' decision as "one of the crassest illustrations of ill-considered and unjustified interventions of our imperial judiciary into the educational process." If discussions of promotion and tenure are to adhere to academic standards, Hook insisted, confidentiality is required without fear of "resentment and retaliatory responses of unsuccessful candidates." Indeed, even before Judge Owens' decision, Georgia administrators seemed wary enough: they had asked Dinnan and his colleagues to decide on the cases of Blaubergs and other faculty via secret ballot rather than by more open discussion and disclosure of each member's views, thus making it easier for the university to defend against possible lawsuits. As to the charge of discrimination, Georgia's vice president for academic affairs, Virginia Trotter, formerly Assistant Secretary for Education at the Department of Health, Education and Welfare, argues that it is unwarranted. Says she: "I chaired the final review committee, and I feel Blaubergs had every chance every step of the way. Over a three-year period her case was reviewed by nine committees. She did not present convincing evidence of her teaching skills, and she displayed no sense of growth in her academic speciality."

In marked contrast to Dinnan's defiance and the support he got from his university, the confrontation between the University of California at Berkeley and the U.S. Department of Labor began with compliance. In 1978 Berkeley administrators allowed federal investigators to see confidential peer-review documents regarding women. But several weeks later, when Labor Department agents asked to photocopy 466 of the documents and send them to Washington as part of a permanent affirmative-action file, Berkeley balked. Once they became Government documents, administrators reasoned, the Freedom of Information Act would allow third parties to gain access to them and the records would no longer be confidential. Berkeley did offer to take all of the documents to Washington where they could be inspected by officials but not copied or filed. The offer was rejected.

On a university-wide basis, Berkeley points with pride to progress in the hiring of women. The proportion of female associate professors, for example, has risen from 5.9 percent in 1968 to 15 percent in 1979. Still, some departments remain almost entirely male. Berkeley's classics department, for example, has only one female professor in a total staff of 16. To pursue its investigation of hiring practices in classics and four other departments, Labor's Office of Federal Contract Compliance asked for an administrative hearing to order delivery of Berkeley's documents. But Administrative Law Judge Thomas Schneider found in favor of the university. Said he in defense of the need for privacy in evaluating candidates: "Words written with the likelihood of publicity are likely to be bland and noncommittal and nonspecific." Last month, Labor Secretary Ray Marshall overruled Schneider's finding and ordered Berkeley to deliver the documents in 30 days or face a cutoff of federal contracts totaling roughly $25 million yearly.

Last week, as Berkeley neared its deadline, the university proposed a compromise limiting access to any documents forwarded to Labor and guaranteeing their return. Otherwise the school is prepared to sue to keep its funds flowing. In the thick of the bureaucratic battle, Berkeley Chancellor Ira Michael Heyman told Time: "It's very hard for a single campus to confont the whole federal system. I'd like to see the issue of disclosure of such confidential documents addressed by large research universities, which unite and use their power against the Federal Government."

Already, many Berkeley departments warn faculty members when sending out requests for peer-review letters that the information requested in confidence may eventually be divulged—as a result of Government actions. One department chairman recalls that eight of ten people asked to write appraisals of one recent tenure candidate did not reply. What troubles professors and department heads is that the reluctance of faculty members to make appraisals now seems strongest in the cases of the weakest—and potentially most litigous—tenure candidates.

Nobody, in or out of academia, denies that there has been race and sex discrimination in the granting of tenure. What troubles many academics is that the corrective methods being used by the Government seem increasingly dangerous. Most would agree with Dartmouth President John G. Kemeny, a staunch critic of past discrimination. Says Kemeny: "Academic institutions now live under a constant threat that any employee not hired or promoted (even for the best of reasons) can file a complaint that will bring a huge bureaucracy down on them. Even when the institution wins the case—and good institutions win most of the time—it involves an enormous expenditure of effort and large sums of money. There is no way of recovering the cost of these efforts even if it is eventually determined that the complaint is totally baseless."—*By Kenneth M. Pierce. Reported by Joyce Leviton/Atlanta and Joseph Pilcher/Los Angeles.*

[From the University Centers for Rational Alternatives, Summer 1974]

THE BIAS IN ANTI-BIAS REGULATIONS

(By Sidney Hook)

Although the writings of those who have sought to arouse the academic community against the preferential hiring practices resulting from the HEW Guidelines on Affirmative Action have often been attacked, their arguments have not been adequately met. Instead their intellectual integrity has been impugned and they have been represented as racists and/or sexists, defenders of the status-quo and of the practices of discrimination that have developed over the years.

The basic truth is that almost every academic critic of the HEW Guidelines has been a strong supporter of the Executive Order 11246 as amended which outlaws, on pain of forfeiting Federal contract awards, employment practices that discriminate on the basis of membership in any racial, religious, sexual or national group. The gravamen of their criticism has been that the provision of "numerical goals" and "precise time tables," mandated by HEW and the Office of Federal Contract Compliance, violates the principles of the Executive Order. Evidence and argument have established that despite the frantic denials and semantic evasions of HEW an its academic apologists their Guidelines require "good faith efforts" on the part of universities to adopt a quota system. The critics of a quota system in all its disguises have opposed a program that would result in the hiring either of unqualified members of minority groups or women or of persons who were not the best qualified. Instead they have advocated the adoption of all effective measures that would increase the qualified supply of minorities and women.

Enormous damage has already been done from which universities and students will suffer for a very long time. Even greater damage is in the offing as HEW moves to enforce its demands that minority members and women be hired in proportion to their alleged availability, on the level of individual departments.

In the struggle to preserve the intellectual integrity of the university, the appearance of Richard A. Lester's Anti-Bias Regulation of the Universities: Faculty Problems and Their Solutions (McGraw Hill, N.Y.) should prove a boon. It is sponsored by the Carnegie Commission on Higher Education which, however, takes no responsibility for any of its opinions or conclusions. It starts from the same premise that has inspired the University Centers for Rational Alternatives, the Committee on Academic Nondiscrimination and Integrity, the Anti-Defamation League and other critics of the governmental affirmative action program as implemented by HEW, viz., that invidious discrimination or prejudice in employment "is destructive of democratic values and violates the principle of appointment promotion on merit." It reviews the first five years of the program, marshalls the criticisms that have been made against it, differentiates between its legitimate and illegitimate purposes, and analyzes some of the assumptions and thoughtways that have misled the zealots.

One must distinguish between two questions. (1) What is the degree of discrimination against minorities and women in higher education, and the nature of the evidence for it? (2) What can be done to remedy discrimination wherever it exists?

That discrimination has existed against members of minorities and women in higher education and still lingers under various disguises, no critic of HEW's Affirmative Action program denies. What has been questioned is the validity of the inferences drawn from superficial, raw and uninterpreted statistical data about the relative distribution of members of minorities and women, concerning the existence of a definite policy of discrimination. A disproportionate number of members of minorities and women teaching at universities may reflect a deliberate policy of exclusion, both with respect to admission of such students to graduate study and to their employment. On the other hand, it may show nothing of the sort. The small number of black graduate students, for example, may reflect not an anti-black policy but the lack of equitable social, economic and educational stimuli or opportunities, for which the entire community must accept the blame, that resulted in the absence of qualified black students for admission to graduate schools. The disproportion in the numbers of men and women graduate students may be evidence not of bias against women but primarily of the pervasive effect of social attitudes concerning sex oriented careers.

In any case, where a specific charge of overt discrimination against members of minorities or women is made it must be buttressed by specific case evidence in a manner comparable to establishing that the provisions of the Fair Housing Act have been violated. Because no member of a certain ethic group lives in an apartment house is by itself not evidence of discrimination. But when a specific violation has been established the statistical fact becomes relevant. Similary, the overrepresentation of a certain group is by itself not a proof of favorable discrimination: no one would seriously accuse the Metropolitan Opera of past discrimination in favor of tenor singers from the Mediterranean area or blame tugboat operators in New York harbor for hiring predominately male captains of Scandinavian ancestry. It would first have to be shown that some equally qualified tenors from other regions and equally qualified men or women navigators of other ethnic groups were denied employment.

Very illuminating is Professor Lester's discussion of alleged discrimination against blacks in higher education. The issue is of particular importance because the entire early Federal affirmative action drive was motivated and stimulated by the history of 300 years of injustice against blacks. Only after the argument for reparations to blacks had prevailed as the single determining factor of overriding importance in justifying a temporary preferential treatment of aggrieved groups, were the programs for minorities implemented. Women were added later. Dr. Lester shows that present-day efforts of institutions of higher education to hire blacks are so strenuous that blacks often receive many more offers from white colleges than to equally qualified whites. One study reveals that, "Blacks with doctorates from high quality schools who have published, report jobs by invitation almost four times as often as whites with the same excellent credentials." It is no secret today that many universities are offering appointments to black faculty at salaries much higher than those offered to their white colleagues with equivalent and sometimes better qualifications. It is not unusual for associate professorships to be offered to blacks just completing their Ph.D. How avid the pursuit is may be inferred from the recent case of a black assistant professor of philosophy at Yale earning a salary of $13,000 on full time who was discovered to have also a full time tenure appointment at N.Y. State University at Stony Brook at $26,000. (Yale objected to this, not Stony Brook.)

The fact that only one percent of university faculties and 5.4 percent of four year college faculties are black is no evidence that today active discrimination against qualified blacks exists, and that it is five times as strong in the universities as in the colleges. And yet some statistical illiterates still hurl charges of overt discrimination and racism at universities merely because blacks are underrepresented. A flyer recently circulated at New York University by three faculty members denounces NYU for racism because blacks constitute 2.1 percent of the full time faculty which, incidentally, is more than twice the national average. It goes on to assert:

"As a matter of simple justice and in order to reflect the population of which NYU is a part, the number of full-time black faculty should be perhaps ten times this number—2.1 percent full-time black faculty now vs. 21.2 percent black population in New York City."

Even if the number of qualified black applicants for college and university positions were equal to their proportion in the general population the argument of MuCauly et al. would still be fallacious: one cannot ask schools in New York City and Washington D.C. to increase their black academic percentages to those of the surrounding population and at the same time support HEW officials who ask universities in North Dakota and Oregon to increase their percentages to the national average.

But why should we assume that the number of blacks in university teaching or any other area or profession in New York City must equal 21.2 percent of the population? Does this mean that blacks on the professional basketball and baseball teams of New York City are discriminatorily overrepresented? Even if complete equality of educational opportunity exists, the vocational distribution different groups will depend on so many variables—traditions, shifting social values, wars and unemployment, etc. that it is completely unreasonable to assume that the ratios in employment will necessarily reflect the ratios in the general population. To impose them is to impose a straitjacket incompatible with the slightest respect for the principle of individual justice and merit. This straitjacket becomes even more intolerable—and ludicrous—when imposed on college departments with tenured faculty or with so few members that statistical laws cease to have any meaning. It is one thing to expect general population ratios in setting up classes or groups that would normally reflect the community's racial or sexual makeup, such as jury rolls.

It is altogether different when we are setting up groups admission to which is based upon merit selection, whether it is a mathematics department or a varsity basketball team.

That factors other than overt discrimination have accounted for certain disproportions in graduate study emerges very clearly from Professor Lester's study. In particular, he discusses the disproportions between the numbers of men and women in graduate schools. He shows, for example, that the percentage of all Ph.D. degrees received by women between 1920 and 1929 was much higher than between 1950 and 1959. To infer from this that discrimination against accepting women for graduate school and accrediting them had markedly increased during the fifties from what it was in the twenties would be absurd. But this is just the kind of inference that the originators of, and apologists for, bureaucratic affirmative action draw from statistical tables. Lester, who is Professor of Economics at Princeton University, argues persuasively that fluctuations in the number of women attending graduate school are more significantly correlated with fluctuations in the attitudes of society and of women to themselves, with respect to the desirability of family and children or a career, than with changes in men's bias against women.

"The 1950s and early 1960s were years of 'the baby boom.' Between 1940 and 1965, the proportion of married women in the female population rose significantly, and the percentage of married women in the age group 25 to 35 who had children under six years of age also increased markedly. These developments helped to cause the labor force participation rates of these women to decline appreciably and to limit their career ambitions. A result was that in the 1950s and early 1960s a much smaller percentage of women prepared themselves with Ph.D. training and drove hard to 'reach the top of their profession.' "

One can find corroborative evidence of this conclusion from other sources, particularly the memoirs of women writing about this period. For example, here is a gifted woman writing about her 25th Radcliffe reunion at Cambridge.

"My class is full of highly intelligent and capable women. But it was graduated into the 1950s when it was fashionable to marry young, have a big family fast and settle into a house full of togetherness." (N.Y. Times, June 26, 1974.)

Many other citations stressing the same point can be given.

It was this attitude that better explains the present overall disproportions among the percentage of men and women teaching in universities than male bias against women. The latter certainly exists but is peripheral, not central, statistically minor, not major. My own experience, extending almost half a century, recommending qualified young women for positions in philosophy confirms this. I do not offer this as "proof" but as relevant evidence. Bias against women exists and there is absolutely no justification for it: where it exists, it must be eliminated, not by reverse discrimination but by a fair application of the merit principle. Nonetheless, it is wrong to exaggerate the hostility of men to women in the university or to introduce a new numerus clausus as the decisive yardstick for hiring.

Professor Lester has some interesting data (from Astin) on the relative strength of different factors encountered as obstacles by women, themselves already employed in academic institutions, in "developing [their] careers fully." A questionnaire sent to women at the end of 1965 who received their Ph.D. degrees in 1957 and 1958 requested that they list the career obstacles they found to be "major problems." Only 12 percent listed "employer discrimination" as a major problem; 88 percent listed other obstacles as major problems, e.g. 18 percent "finding adequate help at home." Of the married women (50 percent), 12 percent listed "husband's negative attitude towards my working."

Some university rules adversely affected women more than men not because they were designed to discriminate against women, but because of social attitudes towards in-group dealings, e.g. the nepotism rule. The purpose was legitimate, but the nepotism rules had a blunderbuss effect that barred qualified married women. They are rapidly being abolished. Professor Lester also cites several studies that indicate that single women on university faculties "seem notably less disadvantaged" in their careers than married women. Recently, male attitudes towards the sharing of domestic duties appear to be changing resulting in greater equality of opportunity for married women.

As we go up to the academic ladder we find that the percentage of women of the total in each rank diminishes: the largest percent is found in the lowest rank—instructor and lecturer (37.6 percent)—and the smallest in the highest rank of full professors (5.2 percent). "Is this not conclusive evidence of discrimination?" ask the proponents of government sponsored Affirmative Action plans. Professor Lester firmly denies it, as well as the assumption that "equal employment opportunity would lead to the same percentage for women in each professional rank," as for men. Such an assumption is questionable since it "fails to take account of the distribution of the qualified supply of women for university appointment at particular ranks." Here too, the greater burden of home responsibilities on women may affect acquisition of the qualifications for promotion to the upper ranks. Two additional considerations support Professor Lester's conclusions. "The distribution of single women by faculty rank seems to resemble the distribution for men more than it does for married women." Further, in every country for which data are available, including the Soviet Union and the Scandinavian countries where discrimination is allegedly less than in the U.S., "the percentages of women become smaller as one moves up the promotional ladder, with relatively few women at the full professor level." The statement holds true even for countries where, due to the huge strains of World War II and the associated extensive male casualties, the work force at the time shifted drastically in favor of women. Marriage and motherhood seem to be career obstacles to women universally although there is some reason to believe that this will be gradually less so in the future.

Professor Lester is at his best in Chapters 4 and 5 in which he offers a devastating analysis of the specific Federal Guidelines for faculty employment and the affirmative action goals for faculty. In the course of his analysis, he exposes the inconsistencies and and inadequacies of the Report of the Committee on Discrimination of the AAUP and the uncritical endorsement by the Carnegie Commission of numerical goals (in reality quotas) in hiring. Both represent scandalous capitulations to the HEW bureaucracy whose schemes have never received Congressional consideration or approval.

Particularly noteworthy is Lester's criticism of HEW's method of calculating "deficiencies" in the employment of women and minority persons, and determining whether and when they have been "underutilized." He protests the repeated reference in the guidelines to the mere "absence of women or minorities in an academic department" as an "'exclusion' on the part of the institution and as a 'deficiency' (meaning discrimination by the institution) regardless of the amount of fully qualified supply of women and blacks actually available for each of the faculty positions in that discipline or department." He shows in considerable detail the inappropriateness of the "availability-utilization" techniques as applied to most tenure positions in major universities.

The points Professor Lester makes are quite telling. Their importance will be ackowledged by any person familiar with the various criteria involved in selecting teacher-scholars for a discipline that embraces many sub-fields and areas of specialization in a well-rounded department. The authors of the HEW guidelines are unaware that their method of determining "deficiencies" and "underutilization," "through perhaps usable and appropriate for jobs requiring manual qualifications and skills, is inappropriate for quite individualized positions that require rare combinations of qualities, such as is the case for most positions at major universities."

Professor Lester has no difficulty in establishing that the numerical goals and time schedules imposed by HEW on universities lead to inflated goals that "can only be met by giving some women and minority-group members preference in hiring, promotion, and/or salary." The result is easy to foresee—new forms of discrimination, and a two-standard faculty: those who have made it strictly on their own, selected by their professional peers in open competition, and those who have made it by virtue of membership in some group. The erosion of the principles of merit, scholarly quality and integrity, are unavoidable in such circumstances.

There is much more in Professor Lester's challenging volume that deserves evaluation. On some points, e.g. the hiring of assistant professors, he seems to draw back from his own excellent principles. His book will of course become the target of enraged attack by the partisans of HEW. It cannot be recommended too strongly, especially to those who support the Civil Rights Act of 1964 whose Section 703(j) of Title VII, explicitly forbids granting "preferential treatment to any individual or to any group because of race, color, religion, sex or national origin on account of any imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer in comparison with the total number or percentage of such race, color, religion, sex, or national origin in any community, state, section, or other area, or in the available work force in any community, state, section or other area."

Interpreting Title VII, the Supreme Court has declared that: "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed . . . Congress has not commanded that the less qualified be preferred over the better merely because of minority origins. Far from disparaging job qualifications, Congress has made such qualifications the controlling factor, so that race, religion, nationality and sex become irrelevent."

It would seem that an affirmative action program that commands the establishment of numerical goals that can be achieved only by preferential hiring is definitely unconstitutional. It is to be hoped that the U.S. Supreme Court will soon rule to that effect.

It is not only unconstitutional, it is immoral for it makes a mockery of the principle of desert which was the basis of denunciations of past discriminatory practices. Independently of the validity of the findings about the actual degree of discrimination that exists today in educational institutions, its elimination does not require reverse discrimination but only the establishment of equal oportunities to compete for open positions, and their award to the best qualified individual.

Many years ago the blacks were deprived of their right to vote and women were denied the right to vote. In rectifying these injustices, no one would dream of demanding that blacks and women be compensated for past discrimination by being given the right to cast an extra vote or two at the expense of their fellow citizens. Something like this demand is reflected in the view that women and members of minorities today receive compensatory, preferential treatment because of discrimination against their groups in the past.

ACADEMIC FREEDOM IN JEOPARDY - TIME TO STRIKE THE ALARM BELL

by SIDNEY HOOK

One of the crassest illustrations of ill considered and unjustified interventions of our imperial judiciary into the educational process has resulted in the incarceration of a principled defender of academic freedom for a period of three months on top of a fine of $3,000. The judge in the case is Wilbur D. Owens, Jr. of the U.S. District Court for the Middle District of Georgia. His victim, sentenced for civil and criminal contempt of court, is Professor James Andrew Dinnan of the University of Georgia. Professor Dinnan's "crime" was his refusal to divulge how he voted as a member of an advisory committee on a promotion and tenure decision affecting an assistant professor whose specialty was women's studies. She brought suit against the University alleging that her promotion and tenure were denied because she was a woman.

In the deposition proceedings her lawyer demanded to know of six members of the committee of nine that had advised against the plaintiff's promotion and grant of tenure, how they voted and why. Under threat of judicial punishment all but Professor Dinnan complied. He maintained that the right to determine who may teach was an essential perogative of academic freedom, and that the quality and integrity of the academic process in recommending and awarding promotions and tenure would be undermined if the confidentiality of the individual votes were breached. At one of the hearings before Judge Owens a memorandum was introduced from the Vice President of Academic Affairs at the University of Georgia, requesting that committees such as that on which Professor Dinnan served take their votes by secret ballot in order to preserve the "quality" of the academic judgement.

Aside from Judge Owens' obvious bias against Professor Dinnan, revealed in his original vicious misreading of the sanctions of criminal contempt as only a remedial measure and in his refusal to give Professor Dinnan sufficient time to prepare his defence, he showed the most abysmal ignorance of how a university must function if it is to uphold the integrity of freedom to teach and freedom to learn. Everyone knows that if the confidentiality of the individual's vote on matters of promotion and tenure are not privileged, considerations other than those germane to merit, scholarship and excellence of teaching affect the decisions taken. Fear of the resentment and retalitory responses of unsuccessful candidates, fear of unpopularity and of denunciatory campaigns among student partisans, reluctance to accept the public role of a final arbiter of a colleague's career begin to operate. Gradually standards erode and in effect are abandoned. Every one except Judge Owens is aware, to cite an analogous situation, that an assessment of a candidate's merits which is confidential is much more reliable than one broadcast to the whole world, to be scrutinized by parties working outside their competence.

The extraordinary thing about the case at hand is that it was unnecessary to find out how Professor Dinnan voted in order to determine whether the assistant professor's rejection was inviduously discriminatory. It was already known that the advisory committee had voted six to three against her. Professor Dinnan was prepared and actually did make clear to the Court the criteria he brought to bear on any submission of proposals for promotion and tenure, the procedures he used to evaluate a candidate's merits as well as those he employed to reach a decision. Neither the assistant professor, her attorney or the judge challenged these criteria or procedures. However, Professor Dinnan drew the line at making public his ultimate decision to vote for or against the candidate. In pressing the plaintiff's suit against the University the disclosure of Professor Dinnan's secret vote was not required. He was not even named in her legal action. She really had no need to know how he voted.

But what of the plaintiff's right to fair procedure? She had the right to appeal the judgement of the Promotion Review Committee which she did. After an independent review by three senior professors her appeal was denied. She also had the right of appeal to the Dean of her College, to the President of the University, and to the Board of Regents of the University of Georgia, the body which under law is the ultimate authority in determining whether or not to promote or give tenure to faculty members. At every level the decision went against her. She did not introduce any evidence that showed that the decision of the Promotions Review Committee against her was arbitrary or motivated by hostility to her as a woman. Nor did she establish that the objective pattern of recommendations by the Committee was biased and individuously discriminatory on the basis of a comparison of the judgement in her case and of other candidates of equal or inferior academic achievement.

At no point was it established that the Promotions Review Committee or Professor Dinnan specifically considered anything that was improper in its evaluation of the teaching, research and service of the candidate. Why then should Professor Dinnan be compelled under threat of imprisonment and heavy fine to disclose how he voted? Nothing in the public interest requires it, and much in the public interest forbids it.

Already the high handed action of Judge Owens is having a deleterious effect on academic practice and freedom. Not only are professors at the University of Georgia refusing to serve on advisory committees since the confidentiality of their individual votes has been threatened by Judge Owen's decision, the same thing is happening at other universities as news of this bizarre case spreads. Until recently the national media have ignored Professor Dinnan's martyrdom for academic freedom. The professional organizations of college and university teachers are fearful of coming to Professor Dinnan's defence or even launching an inquiry. Professors John Dewey and Arthur Lovejoy, the founders of the American Association of University Professors, would have been agahst at the organization's betrayal of its own founding principles.

It is incumbent on members of UCRA to rally the members of their faculties to the defence of Professor Dinnan, not merely for its own sake, but in behalf of the ideals of academic freedom. The whole question of the intervention of untutored judicial tyrants into complex educational matters beyond their ken should become a matter of national and congressional concern.

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Federal Courts and Universities:
The James A. Dinnan Case

by

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One of the most important events in the history of education in this nation has been the federalization of it. The seeds of federal control were sown in federal aid. It now seems odd that serious minded educators once debated the issue of federal aid and federal control. A philosopher of education of that time spoke of the "bugaboo" of federal control.[1] Recently Senator Daniel P. Moynihan has spoken of the nationalization of universities and expressed doubt that universities can be freed from federal control.[2] He believes that professors will be regarded as employees and that the norms of the federal government will prevail over those of universities.[3] He even said that, the federal government has the power to "shut down" any university it chooses.[4]

Senator Moynihan used the Dinnan case as a prime example, among others, of the extent of federal control of universities. Federal bureaucrats and federal courts take a corporate view of universities. There is a governing board, viewed as the corporation, and the mill or factory with its managers and employees. If Senator Moynihan is correct about federal control of universities, then it may be well to view the Dinnan case against this background.

In the Dinnan case, like some modern works of art, it is difficult to distinguish the background from the foreground. The Dinnan case is unique in law. There are few, if any, precedents to follow. The facts in the case may prove to be more important than facts of law. The case is more complex than it may appear. There are a number of philosophical issues in it. One of Dinnan's attorneys expressed the opinion that arguments in the case may be more philosophical than legal.

It was from service on a university promotion and tenure committee that Dr. Dinnan became a deponent or witness in a case against the Board of Regents. In making depositions he answered all questions put to him, except a question that required him to reveal his vote. His refusal to answer this question resulted in a contempt of court proceedings, a fine, and a prison sentence. This paper will be largely a summary of events in the Dinnan case. Some important issues will be identified, but a detailed analysis of them is beyond the scope of this paper. Many of the important issues in the case evolve out of the process by which faculty members are promoted and tenured. For this reason, the promotion and tenure process will be described in some detail. There is considerable evidence that this process has not been properly understood. Indeed, that misunderstanding is an important part of the appeal to the Fifth Circuit Court of Appeals. There are other issues, however, that relate to authority and responsibility, to the use of secret ballots, to freedom of thought and academic freedom, to rights of deponents and witnesses, and to concepts of justice.

The Dinnan case developed out of the case of Maija S. Blaubergs. Dr. Blaubergs was a Visiting Assistant Professor of Educational Psychology.[5] It seems that she was born in a Baltic nation that became part of the Soviet Union. Her family went to Canada and she became a Canadian citizen. Board of Regents' policy limited aliens to visiting appointments and denied them tenure. Dr. Blaubergs challenged the Board of Regents' policy in court and the Board changed the policy to allow foreign nationals to hold regular appointments and gain tenure.

Even before challenging the Board of Regents' policy, Dr. Blaubergs had become interested in the psychology of women. She introduced some new courses in the subject and soon became affiliated with the Women's Studies Program, a non-departmental, interdisciplinary program in the university. After several attempts to gain promotion and tenure, she was notified that her contract would not be renewed. She brought suit against the Board of Regents charging discrimination in the promotional process, especially discrimination against her as a woman and because of her work in the Women's Studies Program.[6] The National Education Association is reported to be financing her case, which is now a class action case.[7]

The University of Georgia has clearly stated criteria for tenure and for promotion to each academic rank and clearly stated procedures to be followed in evaluating candidates for promotion or tenure. The criteria and procedures are published in a pamphlet.[8] All faculty members are given copies. Tenure is separate from promotion at all ranks, but it is attained in the same way. The promotion and tenure process begins within academic departments with reviews at the college and university levels.

At the department level, each candidate is judged by the tenured members of the department according to their assigned and budgeted duties over a period of five or more years and according to the criteria for the appropriate rank. Large amounts of materials giving evidence about teaching, research, and public service are examined. A vote is taken on each candidate. Voters may vote to recommend, not recommend, or abstain. Candidates receiving a majority of positive votes are referred to the college promotion and tenure review committee.

The college committee consists of nine members, all tenured professors. The college committee sees the same materials and uses the criteria and procedures found at the department level. They are informed of the results of the departmental votes, but they never know how any individual voted on any candidate. Members of the college committee are advised not to speak for any candidate from their own department and are required to vote "abstention" on such candidates. Candidates receiving a majority of positive votes are referred to university subject fields promotion and tenure review committees in subject fields of their choice. Those not recommended are provided written statements indicating wherein they failed to meet the published criteria.

University subject field committees see the same materials and use the same criteria. They review the work done by the departmental and college committees. They know the results of voting at the lower levels, but never know how any individual may have voted on any candidate. They also vote in the same way with required abstentions. Candidates not receiving a majority of positive votes are provided with written statements specifying wherein they failed to meet the published criteria. The committee is composed of senior faculty, most of whom have previously served on promotion and tenure committees at lower levels.

Finally, a promotion and tenure review and appeals committee reviews all candidates recommended by university committees and hears appeals from others. This committee is composed of the chairpersons of university subject field committees, plus the Vice-President for Academic Affiars and the Dean of the Graduate School. The committee can reverse the university committees by a 2/3 vote. The two administrators vote only when their vote is required to achieve a majority. Advocacy for friends is ruled out and required abstentions prevail.

Candidates who are not satisfied with the promotion and tenure process can appeal to the Vice-President for Academic Affairs, to the Equal Opportunity and Affirmative Action Officer, and to the Board of Regents. The Board of Regents is the final authority on all promotions and tenure. Appeals may also be made at lower levels within each college.

It is important to observe that promotion and tenure is in the hands of the academic faculty. Each candidate for promotion or tenure will be considered by numerous colleagues, often as many as 65. Friendships and rivalries may exist at the departmental level, but there is more objectivity and impartiality at higher levels. It is also important to observe that nowhere in the process does any one committee determine who is promoted, tenured, or terminated. Candidates who fail in one year may achieve their objectives later.

Dinnan saw himself as representing the university, even the Board of Regents. The Board of Regents is a Constitutionally established body. There is no doubt that the Board has power to delegate authority to the institutions that it governs. Dinnan was duly appointed to a committee and had every right, even a duty to act as he did. In making depositions he found that he was being treated as a private individual. The attorney defending the Board even told him that he was not the university. As a private citizen, he felt that he had no right to judge anyone for promotion or tenure. Voting had been by secret ballot. To divulge his vote would seem to betray his duty.

The attorney from the State Attorney General's Office is reputed to have told Dinnan if you do not answer all questions, we will not defend you. Dinnan then obtained his own attorneys. On May 8, 1980, Judge Wilbur D. Owens, Jr., of the United States District Court, Middle District of Georgia ordered Dinnan to reveal his vote.[9] On May 26, 1980 Blaubergs' attorney, Mr. Andrew H. Marshall called upon Judge Owens to "cause Dr. Dinnan to be arrested immediately and committed to jail until he purges himself of contempt."[10] Mr. Marshall's brief also stated:

> Furthermore, the court should reject application for bail pending appeal since any appeal would be frivolous. . . . Having chosen to ignore the Court's order with knowledge of the consequences, it is just for deponent to reap what he has sown.[11]

Dinnan was not arrested and jailed as Mr. Marshall requested. That would have been unconstitutional.[12] He did face a contempt hearing before Judge Owens on June 2 and 3, 1980.[13] At that hearing, one of Dinnan's attorneys, Mr. Guy Scott, filed a notice of appeal and motion to stay Judge Owens' order of May 8. The judge wanted to know if Dinnan's attorneys could cite a law giving Dinnan the priviledge of not answering the question about his vote. Mr. Scott said no, but also said he had found no authority supporting the judge's position either. Mr. Scott argued that the case was a novel one and that the question about Dinnan's vote was not relevant to what Blaubergs' attorney was searching for. The court reporter's transcript of well over 40 pages reveals many issues such as the authority of the Board of Regents, authority of professors to serve on promotions and tenure committees, the right to vote by secret ballot, academic freedom, and more.

Judge Owens denied the notice to stay his order and appeal. Dinnan had to be found in contempt of court in order to appeal to a higher court. One of his attorneys, Mr. Larkins, presented arguments and cited cases in support of academic freedom and first amendment rights, but to no avail. The judge separated the Dinnan case from that of Blaubergs' because the Dinnan case was not a dispute with the parties in the Blaubergs' case. The judge said the dispute is "between this professor and the authority of this United States Court."[14] Judge Owens then spoke of the court "causing obedience by punitive judgment."[15] He said, "We can't take him out and whip him like we do our children. . . . I can only come up and use the authority given me under the Constitution and laws."[16] He held Dinnan to be in criminal contempt, set bail at $50,000, later reduced to $10,000, fined him $100 per day for 30 days to be followed by 90 days in prison.[17]

On July 3, 1980, Dr. Dinnan surrendered to the U.S. Marshall in Macon, Georgia.[18] He wore an academic robe and hood to dramatize the debated issue of whether he represented the University or not and to show that academic freedom was in jeopardy. His attorneys filed a writ of habeas corpus and Judge Owens had to change the contempt from criminal to civil to keep Dinnan in prison.[19] Attempts to stay the sentence pending appeal were denied by the Fifth Circuit Court of Appeals and the Supreme Court.

The news media quickly realized that Dinnan was a folk hero.[20] Moreover, they identified his case with those of news people sent to prison for contempt of court in defense of their First Amendment rights. The Dinnan story was spread coast to coast. There was a great outpouring of support for Dinnan and sharp criticism of Judge Owens. Even The Wall Street Journal, in an editorial, "A University In Jail," strongly supported Dinnan.[21] Many individuals, Sidney Hook,[22] Albert Shanker,[23] and others, and organizations, especially, the University Centers For Rational Alternatives issued statements in support of Dinnan.[24] Judge Owens even wrote letters to newspapers in defense of his position and referred to some of his critics as "damn liars."[25]

Dinnan's attorneys appealed his case to the Fifth Circuit Court of Appeals. Dean J. Ralph Beaird and Associate Dean Walter Ray Phillips of the University of Georgia School of Law were attorneys for an amici curiae brief presented to the Fifth Circuit Court of Appeals. The amici brief presented arguments supporting the following contentions:[26]

I. The trial judge's failure to recognize a claim of priviledge in disclosure proceedings

  a. The trial judge improperly viewed the role of a federal judge faced with a novel priviledge issue

  b. The trial judge misapprehended the nature of university self-governance and the role of the secret ballot in protection of self-governance

  c. The trial judge was indifferent to the values that the secret ballot is designed to protect

d. The trial judge failed to balance the alleged need for discovery against the interests protected by nondisclosure

II. Academic freedom requires recognition of a priviledge on the part of faculty members not to reveal a vote on promotion and tenure

III. The common law priviledge of the secret ballot should be extended to university faculty voting on promotion and tenure

The _amici_ brief speaks to the legal issues in the Dinnan case. Cogent arguments are presented with extensive documentation. The record of the court reporter clearly shows that the judge did not understand university governance. The judge was badly mistaken in taking a secret ballot to be a "black ball" kind of vote like that of his college fraternity of some thirty years ago.[27] The judge plainly did not recognize the novelty of the case. He was very wrong about the concept of academic freedom and its relation to freedom of thought and of expression.

The _amici_ brief did not, however, speak to what seems to be a deficiency in legal procedure. The rights of children, the mentally incompetent, defendents, and criminals are fairly well defined by law or rules for legal procedure. The rights of deponents and witnesses, if any, are unclear, especially in civil cases where one cannot evoke the Fifth Amendment for protection. A deponent or witness cannot refuse to answer questions even though the questions may violate their rights. For example news people have been imprisoned for trying to protect freedom of the press. The _amici_ brief spoke to this matter in terms of recognition of a claim of priviledge in discovery proceedings. Perhaps some more definite limitations should be placed upon discovery proceedings.

The confidentiality of a vote is an important matter. It may be too important to be treated as a merely debatable priviledged kind of information. These are always qualifications for voting. One cannot vote in an election unless one is a registered voter.

One cannot vote in a club, church, labor union, or the like unless one is a member in good standing and meets other requirements. For those who meet these requirements, voting is a right. The United States Constitution recognizes voting in political elections to be a right of qualified voters.[28] The right of qualified voters to vote in the public or private domain is recognized by custom and common law. A duly appointed university committee whose business is to make judgments and express those judgments by vote has a right, even duty to do so. The results are made public, but individual votes or ballots are secret. This customary practice is not unlawful. Dinnan is not trying to stand above the law and he is not asking any special priviledge for university professors.

The expression "secret ballot" calls forth all sorts of suspicions not unlike the Watergate cover-up and numerous scandals in the federal government. The secret ballot used by promotion committees was extremely simple and straightforward. It consisted of writing on slips of paper words such as "yes", "no", "abstain", folding them and passing them up to the chairperson who shuffled and counted them. There is nothing in the vote or ballot that implies discrimination or nondiscrimination. If there was discrimination in the promotions and tenure process, then it will have to be found elsewhere and not in the votes taken.

There are good reasons for conducting the promotions and tenure process with considerable confindentiality and for use of a secret ballot. Candidates, their friends, their rivals, and administrators could exert undue pressure upon committees. Promotion and tenure committees should be protected from undue pressures. They should be able to deliberate carefully and honestly and objectively without harassment or fear of recrimination.

The Dinnan case can be summarized very briefly. This summary of it is not the words of James A. Dinnan, but he fully concurs in or with them. Any government that attempts to dictate to its citizens what they may think, or punishes them for honest expression of their thoughts by vote, when they are duly and properly qualified to vote, or punishes them for not revealing their vote later, when recriminations could be taken against them, is an unprincipled and tyrannical government unworthy of the support of the soverign people. This is the heart, the "nitty gritty," of the Dinnan case. James A. Dinnan violated no law, yet he was fined and imprisoned without trial by jury.

This paper began with reference to federal control of education. That control was called the background against which to view the Dinnan case, but it was also said that the background could hardly be distinguished from the foreground. This is due to some more recent aspects of federal control which endanger fundamental freedoms. President Bok of Harvard University has spoken of these freedoms as essential to a university and described them in the way that Justice Frankfurter once described them--to determine for itself on academic grounds who may teach, what may be taught, how it should be taught, and who may be admitted to study.[29] President Bok believes that these matters are increasingly coming under government regulation.[30] As they do, essential freedoms are lost and politics replaces academic functions. The Dinnan case exhibits a clear violation of the first of these essential freedoms.

1. Theodore Brameld, Education For The Emerging Age (Harper and Row, Publishers, Inc.: New York, 1965). Chapter 14 is entitled "The Bugaboo of Federal Control," pp. 145-151.

2. Senator Daniel Patrick Moynihan, "The University and The State," a lecture presented on the 100th anniversary of the Columbia University Graduate School, September 30, 1980. Also see, "State vs Academe," Harper's, vol. 261, no. 1567, December, 1980, pp. 31-40 for a slightly different version of this paper.

3. Ibid.

4. Ibid.

5. The University of Georgia Bulletin, 1978-79; Facult Register, p. 14.

6. The Athens Banner-Herald/The Daily News, Sunday, July 13, 1980, p. 1. In 1979-80, when Dr. Blaubergs was last considered for promotion and tenure, one man and two women in her department were promoted ("The Systems Summary," vol. 16, no. 4, April 1980, pp. 15-16) and three women but no men were granted tenure ("The System Summary," vol. 16, no. 5, May, 1980, pp. 21-22).

7. The Athens Observer, Thursday, January 22, 1981, p. 1.

8. The University of Georgia Guidelines For Promotion and Appointments (Revised October 1, 1973).

9. Maija S. Blaubergs vs. Board of Regents of the University System of Georgia, Civil Action 79-42, Athens, Order May 8, 1980.

10. Maija S. Blaubergs, Plaintiff vs. Board of Regents of the University System of Georgia, Defendent, Civil Action 79-42, Athens, Brief in Support of Motion for Contempt May 26, 1980.

11. Ibid.

12. Letter, Mr. John K. Larkins, Jr., Attorney at Law, to Judge Wilbur D. Owens, May 28, 1980 calling attention to the unconstitutionality of Mr. Marshall's request.

13. Maija S. Blaubergs vs. Board of Regents — Re: James A. Dinnan, Contempt Hearing, Criminal Action 80-4, Athens, June 2 and 3, 1980.

14. Ibid.

15. Ibid.

16. Ibid.

17. Ibid.

18. The news media, both newspapers and television, covered Dinnan's surrender in academic robe and hood.

19. The Athens Daily News, Thursday, July 10, 1980, p. 1. It seems that Judge Owens made a mistake in finding Dinnan to be in criminal contempt.

20. Dinnan was viewed as a hero by many common people and also as a hero in the cause of academic freedom. The Board of Trustees of the University of Scranton has voted to confer upon him an honorary degree on May 31, 1981. The letter from President William J. Byron to Dr. Dinnan December 23, 1980 stated that the degree would be awarded, "In recognition of your witness to principle, and in admiration of your courage."

21. The Wall Street Journal, Thursday, September 16, 1980, p. 38.

22. Sidney Hook, "Freedom In Jeopardy - Time to Strike the Alarm Bell," Measure, Supplement, September, 1980.

23. Albert Shanker, "Where We Stand," The New York Times, Sunday, October 5, 1980.

24. University Centers For Rational Alternatives, Dinnan Statement, January 10, 1981.

25. The Atlanta Journal and The Atlanta Constitution, Sunday, August 23, 1980, p. 1A.

26. In the United States Court of Appeals For The Fifth Circuit In Re: Janes A. Dinnan, J. Ralph Beaird and Walter Ray Phillips attorneys for Amici Curiae.

27. Amici Curiae Brief, pp. 6-7.

28. The United States Constitution, Amendments 19 and 24.

29. Derek C. Bok, "The Federal Government and the University," The Public Interest, no. 58, Winter, 1980, p. 81.

30. Ibid.

[From the Chronicle of Higher Education, January, 1981]

POINT OF VIEW

(By John H. Bunzel)

THE CASE OF THE JAILED GEORGIA PROFESSOR: LET'S CUT THROUGH THE INTELLECTUAL SMOG

James Dinnan, professor of education at the University of Georgia, was sent to jail for three months last summer for refusing to comply with U.S. District Judge Wilbur Owen's order to reveal how he had vote in 1979 on a faculty committee that recommended 6 to 3 against the promotion of Jaija S. Blaubergs, a nontenured assistant professor in the college of education. Subsequently her own department voted against giving her tenure.

Denied promotion on nine separate occasions over a three-year period, she appealed to the campus affirmative-action office, which set up a special committee of three women (two of whom were selected by Ms. Blaubergs herself) and two men to review her charges of sex discrimination. By majority vote, it dismissed them as unjustified. Still maintaining that the reasons she had been denied tenure and promotion were her sex and her involvement in feminist activities, she sued the university.

In April, 1980, Ms. Blaubergs' lawyers asked for a deposition from Professor Dinnan. He answered everything that was asked, including questions about the criteria he used when making judgments regarding promotion and tenure. But he declined to divulge his vote, contending that it was confidential and protected by both university policy and the Constitution.

In June, Judge Owens found him in contempt of court, and, on July 3, dressed in his academic robes to show that the government was, in effect, "locking up the University of Georgia," Professor Dinnan surrendered to federal marshals. Now released, he still refuses to disclose his vote, although his lawyers tell him it could mean going back to jail.

His case raises two related questions of profound importance to the academic community:

May a court compel a professor to reveal a vote cast under a secret-ballot procedure established by the university to insure the integrity of the voting process, or is that secret ballot legally privileged from disclosure in federal discovery proceedings?

What are the costs to higher education when the court intervenes in matters involving such academic rights as that of making faculty tenure and promotion decisions?

Ms. Blaubergs's lawyer asserted that "laws pertaining to discrimination will not mean anything if this cloak of secrecy can be placed over the process of deciding who will be promoted and tenured." Thus the important issue is whether the plaintiff's right to know how Mr. Dinnan voted should prevail over the processor's right to privacy and over the integrity of the academic review process.

However, a brief outline of the record does not by itself tell the full story of what the Dinnan case portends for academic freedom and autonomy. Judge Owens demonstrated a remarkable insensitivity to such university-governance procedures as confidential personnel decisions. For example, he compared the secret ballot to his fraternity blackball system. "Nobody had to stand up and have backbone enough to be counted," he said. But the secret ballot at the University of Georgia is not a "blackball" system. Whatever may have been the practice in the judge's fraternity, no single vote on tenure or promotion is ever determinative. Further, the secret ballot permits a vote to be cast free of pressure from other faculty members, administrators, students, or off-campus community groups.

In an *amici curiae* brief, J. Ralph Beaird and Walter Ray Phillips, dean and associate dean, respectively, of the Georgia law school, stated that the judge's summary dismissal of Professor Dinnan's claim that his vote was privileged reflected "an attitude flatly incompatible with -the duty imposed upon him to evaluate the competing demands at issue with care and disinterest." The crucial point is that in the face of Mr. Dinnan's claim that the privacy of his vote was absolutely a right (not an absolute right), the judge had an obligation to weigh the alleged need for discovery against the interests protected by non-disclosure. "It is plain," Mr. Beaird and Mr. Phillips wrote, "that if Judge Owens had engaged in such balancing, he would have concluded with little difficulty that Dr. Blaubergs's need for the particular information sought in this case was minimal"—after all, learning if Mr. Dinnan voted for or against her promotion would not establish whether there was sex discrimination—"and that the interests protected by nondisclosure were substantial." In short, sending Mr. Dinnan to jail for refusing to reveal his vote did not serve an overriding public purpose.

It is not necessary to pretend there is no sex discrimination in higher education or to believe that academic freedom is a license to discriminate, to claim that there is no clear, convincing proof of discriminatory intent on the part of the university in the denial of tenure and promotion to Ms. Blaubergs. A special committee (including two women) set up in February, 1980, to review, once more, her many appeals found "no evidence of irregular procedures, invidious discrimination, or arbitrary or capricious action." It unanimously concluded that she had "failed to meet the required standards for promotion and those for tenure"—and that was the judgment of virtually every other faculty committee that evaluated her teaching, research, and professional promise. Furthermore, faculty committees that had denied her promotion and tenure had no difficulty in recommending promotion and tenure for other women who meet the appropriate academic standards—or in turning down men who did not.

The roots and the Dinnan case trace back to the 1970's, when such university values as self-governance, merit appointment, and individual judgment became increasingly entangled in the web of the government's affirmative-action guidelines and enforcement procedures.

Most educators have long believed that the important goal for colleges and universities is and should be equality of opportunity for everyone and the appointment of the best-qualified person in every instance. Today, the primary objective of many proponents of affirmative action seems to be to pressure the academic community to favor applicants on the basis of race or sex by the use of numerical goals and timetables. Where discrimination once turned on whether it was "intentional on the basis of race," now the test is whether a university's tenure or promotion process has an "adverse impact" on certain (but not all) minority groups and on women. In other words, the burden of proof shifts to the campus to show that it is not guilty of discriminating on grounds of sex or race, reversing the ordinary requirements of legal procedure. Universities, now cast in the defensive role, are having to devote more and more of their time and resources to responding to individual and group discrimination complaints—some of them frivolous. One result is that in the conflict between long-established academic policies and the imperatives of affirmative action, a fundamental academic value—the confidentiality of faculty evaluations—has been breached.

This is bad news. Worse news is that the American Association of University Professors, the architect and most uncompromising defender of academic freedom, says that although it wants to "protect the review process" and finds the jailing of Professor Dinnan "inappropriate," it "doesn't want to allow unfair discrimination." It has therefore announced that it is ready to assist everybody in resolving the matter.

By straddling a precedential issue that sent a colleague to jail, the A.A.U.P. has lost an opportunity to put on the public record some of the reasons that confidentiality in the academic review process is necessary. Much of the intellectual smog that surrounds this question derives from the simplistic view that equates confidentiality with secrecy. In today's post-Watergate climate, secrets are bad news. But peer judgments by faculty members are not secret in this invidious sense. They are professional evaluations available to faculty committees that weigh their worth in coming to a decision about the academic credentials of the person under review. Far from secret, the evaluations are subject to intensive scrutiny by faculty members, deans, and administrative officials, all of whom have a common interest in seeing to it that the system works professionally and fairly to safeguard the rights and needs of the individual as well as those of the institution.

Those who argue against the principle of confidentiality frequently make the mistake of assuming that a tenure or promotion review is like a criminal or disciplinary action. But academic personnel reviews are not court proceedings, and should not be interpreted as such.

When faculty committees act on the professional future of a colleague, it is not an adversarial procedure. It does not take place in a secret, star-chamber session in which evil people give vent to their arbitrary, capricious whims—the involvement of both faculty members and administrators and the many steps of the review process prevent that.

Confidentiality does not jeopardize a faculty member's rights. Confidential peer judgment is the best way to assure honesty and candor in evaluating performance. Efforts to batter down the principle of confidentiality will ultimately produce deterioration in the ability to maintain a quality faculty. If the only way a less than competent faculty member can be denied promotion or tenure is for someone to state publicly that the person is unworthy, promotion and tenure are virtually assured for everyone. That is a sure recipe for a mediocre university.

Egalitarian and populist pressures that have weakened meritocratic values are changing the academic world. The practice of rewarding excellence and quality in individual performance is giving way to demands for spreading benefits more equally among all members of the faculty. Those who insist on high academic standards for tenure and promotions by differentiating among candidates through comparative (and truthful) evaluations are finding that individual quality is increasingly discounted in favor of group equity. Meritorious performance and scholarly achievement are becoming less important than seniority and other less discriminating standards of competence. But colleges and universities are in the business of making discriminating judgments. There must be equity on our campuses—but not at the expense of excellence.

Senator HATCH. Thank you, Professor Todorovich.

What is wrong philosophically, in your view, with affirmative action as a temporary and remedial measure to account for past discrimination against minority groups? It is certainly difficult to deny that minority groups, especially blacks, have been subject to considerable discrimination throughout our country's history. At least I think it is difficult to deny. Again, what is wrong philosophically, in your view, of affirmative action as a temporary and remedial measure to account for past discrimination against minority groups?

Mr. TODOROVICH. Nothing philosophically as long as we understand what we mean under remedial. I am a member now of a college which does its best to pick up people of any race or creed. It just happens in New York City that many——

Senator HATCH. You called it "expanding the net," I believe.

Mr. TODOROVICH. Expanding the net, yes, and giving any opportunity—that is what we mean under opportunity—to catch up and remedy what has been missed before and not just because of the way schooling went. We go even farther. There is a question of what family attitudes are.

We had this problem not just with minorities which are now official. Not so long ago, some of our professors would go from time to time into some Italian neighborhoods in Brooklyn to urge the parents to not lock their children into the same trades in which they were brought up, but if they are capable, to let them go further in, at that time, the Free University of the City of New York.

As Dr. Hook points out, there is a long tradition of trying to bend down and give any opportunity to moving upward as it was done in the tradition of this country.

However, the philosophy of this kind will get into difficulties if we, by hook and crook, try to guarantee also a numerical equality at the output end.

Senator HATCH. Dr. Todorovich, I believe you have previously been associated with several ethnic American organizations. You indicated that in your remarks. Is it possible to generalize about the attitudes in the ethnic communities about affirmative action programs and policies? Is there a feeling that these communities ought to be accorded greater consideration under affirmative action programs?

Mr. TODOROVICH. I did not exactly get the thrust of your question, but maybe what I will say is——

Senator **Hatch**. What is the attitude of the ethnic American people in the groups that you have been associated with? Do they want to have affirmative action programs for themselves?

Mr. **Todorovich**. First of all, as I remember, the last comprehensive poll of about 3 years ago on the question of preference—it was stated in that language—was not only rejected by 86 percent of the general population, I believe, but also by two-thirds of the minority population, blacks in particular. If you would want, I can find out the exact time and name of the poll.

I must say on my domestic grounds where I teach students in preengineering and where the homily usually reads that I have to make sure that you can build a bridge over which I will confidently ride one day, there is never disagreement. As far as my students are concerned, sometimes I have trouble remembering that they are black, or Hispanic, or Oriental, or whatever. They are all just strong minds for my purpose. They fully understand my concern with academic matters because they will have their children driving over those same bridges.

Especially in the hard sciences, extending opportunities is just as simple as that. You either can do something or cannot. We never have any problem with those students who are motivated and hard working.

Senator **Hatch**. Thank you, Professor Todorovich. We appreciate very much your efforts in being here today also.

Our next witness will be the Honorable William T. Coleman who is senior partner in the Washington law firm of O'Melveny & Myers and chairman of the board of the NAACP Legal and Educational Defense Fund. Mr. Coleman is the former U.S. Secretary of Transportation in the Ford administration.

The NAACP Legal and Educational Defense Fund is a frequent and always enlightening participant in the hearings of the Constitution Subcommittee. The fund is one of the Nation's outstanding sources of litigating expertise in civil rights affairs.

We are pleased to have both you, Mr. Coleman, and the NAACP Legal and Educational Defense Fund testify before this committee.

No doubt testifying before congressional committees is one of the things that you probably most miss from your days as Secretary. [Laughter].

Mr. **Coleman**. I miss it very much.

Senator **Hatch**. That is nice to hear.

Please go ahead, Bill. It is nice to have you here.

STATEMENT OF WILLIAM T. COLEMAN, NAACP LEGAL DEFENSE FUND

Mr. **Coleman**. Good morning, Mr. Chairman.

I am here today in my capacity as chairman of the board of the NAACP Legal Defense and Educational Fund. Since it is difficult to confine my perspective, however, to that one particular function, I shall also note in the interest of full disclosure that my personal views on the issues being considered by this subcommittee are very much affected by almost 40 years as a practicing lawyer, my episodic ventures as a public servant, my membership on eight corporate boards, my legal representation of some of the major American corporations, and my lifetime commitment to and support of the Republican Party.

I approach this hearing with some trepidation, for in today's economic and political environment, the defense of affirmative action is sadly not a welcome stance in some circles. Some principles, however, transcend politics and compel us to place at risk whatever waning political aspirations we still may harbor in defense of certain simple notions of justice.

I have prepared a formal statement, sir, and I know that you will read it.

Senator HATCH. We will place it in the record following your oral statement.

Mr. COLEMAN. I would like to make certain points. First, when my good friend Morris Abram comes in and speaks as to what all civil rights people feel, he just is wrong. When I looked at "Simple Justice," which is really the history of the civil rights struggle, Mr. Abram's name does not even appear in the index. I certainly think that people like Ben Hooks and Vernon Jordan and others of us who marched and fought are more qualified to speak as to what the civil rights movement wants than people like Morris.

Senator HATCH. I might just mention that he was very impressive and very articulate in presenting his point of view.

Mr. COLEMAN. Yes.

Senator HATCH. I will also add for the record that I feel strongly that Dr. Abram has an unblemished record in support of equal rights and equal opportunities for all American citizens. Now he does differ perhaps from——

Mr. COLEMAN. He differs on this issue and this is the gut issue today. It is all right to send the lady candy, but when you really get down to try to support her and make sure she gets a good living, to say that she is going to be denied opportunity to get a meaningful job, then it certainly affects your overall position.

Senator HATCH. Sure.

Mr. COLEMAN. At the outset, the one thing I would like to make crystal clear, although I do not think I have to make it to you, being a distinguished graduate from the Pittsburgh Law School, is that there is no real constitutional argument that a statute or a State practice or a private practice which establishes affirmative action programs that will take race into consideration in order to create opportunities for minorities somehow violates the 14th amendment.

I urge you to reread the history of the 14th amendment. That amendment was passed basically to protect black people. That was the purpose of the amendment. That is why a war was fought. It was to protect black people.

To say that Government programs which try to end the result of slavery, to end the result of racial discrimination and racial segregation somehow violate the 14th amendment is just too much of a sophisticated argument for me. I call your attention to Mr. Justice Frankfurter's concurring opinion in the *Corsi* case.

To say that statutes by the Federal Government or practices by the Federal Government which are trying to benefit black people and right past wrongs violate the 14th amendment just sets that history on its head. How can you draw such statute or such programs if you don't mention race?

Also, every Federal circuit court that has had before it the issue, once you show that there has been racial discrimination in a plant—and you show that in part by demonstrating that there are black people who did not get jobs, or there are black people who are not in the workforce, or even though you are in a community where basically there are a lot of black people and there are no black people working—once the court has made that finding, every circuit in this country has held without any qualification that at that point a Federal judge can step in and say that to correct this type of discrimination you have to have certain types of goals, certain types of provisions based upon race which will ultimately end that racial discrimination.

This is nothing new in American law. Just read the antitrust cases. There are a lot of things that people who have not violated the antitrust laws have a right to do and can refrain from doing. However, once a court determines they have violated the antitrust law, then every court orders them to do many things that otherwise the courts could not do.

Senator HATCH. Some say there is nothing new ever in American law.

Mr. COLEMAN. I will never forget when I was in law school. There is a case, you read it, and the result just does not make sense until the professor tells you one more thing: a black person was involved. At that point, rules, and Congressmen and Senators who apply all these general rules, begin to get hung up on issues they should not be hung up on.

I feel that sincerely. The whole thrust of affirmative action was in part based on the *Morton Salt* case, an antitrust case. If you could just back off from questions of race and look at what provisions you apply in the law when you are dealing with any type of wrong, you will find that affirmative action fits in.

Why are these provisions needed? Look at the country. I call your attention to Mr. Justice Marshall's statement which I quote on page 8, footnote 9 of my formal statement. Look at the country. This was 25 years after *Brown*. Mr. Justice Marshall describes what life is today in these United States: blacks do not earn as much as whites; blacks have a much higher rate of unemployment; the child of a black mother is much more likely to die.

Take any measure. Look at this Congress and see how few blacks are here. Look at this Senate and see how few blacks are here. Look at any part of American life and you will find that basically there are very few blacks that are participating in the decisionmaking process.

Why is that? Some may say that blacks are inferior and therefore they just do not have the ability. I think anyone who has examined the life of an Alexander Pushkin, a William DuBois, a Charles Drew, a Langston Hughes, a Bill Hastie would have to reject that argument.

Senator HATCH. Or a Bill Coleman.

Mr. COLEMAN. I will get back to that.

Others will say that God somehow is unjust and He did not distribute the same talents equally among all the races. I think those that believe in a Christian society, a Judaic society, or any other religion would have to reject these contentions.

It seems to me that the only answer left, if you would reject these two contentions, which I am confident you do, is that somehow the system in this country, even though we have talked about freedom and lack of segregation, as yet has not developed so that every child has an equal opportunity and every human being has an equal opportunity.

Why is that? I know you do not like to hear this, Senator. I do not like to say it, but when the original Constitution of the United States was adopted, the one thing it said was that blacks could be in slavery. It did not say that Lutherans, Armenians, Poles, or anybody else would be in slavery. It said that blacks and only blacks would be in slavery.

In this country, in the *Dred Scott* case, it was said a black person, even though he was born in the United States and born free, could not be a citizen.

As a result of that and other things, those of my ancestors and your ancestors who believed in equality got involved in a great War Between the States.

Three amendments were then adopted. They were tremendous amendments. However, what happened in this country? The 15th amendment says simply you cannot deny a person the right to vote because of color. That was adopted in 1870. In your lifetime, much later, or when you went to the Pittsburgh Law School, you read about the voting cases in the South. You read that the Supreme Court was still saying that those regulations which denied blacks the right to vote in a Democratic primary were perfectly OK.

In this country, I would tell you that you almost have to get down to 1970 before you can say that there is a consensus that somehow to discriminate against black people, to have racial segregation is wrong. Since that time, we have been trying to make strides.

However, you cannot wipe out 300 years of history overnight. You have to have some type of program that will permit those whose ancestors were denied rights that you got from the day you were born the rights that every Pole got from the time he came to the United States but were denied black people until 1970. That is what affirmative action is all about.

I have had several experiences during my life. I would like to share some of them with you. One is that I went to the Harvard Law School in 1941. That was a university that at least since 1850 had an official policy that it did not discriminate on the basis of race. Despite that fact, in 1941, out of 500 people, there were only four or five blacks in my class.

It was only much later that people like Erwin Griswold and Al Sachs in the 1960's began to say that has to be wrong. Because of affirmative action programs, I am pleased to report to you that now at the Harvard Law School, 10 to 12 percent of the class is made up of minorities.

There is another experience I would like to share with you. When I became Secretary of Transportation, I took that oath of office that I would defend the Constitution and execute the laws.

There were few public officials more against racial segregation and racial discrimination than President Ford.

When I went to that Department, I found that less than 10 percent of the people there were black. I found that black contractors and professionals were not getting subcontracts. I found that there were very few blacks in any position of authority in the Department of Transportation.

Take the air controllers, for example. There, anyone who finishes high school, applies, takes and passes the examination can be accepted for training as an air controller. The Government then paid $10,000 a year to the person for him or her to be trained for 18 months. At the end of that time, he or she could have the opportunity to make up to $30,000 or $50,000 a year.

With respect to the FAA, they had a practice of permitting outside accountants to audit the books. I found there were no black accountants that had that opportunity.

In the Northeast corridor, they were going to build a corridor through an area of poverty, a density of blacks. Yet no one was thinking, "What is wrong with saying that despite the fact that the Government is going to spend $2 or $3 or $4 billion, nobody is going to make sure that minority subcontractors get a fair part of that action?"

I was the most surprised man in the world when I said, "That will end," and 6 months later I asked what had happened and found nothing had happened. Only thereafter, through affirmative action programs and insistence that there be some consideration to this fact, did things change.

I would just urge you to examine the Department of Transportation before I got there as against after I got there. I think that will help you greatly to understand why there must be affirmative action programs.

I also would like to say that with respect to the corporate boards I sit on, I am very happy that most of those companies—they include IBM, American Can, Philadelphia Electric, Chase Manhattan Bank Insurance Co. of North America—have active affirmative action programs. They are very happy with these programs. They are working. Please do not by any action of this Senate try to change what is working.

Even though we spent some 300 years telling black people that they were inferior, people talk in terms of somehow in 1964 we are now going to go to a "neutral principle." OK, we went to a neutral principle.

Look at Government employment. Look at employment in corporations. Look at anything you want. You will find that blacks have not yet had full opportunity. Only where you have an active affirmative action program do you get that.

In my testimony, I try to indicate to you on page 28 what I think Congress ought to find before it says that we will try to restrict affirmative action programs with respect to blacks.

You should ask: Is there substantial equality in average wages between minorities and whites? I do not think you can say that today, sir.

Is there an approximately equivalent rate of unemployment between minorities and whites? Can you say that today?

Is there substantial equality in housing conditions and opportunities? Can you say that today?

Is there substantial equality in admissions to institutions of higher education and professional schools? My good friend who just testified before me said that for 200 years the faculties of these institutions were able to run them. I would like him to come back here and tell me why, if that is so, those great institutions had very few blacks. Many of them had very few women. You cannot leave it to the academicians if you go by their past record because their record is one of insensitivity to this problem.

Is there substantial representation in membership in trade organizations and unions?

Is there substantial representation in corporate board rooms, banks, the guiding bodies of the major political parties, the Congress and State legislatures, in short, in the positions of influence and power in our society where basic economic and political decisions are made?

In conclusion, I am pretty sure, Senator Hatch, that you think that my views as chairman of the Legal Defense Fund are not surprising. However, I hope that my comments also will be received and accepted as the views of a life-long Republican.

At this time of Republican resurgence, when the Nation is awakening to the potential for greater economic freedom and freedom from Government intrusion and regulation in our lives, the Republican Party should remember that it is the party of Abraham Lincoln, that it is the party of Charles Evans Hughes, that it is the party of Earl Warren.

These great Republicans also were dedicated to a free society, one in which all Americans, black and white, would have a genuinely equal opportunity to participate in the fruits of a free society. They were realists and, in fact, they wanted to see the demonstration of that participation. Until we see it in this country, I think we do have to have affirmative action programs.

Thank you, sir.

[The prepared statement of Mr. Coleman follows:]

PREPARED STATEMENT OF WILLIAM T. COLEMAN, JR.

Mr. Chairman and Members of the Subcommittee: Thank you for the opportunity to testify on an issue of vital concern to all Americans. My name is William T. Coleman, Jr.[1] I appear today in my capacity as Chairman of the Board of the NAACP Legal Defense and Educational Fund.[2] Since it is difficult to confine my perspective, however, to that one particular function, I should also note—in the interest of full disclosure—that my personal views on the issues being considered by this Subcommittee are very much affected by almost forty years as a practicing lawyer, my edisodic ventures as a public servant, my membership on eight corporate boards, my legal representation of some of the major American corporations and my lifetime commitment to, and support of, the Republican Party. I approach this hearing with some trepidation, for in today's economic and political environment, the defense of affirmative action is sadly not a welcome stance in some circles. Some principles, however, transcend politics and compel us to place at risk whatever waning political aspirations we still may harbor in defense of certain simple notions of justice. I have a formal written statement that I would like to submit for the record and a few personal observations that I would like to note at this time.

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[1] Mr. Coleman is Chairman of the Board of the NAACP Legal Defense and Educational Fund and is presently a senior partner at O'Melveny & Myers of Washington, D.C. Los Angeles, California, and Paris, France. He was Secretary of Transportation during President Ford's Administration and is on the Board of Trustees of the Supreme Court Historical Society, the Urban Institute, the Rand Corporation, the Carnegie Institution of Washington, the Brookings Institution and the Center for Law and Social Policy. He serves on the Executive Committee of the Lawyer's Committee for Civil Rights Under Law and is on the Board of Directors for the United Nations Association and was Chairman of that Association's Panel on U.S. Foreign Polilcy & Human Rights. Mr. Coleman is a member of the Council of the American Law Institute and the ABA Standing Committee on Federal Judiciary, and is on the Howard University International Sponsors Council. He is on the Board of Directors of AMAX, Inc.; American Can Company; Chase Manhattan Bank, N.A.; I.B.M. Corporation; INA Corporation; Pan American World Airways, Inc.; PepsiCo, Inc.; and Philadelphia Electric Company.

[2] The NAACP Legal Defense and Educational Fund has long been in the forefront of this nation's effort to translate its constitutional ideals into realities for black Americans. For over forty years, the Legal Defense Fund has worked through the courts to establish and enforce equal rights for black citizens to decent housing, quality education, good jobs, and full participation in the mainstream of American life. Legal Defense Fund lawyers have been counsel in

Let's make one thing clear. As a matter of constitutional law, there is nothing that prevents a state or locality or private concern from establishing an affirmative action program that will take race into consideration in creating opportunities for minorities to participate fully in our educational, economic and governmental system. The courts have held with virtual unanimity that race-conscious action may, and in some instances must, be taken under the civil rights laws and the Constitution, to eradicate the effects of discrimination in public education, voting rights, and employment. The Supreme Court has long recognized, for example, that in order to remedy constitutional violations in school desegregation cases, courts must often set mathematical ratios of majority to minority students in the school systems as "a starting point in the process of shaping a remedy." [3] The Court has also upheld legislatively adopted numerical quotas designed to assure fair representation of blacks in the electoral process.[4] All nine of the federal courts of appeals that have considered the legality of such race-conscious remedies in employment discrimination cases have found them lawful when necessary to correct proven and alleged violations of the law.[5] Such remedies have also been upheld in requirements imposed by statute and executive order on government contractors,[6] and in voluntary affirmative action plans adopted by both public and private employers.[7]

Those who object to affirmative action programs seek to justify their assault on the grounds that affirmative action is inconsistent with the uniquely American "tradition" of "color blindness"—that Americans should not make racial or ethnic distinctions. This "tradition" is elevated to a constitutional value by those who argue that the Fourteenth Amendment prevents states from making distinctions on the basis of race for even for the purpose of improving the economic opportunity of

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many landmark cases in the Supreme Court of the United States establishing basic constitutional and statutory rights for black Americans. *See, e.g., Brown* v. *Board of Education,* 347 U.S. 438 (1954); *Shelly* v. *Kraemer,* 334 U.S. 1 (1948); *Griggs* v. *Duke Power Co,* 401 U.S. 424 (1971). It is therefore fitting that we have been invited to appear before this Subcommittee to express our views on affirmtive action as a means for achieving this goal.

[3] *Swann* v. *Charlotte—Mecklenburg Board of Education,* 402 U.S. 1, 25 (1971).

[4] *United Jewish Organizations* v. *Carey,* 430 U.S. 144 (1977).

[5] First Circuit: *Boston Chapter NAACP* v. *Beecher,* 504 F.2d 1017 (1st Cir. 1974), *cert. denied,* 421 U.S. 910 (1975); *Associated Gen. Contractors* v. *Altshuler,* 490 F.2d 9 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974), Second Circuit: *Rios* v. *Enterprise Ass'n Steamfitters Local 638,* 501 F.2d 622 (2nd Cir. 1974); *Bridgeport Guardians, Inc.,* v. *Civil Serv. Comm'n,* 482 F.2d 1333 (2nd Cir. 1973), *cert. denied,* 421 U.S. 991 (1975); *United States* v. *Wood, Wire & Metal Lathers Local 46,* 471 F.2d 408 (2nd Cir.), *cert. denied,* 412 U.S. 939 (1973); *Vulcan Soc'y* v. *Civil Serv. Comm'n,* 490 F.2d 387 (2nd Cir. 1973); Third Circuit: *Erie Human Relations Comm'n* v. *Tullio,* 493 F.2d 371 (3rd Cir. 1974); *Contractors Ass'n* v. *Sec'y of Labor,* 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971); Fourth Circuit: *Sherrill* v. *J. P. Stevens & Co.,* 410 F. Supp. 770 (W.D.N.C. 1975), *aff'd,* 551 F.2d 308 (4th Cir. 1977); Fifth Circuit: *NAACP* v. *Allen,* 493 F.2d 614 (5th Cir. 1974); *Morrow* v. *Crisler,* 491 F.2d 1053 (5th Cir. 1974) (en banc), *cert. denied,* 419 U.S. 895 (1974); *Local 53, Int'l Ass'n of Heat and Frost Insulators and Asbestos Workers* v. *Vogler,* 407 F.2d 1047 (5th Cir. 1969); Sixth Circuit: *United States* v. *Masonry Contractors Ass'n,* 497 F.2d 871 (6th Cir. 1974); *United States* v. *Local 212, IBEW,* 472 F.2d 634 (6th Cir. 1973); *Sims* v. *Sheet Metal Workers Local 65,* 489 F.2d 1023 (6th Cir. 1973); *United States* v. *Local 38, IBEW,* 428 F.2d 144 (6th Cir.), *cert. denied,* 400 U.S. 943 (1970); Seventh Circuit: *United States* v. *City of Chicago,* 549 F.2d 415 (7th Cir. 1977), *cert. denied,* 434 U.S. 875 (1977); *Crockett* v. *Green,* 534 F.2d 715 (7th Cir. 1976); *Southern Ill. Builders Ass'n* v. *Ogilvie,* 471 F.2d 680 (7th Cir. 1972); Eighth Circuit: *Firefighters Institute for Racial Equality* v. *City of St. Louis,* 588 F.2d 235 (8th Cir. 1978), *cert. denied,* 443 U.S. 904 (1979); *United States* v. *N.L. Indus., Inc.,* 479 F.2d 354 (8th Cir. 1973); *Carter* v. *Gallagher,* 452 F.2d 327 (8th Cir. 1971) (en banc), *cert. denied,* 406 U.S. 950 (1972); Ninth Circuit: *United States* v. *Ironworkers Local 86,* 443 F.2d 544 (9th Cir.), *cert. denied,* 404 U.S. 984 (1971).

[6] *Fullilove* v. *Klutznick,* 100 S.Ct. 2758 (1980); *Contractors Ass'n of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F.2d 159 (3rd Cir.), *cert. denied,* 404 U.S. 854 (1971).

[7] *United Steelworkers of America* v. *Weber,* 443 U.S. 193 (1979); *Detroit Police Officers Ass'n* v. *Young,* 608 F.2d 671 (6th Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3466 (Jan. 22, 1980).

minorities. Finally, opponents argue that affirmative action constitutes a remedy that is in itself discriminatory and infringes upon the rights of non-blacks and of public and private institutions to act in their economic self-interest.

Let me deal with each of these arguments—tradition, constitutional prohibition, and improper remedy—in turn.

In *Regents of the University of California* v. *Bakke*,[8] racial preferences for historically disadvantage minorities were treated as constitutionally suspect because, according to Mr. Justice Powell, such distinctions appeared to violate traditions which are "rooted in our Nation's constitutional and demographic history." With all due respect to Mr. Justice Powell, he is wrong if he is talking about a tradition that racial distinctions are irrelevant. There has been no such tradition for black Americans. There is, moreover, no tradition that Government action which favors blacks is suspect. If our nation has traditions concerning racial distinctions, I suggest that a fair reading of history shows that we have two traditions. On the one hand, we have the egalitarian tradition that serves as the all-purpose catechism for use in civics classes, political speechmaking and official government documents. This tradition has been urged when the governmental action based upon race was directed against the racial minority to its detriment. On the other hand, we have the practical—and malevolent—tradition that in fact has characterized much official practice over the past three and a half centuries. This latter tradition is rarely acknowledged in constitutional doctrine, yet it is very much a part of American history and American life today.

In American history it is reflected in the original Constitution which acknowledged and legitimized the slavery of blacks, and by the fact that state and federal governments soon ignored the Thirteenth, Fourteenth and Fifteenth Amendments and resanctioned racial segregation and racial discrimination. In fact, until the late 1960's there was no national consensus that racial segregation was illegal. This malevolent tradition is reflected today in higher unemployment rates, lower wages, substandard housing and poorer health for black Americans,[9] and in the more subtle psychological assaults on human dignity which are today's remnants of the legacy of slavery. Blacks still remain a "discrete and insular minority" toward which there is latent hostility. Let us pray the day will come when we can agree that the need to preserve the Fourteenth Amendment's historic core purpose of protecting blacks is so obsolete that it can be disregarded. It takes an extraordinary insensitivity and an extraordinary ignorance of actual life in America today, however, to support the belief that this day has come or, indeed, is even near.

I will acknowledge that affirmative action to bring black Americans into the mainstream of our economic life directly conflicts with the practical American tradition, nurtured officially from 1619 until the mid-1960's and unofficially until today, of relegating minorities to an inferior economic status. And perhaps it conflicts, as well, with our wishful tradition of complete egalitarianism. Indeed, as Constitutional Law Professor John Hart Ely of Harvard points out, courageous advocates for egalitarianism in the past have had their hands full attempting, generally unsuccessfully, to combat widespread official discrimination against minorities. It is no wonder, that, until recently, the egalitarian tradition has rarely involved the opportunity to create affirmative new opportunities for minorities.[10]

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[8] 438 U.S. 265 (1978).

[9] Justice Marshall's opinion in the *Bakke* case reviews the overwhelming evidence that, [m]easured by any benchmark of comfort or achievement, meaningful equlaity remains a distant dream for the Negro.

A Negro child today has a life expectancy which is shorter by more than five years than that of a white child. The Negro child's mother is over three times more likely to die of complications in childbirth, and the infant mortality rate for Negroes is nearly twice that for whites. The median income of the Negro family is only 60 percent that of the median of a white family, and the percentage of Negroes who live in families with incomes below the poverty line is nearly four times greater than that of whites.

When the Negro child reaches working age, he finds that America offers him significantly less than it offers his white counterpart. For Negro adults, the unemployment rate is twice that of whites, and the unemployment rate for Negro teenagers is nearly three times that of white teenagers. A Negro male who completes four years of college can expect a median annual income of merely $110 more than a white male who has only a high school diploma. Although Negroes represent 11.5 percent of the population, they are only 1.2 percent of the lawyers and judges, 2 percent of the physicians, 2.3 percent of the dentists, 1.1 percent of the engineers and 2.6 percent of the college and university professors.

The relationship between those figures and the history of unequal treatment afforded to the Negro cannot be denied. At every point from birth to death the impact of the past in reflected in the still disfavored position of the Negro.

[10] *See* J. H. Ely, "Democracy and Distrust, A Theory of Judicial Review," Cambridge: Harvard University Press (1980).

Even more offensive to basic notions of fairness is the argument that affirmative action violates the Fourteenth Amendment and constitutes discrimination based on race. Proponents of this theory even seek support in judicial decisions that have invoked the Fourteenth Amendment to bar racial discrimination against minorities, overlooking the critical fact that the Fourteenth Amendment was created for the protection of minorities. Justice Frankfurter, in his concurring opinion in *Railway Mail Association* v. *Corsi*,[11] should have put to rest for all time this perversion of the Fourteenth Amendment. There, the Supreme Court upheld a New York statute forbidding racial discrimination by labor organizations "with all the economic consequences that such denial entails." The union had argued that such state interference with a private organization violates the due process clause of the Fourteenth Amendment. The Justice had little patience with this argument, stating "a State may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice to another's hurt. To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment. Certainly, the insistence by individuals on their private prejudices as to race, color or creed, in relations like those now before us, ought not to have a higher constitutional sanction than the determination of a State to extend the area of nondiscrimination beyond that which the Constitution itself exacts."

The Reconstruction Congress, the same Congress that gave the nation the Fourteenth Amendment, passed over President Johnson's veto such explicit preferences for blacks as those contained in the Freedman's Bureau Act of 1866 and the Colored Servicemen's Claim Act of 1867.

To construe constitutional amendments designed to protect the rights of minorities in a way that would prevent state or private action to advance equal opportunity for minorities, and/or to correct past inequities based upon race, is Orwellian double-talk. You recall, in the book 1984, how the government posted signs stating "Love is Hate" and "Peace is War".

Another often heard objection to affirmative action programs is that they require companies or institutions to take steps that they normally would not have to undertake in their economic self-interest in a free society. This argument overlooks the fact that affirmative action plans are a remedy for past discrimination. Where there has been violation of the law in the past, it is not uncommon for the courts to order the violator to take steps that he otherwise would not be obligated to take to remedy the wrongs. Certainly when companies are found in violation of the antitrust laws, they are required to divest themselves of assets, pay damages, or take other actions that they would not routinely be compelled to undertake in a free-market economy. But when the fashioning of appropriate judicial remedies is applied to the complex and emotional environment of race, suddenly there are outbursts of indignation. Yet, all the courts are doing is fashioning a judicial remedy that corrects a past violation of the law. This type of remedy is accepted and applauded by Americans in almost every other context.

Some Americans, who once had restrictive quotas imposed upon them, have attacked affirmative action programs, in my judgment sometimes erroneously. John Hart Ely, in "Democracy and Distrust," pp. 171–72, has written what to me shows the fallacy of such attacks:

"[I]t may be helpful explicitly to confront a fear that apparently has prompted certain Jewish groups to oppose preferential admissions for blacks. Somehow, the concern seems to run, most of those "black places" will be taken from Jews. I do not for a moment discount the reality of anti-Semitism in our society, nor can we dismiss the feared scenario as "just one of the costs" of pursuing racial equality. It is an unacceptable scenario, and an unconstitutional one as well. An American state legislature, unlike perhaps the Israeli Parliament, cannot legitimately pursue the goal of reducing the percentage of doctors who are Jewish. Whites generally, not Jews in particular, are a majority in our society, and consequently racial discrimination is unsuspicious only when it runs against whites in general. It is hard to see, however, how this danger can form the basis for a constitutional argument against preferences for blacks or other racial minorities. A "discretionary" system of selection already leaves room for various sorts of indefensible prejudice to operate: no matter how one might feel about the comparative merits and dangers of such a system—my own feeling has never been very positive—a decision to extend preferences to blacks does not significantly alter the problem. Administrators who include toward anti-Semitism in the one situation will very likely incline toward it in the other, and the chances of catching them—of demonstrating the illegality of what they are doing—don't seem to be greater one way than the other. Should a preferential admissions program for blacks be accompanied by an unexplained disproportionate drop in the percentage of Jews, or even by a shift to a selection system that left more room for anti-Semitism—a more discretionary system or a ceiling on the number of students from New York City—the appropriate judicial response would be clear. There would then be reason to suspect that the idea was to prefer one minority at the disproportionate expense of another for reasons of ethnic prejudice, and the scheme should be invalidated. Anti-Semitism is a danger—one that should, in any event, be combated by every available tool, including constitutional litigation—but the danger is independent of a decision to extend preferences to blacks. There is thus nothing constitutionally suspicious about a majority's discriminating against itself, but we must never relent in our vigilance lest something masquerading as that should in fact be something else."

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[11] 326 U.S. 88 (1944).

See also *op. cit.*, n.109.

I have discussed why I believe some of the arguments against affirmative action are fallacious. The best argument for affirmative action, however, is that it works. It is not a panacea, but in my own experience, I have witnessed its effectiveness from several perspectives.

As an incoming freshman at Harvard Law School in 1941, I could count on one hand—only four—the number of black students in my class of over 500. Today, many years later, after a concerted commitment to affirmative action, ten to twelve percent of the student body are members of minority groups. I know the tremendous opportunity that my Harvard Law School training provided me, and I believe it is genuine progress to be able to say that ten times as many members of minority groups today have the advantage of that opportunity.

Secondly, when I was appointed Secretary of Transportation by President Ford, I soon became dismayed at the low numbers of minority employees in the Department and the low levels of minority participation in the public works construction projects funded by the Department. When I took the oath of office to defend the Constitution and to execute faithfully the laws of the United States, it placed upon me an obligation to see that all Americans, including minorities, had the same opportunities for federal employment, and that since the federal government was taking a significant percentage of the gross national product each year, the contractors and subcontractors to profit from such money should be of all races. Yet I saw that (a) although air traffic controllers, for example, received most of their pertinent training from the government, very few blacks were admitted to this program; (b) major expenditures were made for transportation projects, many of them in the inner-city, yet blacks were very much under-represented on the construction crews and almost nonexistent among the contractors; and (c) when outside accountants were needed to review the books of various transportation agencies, minority firms were never selected. I assure you that, by merely stating that there shall be no longer any racial discrimination, I did not, and could not, change these brutal facts.

In each of these and other areas I thus set about to establish affirmative action plans, to make affirmative action an essential prerequisite for government funding and to create goals and other incentives for the hiring of minority personnel. We made substantial progress in each of these areas. Minority CPA's were hired to examine the FAA's books; more minorities were recruited as air traffic controllers; the Northeast Corridor Project included a substantial minority business program which has not only benefited black entrepreneurs but created construction jobs and training for black laborers.[12] The fact is that there was a long history of limited or nonexistent access by blacks to the benefits provided by the Department of Transportation. The fact is that it took a strong commitment to affirmative action to begin to change this trend.

My experience as Secretary of Transportation is not unique. Other responsible government officials and private institutions have found that, in many circumstances, there is no effective alternative to the use of race-conscious measures if blacks and other minorities are ever to become full and equal participants in our society. The Detroit Police Department, for example, over a period of years upgraded its minority recruitment efforts and modified its selection procedures without substantially increasing the numbers of black police officers hired and promoted. Only after the department adopted a policy of hiring and promoting one qualified black for every qualified white did it succeed in integrating the police force. Similarly, for more than 25 years federal committees and agencies attempted without noteworthy success to secure compliance with executive orders banning discrimination by government contractors. The Labor Department eventually concluded, during the Nixon Administration, that it was necessary to adopt measurable numerical goals and timetables for minority employment and advancement.

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[12] Seventeen percent of the subcontracting work on the Northeast Corridor Project is being done by minority contractors.

Race-conscious affirmative action plans, when properly designed and implemented, can benefit whites as well as minorities in a number of ways. The training program at issue in the *Weber* case,[13] for example, was adopted primarily to provide opportunities for black employees to move into the skilled crafts, but half of the openings went to unskilled white employees who previously had no access to such training. Affirmative action plans which focus on observable numerical results also encourage institutions to reform arbitrary tests and qualification standards. While such tests and standards may have a disproportionately adverse impact on minorities, they almost always operate to the detriment of some whites as well. Changes in such standards not only benefit the arbitrarily excluded whites, but also contribute to the development of a true merit system.

Using race-conscious methods to bring minorities into predominantly white schools, offices, factories, and neighborhoods can also have a beneficial educational effect on the white majority. As Justice Powell noted in his opinion in *Bakke*, race-conscious university admissions policies benefit all students by insuring racially and ethnically diverse student bodies. As well thought-out and sensitively administered affirmative action plans increasingly bring qualified minorities into contact with whites, some of — — the old myths, stereotypes, and prejudices are beginning to fall away. Moreover, using race-conscious measures to achieve full minority participation in police and fire departments and in other governmental functions is often essential to the provision of fair and effective law enforcement and other government services. All citizens benefit when blacks as well as whites trust their police departments and other governmental institutions.

As a member of eight corporate boards of directors, I take a special interest in the affirmative action programs of the companies with which I am affiliated. Although good news does not travel very far, I can say categorically to this Subcommittee that my overall conclusion is that major U.S. companies support affirmative action programs, and that such programs are working effectively to bring black Americans into the mainstream of our economy. Given the recognition by corporate executives that such programs are in the nation's economic interest as well as in their own self-interest, government should encourage and support efforts by the private sector to act in a socially and economically responsible manner.

In the twenty-seven years since *Brown* v. *Board of Education*, many of us may have forgotten that black Americans were brought to this country in chains in the hulls of cargo ships and sold as slaves. It is also forgotten that the Supreme Court held in the *Dred Scott* case that blacks, whether slave or free, imported or native born, could not be citizens of the United States. Through the combined actions and inactions of state and federal governments over the years, they were held in a position of legal inferiority for another century after the Civil War. In fact, not until the mid-1970's can one fairly say there was a national consensus that governmentally sponsored racial discrimination and segregation were legally wrong. Righting the wrongs of this legacy of social injustice, this legacy of racial intolerance and bigotry, cannot be accomplished by one landmark Supreme Court decision or by egalitarian pronouncements in civil rights laws.

The consequences of centuries of slavery and second-class citizenship cannot be overcome by simply pretending that those consequences do not exist. It is nothing but a sham to allocate jobs, university admissions, government contracts, and other scarce opportunities and resources on the basis of so-called "neutral" criteria that in fact perpetuate the legacy of slavery and discrimination. Bringing real equality into the mainstream of American culture and purging that culture of the effects of racism and racial segregation will take many more decades of committed effort. The facts today demonstrate that we have a long way to go.

The substantial inequality between minorities and whites today is susceptible of many interpretations. Some will argue that blacks are inherently inferior and thus relegated to an economically subordinate status. Yet, such a theory explodes upon the existence of an Alexander Pushkin, a William DuBois, a Charles Drew, a Langston Hughes, or a William H. Hastie, to include only a few of the dead. Others may argue that, while there may be talented exceptions, God has not distributed ability proportionately among the races. I believe both of these theories are wrong and must be vigorously refuted. And if they are wrong, then the only rational explanation for the enormous disparity that continues to exist between minorities and the majority of white Americans is the legacy of slavery and racial discrimination. That legacy calls for affirmative action to remedy past wrongs, to realize the human potential of black Americans, and to transform egalitarian wishfulness into pragmatic experience. To do so requires more than simple color-blindness; it requires the skillful use of race-consciousness to achieve a race-neutral society. As Justice Marshall so eloquently stated in the *Bakke* case:

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[13] *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979).

"The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro.

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"It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. For far too long, the doors to those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors."

In a series of cases decided over the past three years, the Supreme Court has recognized the validity of various forms of race-conscious affirmative action. In the *Bakke* case in 1978, while a majority of the Court invalidated a particular medical school special admissions program on statutory grounds, a different majority held that "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." In the *Weber* case the following year, the Court held that Title VII of the Civil Rights Act of 1964 permits private employers and unions to adopt race-conscious numerical affirmative action plans which are designed to break down patterns of racial segregation and hierarchy in traditionally segregated job categories, provided that such plans do not "unnecessarily trammel the interests of the white employees" and that they are "temporary measure[s] . . . not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." Finally, last year in the *Fullilove* case the Court held that Congress, in providing grants of federal funds to state and local governments for public works contracts, may properly require that a minium percentage of those funds be set aside to procure services and supplies from minority business enterprises.

In each of these cases, members of the Court carefully reviewed and documented the evidence demonstrating the need for race-conscious affirmative action: a long history of limited minority access to the medical profession and denial of adequate health care to minority communities; exclusion of blacks from vocational schools and jobs in the skilled trades for a century after Emancipation; the longstanding denial of effective participation by minority businesses in public contracting opportunities. And in each case, as in our society generally, the recent adoption of racially "neutral" admissions policies, employment practices, and contracting procedures could not suddenly obliterate the consequences of our history and bring about immediate equality of opportunity. On the contrary, in the context of our national history of slavery, segregation, and discrimination, the failure to take race into account often perpetuates the effects of our past. In reality, "neutral" practices—such as admitting to professional schools only those students with the highest grades and test scores, or selecting for job training programs only those employees with the most seniority, or awarding government contracts only to the lowest bidders—may simply insure that black Americans continue to be excluded from full and equal participation in our society. Far from serving the goal of equality, such racially "neutral" policies guarantee that there will continue to be no escape from the self-perpetuating cycle of discrimination, poverty, and despair: discrimination in education will deny the credentials to get good jobs; discrimination in employment will deny the economic resources to buy good housing; discrimination in housing will confine minorities to school districts providing inferior education; and so on, ad infinitum. The warning given by the National Advisory Commission on Civil Disorders in 1968 will prove to be true: our nation will be "two societies, black and white, separate and unequal."

The ultimate goal of affirmative action, then, contrary to the arguments of some of its critics, is not to set up a permanent system of proportional representation for all racial and ethnic groups. Rather, it is to break the cycle of discrimination and to achieve equality of opportunity which is real and not illusory.

Despite the continuing legacy of slavery and discrimination, there has been some progress in recent years. Among blacks who are employed, there has been a substantial increase in professionals and managers. While about one percent of America's law students were members of minority groups in 1964, today the figure is close to ten percent. In 1969 only about three percent of medical school enrollment was minority; today it is about ten percent. The ratio of black undergraduate enrollment to black population for the first time is virtually the same as the ratio of white undergraduates to white population.

This is not to say that we no longer need affirmative action. Minority managers are clustered at low levels; the percentage of minority professionals remains in the low single digits. A disproportionate number of blacks attend two-year colleges or fail to graduate from four-year schools. Unemployment among blacks remains double that among whites; the jobless rate for teen-age blacks is four times that of young whites. Black median income is less than 60 percent of white median income.

But affirmative action has begun to work. As Jack Greenberg, Director-Counsel of the Legal Defense Fund, has stated:

"It doesn't take a statistician to perceive the shifting racial and ethnic makeup of the American social and economic structure. Anyone who walks down the corridors of a major corporation or looks into a university classroom can readily observe the difference between today and a decade ago. There are conspicuously more blacks, Latinos and women everywhere."

Affirmative action is at least partly responsible for this change. It has given some black citizens and other minorities their first foothold on equal participation and their first stake in the success of America's institutions. If we are ever to achieve the goal of a truly race-neutral society, those institutions must be permitted to continue using affirmative action to bring minorities into the mainstream of American life.

It would be my fondest hope to appear before this Subcommittee one day to state that affirmative action is no longer an essential tool in the realization of the American dream. When practical realities reflect our egalitarian aspirations, then we will have created a true tradition of equal opportunity regardless of race. But let us not be deceived by mistaking our wish for a society free of discrimination for the reality of today's conditions. As Mr. Justice Blackmun stated in *Bakke,*

"In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetrate racial supremacy."

Perhaps this Committee can establish criteria by which it will measure the practical conditions against the principles of equal opportunity. When we can show, as a nation, that we have made sufficient progress in meeting these criteria, then the remedy of affirmative action will no longer be an essential tool in realizing our constitutionally recognized values.

The criteria I would list include the following:

1. Substantial equality in average wages between minorities and whites;
2. Approximately equivalent rates of unemployment among minorities and whites;
3. Substantial equality in housing conditions and opportunities;
4. Substantial equality in admissions to institutions of higher education and professional schools;
5. Substantial representation in membership in trade organizations and unions; and
6. Substantial representation in corporate board rooms, banks, the guiding bodies of the major political parties, the Congress and state legislatures—in short, in the positions of influence and power in our society, where basic economic and political decisions are made

Perhaps, as views of the Chairman of the Legal Defense Fund, my comments today have not been surprising. But I would hope that my comments also will be received and accepted as the views of a life-long Republican. At this time of Republican resurgence, when the nation is awakening to the potential for greater economic freedom and freedom from government intrusion and regulation in our lives, the Republican Party should remember that it is the party of Abraham Lincoln and Charles Evans Hughes and Earl Warren. These great Republicans also were dedicated to a free society, one in which all Americans—black and white—would have a genuinely equal opportunity to participate in the fruits of a free society and, in fact, would so participate.

EQUALITY—NOT YET

(By William T. Coleman Jr.)

WASHINGTON.—For black Americans, racial equality is a tradition without a past. Perhaps, one day America will be color-blind. It takes an extraordinary ignorance of actual life in America today to believe that day has come.

Some who profess support for the goal of equal rights condemn affirmative action as "odious" and "invidious." They would discard numerical goals and timetables for employment of blacks by Government contractors; they would outlaw consideration of race in the admission of black students to colleges and professional schools; they would deprive the courts of the power to shape numerical remedies for proved discrimination in hiring and promotion.

Such affirmative-action programs and judicial remedies, it is argued, are inconsistent with the American "tradition" of color-blindness and individual merit. However, there never has been such a tradition for black Americans. Moreover, there is another American "tradition"—one of slavery, segregation, bigotry, and injustice. This latter tradition was embedded in the slavery provisions of our Constitution, and it was renewed by the immediate post-Civil War rejection of the true purpose and meaning of the 13th, 14th, and 15th Amendments. This tradition is reflected today in higher unemployment rates, lower wages, substandard housing and poorer health for black Americans, and in more subtle psychological assaults on human dignity.

The failure to take race into account in the present often perpetuates the legacy of our past. "Neutral" practices—admitting to professional school only those students with the highest grades and test scores, or selecting for jobtraining programs those with the most seniority—may simply ensure that blacks will continue to be excluded.

The law therefore requires a close examination of testing and hiring practices that have a disparate impact on minorities to ensure that they reflect real differences in merit. We must go beyond mere neutrality, however, if we are ever to overcome the lasting legacy of slavery and discrimination. That requires affirmative action.

Some argue that affirmative action violates the 14th Amendment. However, the same Congress that adopted the 14th Amendment also passed such explicit preferences for blacks as the Freedman's Bureau Act of 1866 and the Colored Servicemen's Claims Act of 1867. To interpret this amendment as prohibiting the consideration of race to advance equal opportunity has all the earmarks of such Orwellian double-talk as "Love is Hate" and "Peace is War."

The best argument for affirmative action is that it works. As the newly appointed Secretary of Transportation in President Ford's Cabinet, I was dismayed at the low numbers of minority group employees in the department and the low levels of their participation in projects funded by the department. Although air-traffic controllers for example, received most of their training from the Government, very few blacks were admitted to this program; major expenditures were made for transportation projects, yet blacks were seriously underrepresented on construction crews and almost none consistent among contractors; and where outside accountants were needed to review the various transportation agencies' books, minority-group firms were never selected.

With the establishment of effective affirmative-action plans, however, we made substantial progress in hiring minority-member accountants, recruiting minority members as air-traffic controllers, and including a substantial minority-group business program as part of the Northeast Corridor Project, a plan to create a high-speed rail corridor between Washington and Boston. As a member of the boards of nine major American corporations, I have found that affirmative-action programs are working effectively to bring blacks into the mainstream of our economy. Thousands of black workers have been hired and promoted into training programs, skilled crafts and supervisory positions.

Several criteria come to mind for determining when equal opportunity has been achieved. There must be substantial equality between minority groups and whites in wages, unemployment rates, housing conditions and opportunities, admissions to colleges and professional schools, and membership in trade organizations and unions. Moreover, minority groups must be substantially represented in corporate board rooms, banks, the guiding bodies of the major political parties, Congress, and the state legislatures—in short, in positions where basic economic and political decisions are made.

When practical realities reflect our egalitarian aspirations, then we will have a true tradition of equality. Until that day comes, however, we must take affirmative action to remedy past wrongs, to realize the human potential of black Americans and to transform egalitarian wishfulness into pragmatic experience.

Admittedly, my views are those of a committed advocate of civil rights. But they are also those of a committed member of the Republican Party. At this time of Republican resurgence, we must remember that ours is the party of Abraham Lincoln, Charles Evans Hughes, and Earl Warren. Like those great Republicans, we should strive not only for greater economic freedom and freedom from unwarranted

Government intrusion in our lives but also for true equality of opportunity for black Americans.

(William T. Coleman Jr., Secretary of Transportation from 1975 to 1977, is a practicing lawyer and chairman of the NAACP Legal Defense and Educational Fund Inc.)

Senator HATCH. Thank you, Bill.

You have already answered quite a few of the questions that I was going to ask you.

Dr. Thomas Sowell of the Hoover Institution, who will be testifying here next week, has argued that affirmative action programs tend primarily to help those minority members who come from the least disadvantaged backgrounds. Indeed, he suggests that these programs actually pose hindrances to the advancement of the most severely disadvantaged individuals by making employers extremely reluctant to hire them in the first place since they believe that future failures to promote them and such may bring Washington down on their heads.

How would you respond to Dr. Sowell's views?

Mr. COLEMAN. I would tell him that he has been teaching and perhaps those who teach just do not know how to do. The fact is, sir, that it is ridiculous to say that.

The Legal Defense Fund has brought lawsuits involving the U.S. Steelworkers. I have great admiration for steelworkers. If I did not, since I know that you were a member of the union at one time, I would, but I still do.

Yet in this society, we would not describe them as being the elite and the type of people the professor is talking about. We have been able to break down the discrimination and we have been able to change it.

If you look at it, you will be able to find that you are dealing with those who work for their living with their hands. Those are the people you are helping.

Senator HATCH. Let me reverse that question a little bit. Bill, you are a graduate of the University of Pennsylvania and the Harvard Law School.

Mr. COLEMAN. Yes.

Senator HATCH. You served a U.S. President as a Cabinet official. Your daughter is a graduate, I think, of Yale University. She is a lawyer who served as special assistant to the last U.S. Attorney General.

Mr. COLEMAN. She is a Republican, too, sir.

Senator HATCH. That is good. That is a very good thing.

My question is this: Why should she be entitled to preferential treatment because of either sex or race? On what basis can you contend that she is entitled to compensatory treatment for past discrimination?

Mr. COLEMAN. I do not think anybody is saying that, sir. I just think that is——

Senator HATCH. We do have people saying that.

Mr. COLEMAN. Be serious now, sir. Are you seriously saying that if you have an affirmative action program at the Harvard Law School, for example, or the University of Pennsylvania, what happens is that every black who applies, even though he or she is a graduate of Milton Academy and was first in the class there, the admission authorities say they cannot consider them with the normal applications and only put them under the affirmative action program? It is not done that way, sir.

What happens is that, when they apply all of the neutral normal rules and when they get finished and find that by doing that they have only two blacks out of a big class at the University of Pennsylvania, what do they then do? Then you have a responsibility, I think, to seek out people that in your judgment have the same ability and talents even though it is not revealed by the so-called neutral principles.

That is why I initially said if you want to go on the position that blacks are inferior or that God is unjust, then you can go that way. However, once you reject those two premises, as I do, you have to realize that the reason why you do not have the applicants that are initially as qualified if you apply the so-called neutral standards is, in part, that all the testing has been developed based upon a white culture.

I am from Philadelphia. I still live there. I pay the taxes for the schools in Philadelphia. The schools with respect to blacks are lousy. They have been lousy. It takes a heck of a talented kid to develop the potential for admission to the highly selective colleges.

You talked about me. You talked about my parents. We were lucky. We did not go to segregated schools. However, there were times when race played a part. When I read your biography, I noted with great interest you said you worked your way through school. However, I am pretty sure that all through that, nobody ever discouraged you from your opportunities.

Senator HATCH. No.

Mr. COLEMAN. I went to a high school in Philadelphia. I gave a speech which I thought was better than any speech that anybody else in the class gave. My white English teacher said to me, "Bill, I think you will make a good chauffeur."

Now but for the fact that I had a mother and a father who had a different attitude and had been well-trained and were both college graduates, that could have destroyed me. It did not. However, that is what you have out there and that is what you still have out there.

Senator HATCH. You are making excellent points. I might mention that the reason I asked that question is because there are those—and I think there is perhaps some credibility to the argument—who feel that affirmative action programs really do not help the most disadvantaged minorities; they basically help those entirely able to help themselves. However, you have made another point.

Mr. COLEMAN. I would cite to you, sir, the litigation we have had. Consider all the blacks who would not be considered of the status or type you are talking about, but yet now are making more money and getting opportunities.

People can come and say anything, but I wish you would go and get the facts. If you got the facts, I have every reason to believe that on the floor of the Senate you would be the greatest exponent of affirmative action, if you really studied the facts.

Senator HATCH. That is a compliment I suppose.

Let me just say this: I am genuinely listening. You have contributed significantly to the discussion today.

Is it your honest view that affirmative action has contributed positively to the social relations between the races? There are some who would say that that affirmative action programs have sharpened tensions and divisions between the races instead. What is your viewpoint on that?

Mr. COLEMAN. I think it has contributed greatly to peace and tranquillity in this country.

Senator HATCH. I can see why you are a great lawyer.

Mr. COLEMAN. The amazing thing is when you get out of this country and overseas. The people who are in here complaining to you, when they really start talking about the greatness of this country, they talk about blacks having opportunity. The people at Harvard talk about the fact that at Harvard now 10 percent of the student body is black. They talk about these things which really distinguish America and make it great.

You have to start with the fact that black people were the only people who came here in the conditions they did and were the only people until 1965 or 1970 whom almost everyone, affirmatively, was trying to do everything to keep them down.

That has now changed. It has not changed because those people who were trying to keep them down finally decided to be colorblind. It was because we went to court.

Go back and reread some of the arguments of the good attorneys general from some of the Southern States about why segregation did not violate the 14th amendment.

Now as we still try to get equality, and we are probably about 10 to 15 percent there, we have another tool which will help our children really occupy the positions they should. We now have the same people coming in with different arguments, a little more sophisticated and trying to prevent this great social change which is needed if we are going to keep this country from ending up as two separate societies, one white and one black.

Senator HATCH. In relation to your argument that blacks are the only group in our society who have been brought into the country under such conditions of servitude——

Mr. COLEMAN. No, sir, that is not my argument.

Senator HATCH. I know, but you are making the point nevertheless that they have had a different history and experience in this country.

Mr. COLEMAN. Yes, sir.

Senator HATCH. As a result of that different history then, what is your view on treating blacks and Hispanics identically for purposes of affirmative action programs? Do you think they should be?

Mr. COLEMAN. Let me make it clear. I hope I do not irritate anybody.

Senator HATCH. That is always one of the problems with affirmative action.

Mr. COLEMAN. I had the Gerard College case where they had a provision limiting admission to white males only. I was demonstrating that that was unconstitutional and that you cannot do that.

My opponents were saying, "What is wrong with having a high school for girls and a high school for boys?" That is just a different case.

I start with the proposition that the 14th amendment had one particular purpose. That was to protect blacks and finally put blacks in the mainstream. That is the purpose.

There are other people who have the right to take advantage of that provision if they can show similar circumstances. From all my experience with the Mexican Americans, I would put them probably 95 percent in the same class as black Americans. Certainly those my color or darker, maybe unfortunately for them, may get confused with being blacks.

I do not think anybody who lives in Texas and sees Mexican Americans or anybody who lives in Philadelphia and sees the Puerto Ricans being discriminated against would say that a responsible government does not have to do something to change the situation.

Senator HATCH. Let me give you another illustration. What if Virginia State University for example, an all-black school, is directed by the Federal Government to integrate itself with particular percentages of whites or else lose Federal funding? What would you feel about that type of an order from the Federal Government?

Mr. COLEMAN. I hope that the Federal Government will act with judgment. However, I think ultimately that the black universities should have significant numbers of whites. I would urge you, however, to get played for you a statement that Carl Rowan made last night at five minutes to 7 on the radio. I was waiting to see the seven o'clock news to see what was going to happen with respect to the four airplanes going to Israel. The fact is that the black universities of this country have contributed greatly.

Senator HATCH. There is no question about it.

Mr. COLEMAN. I wish you would get Mr. Rowan's statistics. As I remember them, something like 40 percent of all the black dentists trained in the United States came out of the black dental colleges. In the medical profession, it was about 25 percent.

I ask you to go back to 1866, the Reconstruction Congress, when the 14th amendment was promulgated, and read about what it meant. Please read the fact that the same Congress at the same time passed the Freedmen's Bureau Act of 1866 and the Colored Servicemen's Claims Act of 1867. There, they affirmatively made provisions to benefit blacks.

If I could ever get that point really embedded—people like to back away from it—but if you really read the history and find that you have an amendment that affirmatively did that, then it seems to me that clearly you are doing a great disservice to the country if you try to prohibit now something it took us over 150 years to get, and, just when it is beginning to work, to prohibit it from cleaning up and doing the job so that maybe when your son is a Senator, then he can see that statistically we are all really one Nation. At that time, you can take another look at it.

Senator HATCH. My sons have seen what a miserable position this is. I doubt that any of them will run for Senator.

Let me say this, Bill. I am personally very proud that you are a Republican. I am also very proud to have your friendship.

I started to read "Simple Justice" a few years ago. I do not know what I did with my book. Would you loan me yours?

Mr. **Coleman**. Yes, sir. In fact, this does not cost $25 so I will give it to you since that does not violate the law with respect to gifts to public officials, and I can get another copy.

Senator **Hatch**. You are going to give it to me?

Mr. **Coleman**. I will give it to you.

Senator **Hatch**. I am even more proud that you are a Republican now. [Laughter.]

Mr. **Coleman**. I would also urge you to read this book, a book called "Democracy and Distrust" by John Hart Ely.

Senator **Hatch**. If you want to give that to me, I will read that one, too.

Mr. **Coleman**. I will send you one of these because this is my marked up copy.

Senator **Hatch**. That is exactly why I should read that one.

Mr. **Coleman**. Incidentally, it has what I think is the best answer to the concern of certain Jewish organizations. Because there was a tradition in Germany and perhaps here of using quotas to restrict opportunity, some Jewish groups today are opposed to affirmative action programs which are designed to enlarge opportunities for blacks. I think Professor Ely, on pages 171 and 172 and footnote 109, has the best argument I have ever seen to answer completely that argument.

Senator **Hatch**. Maybe you better loan me that one, too, and I will buy you a new one.

Mr. **Coleman**. I will send you one. Can I deliver one to you by 3 o'clock this afternoon.

Senator **Hatch**. However, I want your notes. That is the only problem.

Mr. **Coleman**. Will you give it back to me?

Senator **Hatch**. Yes, I will.

I have been reading various civil rights materials through the years. I have to admit that I do not consider myself an authority on it at all, but it is amazing how so many of these battles have come through this subcommittee and I have had to be in the middle of them. I have not enjoyed being in the middle of most of them.

In some areas, I may have pleased the civil rights community; in other areas, I may have upset them. I wish I could always please them.

I want to do what is right. I want to do what is right on affirmative action.

I have to admit that you are very persuasive in many ways. I am going to continue reading. However, I still feel pretty strongly about this issue. I do want to keep the dialog going however.

Mr. **Coleman**. I would like to also.

Senator **Hatch**. I respect you greatly, Bill. You look at these things from a perspective of someone who has been raised with and experienced these difficulties that maybe some of us have not had. I was raised in poverty, as well. I was raised with young black people, and have always gotten along with them as well as anyone else.

Mr. **Coleman**. I understand what you mean.

Were you old enough to go into the Second World War?

Senator **Hatch**. No, I was not.

Mr. **Coleman**. I came from the Harvard Law School first in my class. I went to serve my country. I went into a Jim Crow army in Mississippi. My first command from a white sergeant was: "Hey, nigger, where are you going?" Let us not kid ourselves. This country——

Senator **Hatch**. I am aware of that. There is no question that that type of approach is deplorable.

I will get that one book back to you, but I am probably going to accept your offer and keep the other one. I will read them both however much time it takes.

Mr. **Coleman**. Thank you.

Senator **Hatch**. Senator Grassley?

Senator **Grassley**. Thank you.

Mr. Secretary, when I first came to Congress, that was your last 2 years in the Cabinet, I appreciated getting acquainted with you and working with you.

I only have one question and it will not be a long line of questioning. It is taking off from the point you just made about one particular purpose for the 14th amendment and then referring to testimony you gave on pages 10 and 11 where you say that the 14th amendment is to protect minorities.

As way of clarification, I would like to have you say if you agree that if a person who is not a member of a minority group is discriminated against, then obviously he can seek redress under the 14th amendment as well?

Mr. **Coleman**. Unfortunately, life is not that simple. You start with the fact that there are a lot of statutes which regulate corporations in different ways. Merely because you show inequality of treatment, that does not mean that a statute is unconstitutional.

There are a lot of us that get regulated. Those of us who make more than $60,000 a year have to pay a 70 percent unearned income tax. Other people do not.

There are a lot of distinctions. You just cannot say. Those distinctions under the law, as you know, sir, have a rational basis.

When you get to laws which are directed against a particular person because of his race, then you have a completely different approach because there you are not talking about reasonable classifications. You are talking about the fact, with respect to blacks, that it was clear that the amendment was supposed to end that.

I would say that like most great constitutional provisions, a court and a Congress have the duty to see if there are other people similarly situated. I think the Mexican-Americans should also be under it.

Separately and distinct, you have the problem of women. In this country, women could not vote until about 1920, a date that you can pick better than I can. There was a lot of discrimination against women. Therefore, there has to be sensitivity to that fact. If there are women who want to be in the work force but yet cannot get jobs, then obviously the 14th amendment is used for that purpose also.

Senator **Grassley**. Thank you, Mr. Chairman.

Senator **Hatch**. Thank you, Senator Grassley.

Thank you, Mr. Secretary. We appreciate your testimony and all the effort you have put forth.

I particularly appreciate these two books. I will get the one back to you. We will be glad to have you back any time you can come. Thank you.

Our last witness today will be Mr. Nathan Dershowitz, who is the legislative director of the American Jewish Congress. He prepared amicus briefs for the American Jewish Congress in the *Bakke* and other affirmative action cases.

The American Jewish Congress is a national organization devoted to the interests of the American Jewish community.

Mr. Dershowitz, we are extremely pleased to have you with us here today. We look forward to your views on this important, and provocative, subject. We appreciate the effort you are making to be here with us.

STATEMENT OF NATHAN DERSHOWITZ, AMERICAN JEWISH CONGRESS

Mr. **Dershowitz**. Thank you, Senator Hatch.

What I would like to do is very quickly summarize the testimony that we have prepared and then answer any questions that the Senator may have. I will also comment on some of the comments that others have made earlier in the morning.

It is clearly a distinct advantage to be last. It gives one an opportunity to see what is on the Senator's mind and to try to deal specifically with those problems.

CONTINUING FAILURE TO OVERCOME EFFECTS OF OFFICIAL DISCRIMINATION

The American Jewish Congress strongly believes that there is a need to return to affirmative action as that concept was originally used by Presidents Kennedy and Johnson.

We believe that among the Nation's most intractable social problems is the continuing failure to overcome fully the effects of official discrimination. Over the past 35 years, great progress has been made toward this goal, but much remains to be done.

The racial ghettos in urban areas, the disproportionate impact of unemployment and poverty on members of minority groups, as well as the disproportionate number of minorities and women holding low-paying, dead end jobs are all problems which urgently demand solution. If these problems are not resolved, America could still become, as the Kerner Commission warned 13 years ago it would, two societies: One white and one minority.

In our view, there are three distinct elements which must comprise the Nation's efforts to overcome the present racial situation. First, existing State and Federal antidiscrimination laws apply to a wide spectrum of activity and represent a significant national commitment to the elimination of racial and other invidious forms of discrimination. As you mentioned earlier, Senator, the vigorous enforcement of the 1964 Civil Rights Act and its amendments is obviously a necessary step toward improving our present racial situation.

However, in addition to enforcing antidiscrimination laws, the Government must also carefully examine its programs to insure that they do not inadvertently injure or exclude any group or reinforce existing patterns of isolation. In this sense, a consciousness of the racial impact of governmental programs is clearly necessary.

THE AMERICAN JEWISH CONGRESS SUPPORTS AFFIRMATIVE ACTION

However, in our view, even if these two actions are implemented fully, some sort of affirmative action is necessary. In our written testimony, we cite from a 1974 resolution adopted by the American Jewish Congress which fully supports the principle of affirmative action.

We believe, however, that a fundamental reevaluation of the concept of affirmative action is necessary because that concept has been perverted over the years into a new form of discrimination.

As first used by Presidents Kennedy and Johnson, affirmative action connoted a positive effort to identify and encourage qualified individuals denied opportunity because of their race or national origin. As a result of such affirmative action efforts, such persons would now have a better chance to compete fairly on their own merits.

THE CONCEPT OF AFFIRMATIVE ACTION HAS BEEN PERVERTED

This concept of affirmative action remains sound. However, because of the urgent need to do something, the concept of affirmative action has, as you indicated earlier, been transformed from an effort to guarantee equality of opportunity into an effort to guarantee equality of result, with result being defined as the distribution of societal benefits so that certain groups are represented in proportion to their presence in the population.

This result oriented concept is frequently implemented by quotas and other numerical devices wholly antithetical to the great principles embodied in the concept of equal protection of the laws and it raises a host of subsidiary questions.

I believe that you mentioned some of these subsidiary questions in some of your initial questioning. For example, in the amicus brief that we submitted in the *Bakke* case, we dealt in quite a bit of detail with the question of the different entitlements claimed by different groups within society.

For example, if you are talking about official discrimination, the history of discrimination, as Mr. Coleman mentioned earlier, is a history in the United States of discrimination against blacks. Our Constitution not only mentions slavery but also treats blacks as three-fifths of people. That is in our Constitution.

Our country also has a history of discrimination against native Americans and a history of the internment of Japanese Americans.

THE REMEDY MUST BE DESIGNED TO ADDRESS THE PROBLEM

However, these different forms of discrimination may require different remedies. There was also some discussion earlier this morning of remedies. When one deals with a remedy, one has to analyze what the problem is. I think it was clear that Mr. Coleman's presentation dealt primarily, if not exclusively, with the claim of entitlement on behalf of blacks.

The question is whether that claim of entitlement on behalf of blacks is identical with the claim of entitlement that is made on behalf of Hispanics. Then the question is, which Hispanics? What is the nature of the entitlement? How much of an entitlement? Where do you draw the line on entitlement and when does entitlement end?

One of the questions that was raised in the *Bakke* case was the question whether Asian Americans, who had received a large percentage of the preferential slots that were available under that special admissions program, were entitled to a preference? Which Asian Americans were entitled and why?

As I mentioned earlier, Japanese Americans were discriminated against by a policy of the United States. Can one say the same thing about other Asian Americans? Does their entitlement to preferential treatment exist by reason of discrimination against them by the Government?

Those are some of the subsidiary questions which lurk under the whole question of affirmative action. What is happening is that the undergirding principles of color blindness and equal opportunity for all as individuals are becoming subsumed by these group-based preferential treatment plans.

RACE-CONSCIOUS AFFIRMATIVE ACTION SETS A DANGEROUS EXAMPLE

Race-conscious affirmative action, as that term has come to mean, is based upon principles which we strongly reject. It is precisely the rejection of the use of race as a criterion for allocating benefits, which is the ultimate basis for all of our civil rights laws.

As Justice Brandeis remarked in *Olmstead* v. *United States:*

> Our Government is the potent, omnipresent teacher. For good, or for evil, it teaches the whole people by its example.

Race-conscious affirmative action sets a dangerous example.

Mr. COLEMAN. That last part is not in the quote.

Mr. DERSHOWITZ. That is not in the quote.

We, as a society, have not always implemented the ideal that every individual should be allowed to progress as far as his or her ability will allow. However, as a society, we have now firmly committed ourselves to the realization of that goal.

The warning of Justice Jackson, in his perceptive dissent in *Korematsu* v. *United States,* the Japanese exclusion case, about the harm of validating racial discrimination, is also apt. There, he wrote:

> The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need.

As Justice Jackson predicted, advocates of affirmative action both in and out of Government have pressed the claim of an urgent need to use the loaded weapon of race-conscious affirmative action.

Again as Justice Jackson prophetically warned 40 years ago:

> Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.

NON-RACE-CONSCIOUS AFFIRMATIVE ACTION

I have already outlined the basic position that we take. What I would like to do now is note a few examples of non-race specific affirmative action programs which we believe have been successful, and to suggest that use of these non-race specific forms of affirmative action will eliminate some of the feelings which you mentioned earlier—the divisive feelings that are developing within the society.

When the Government defended the University of California in the *Bakke* case, it argued that race-conscious affirmative action programs are the only available alternative. In the course of preparing our *Bakke* brief, I reviewed numerous affirmative action programs.

The Temple University School of Law, under the leadership of Dean Peter Liacouris, developed a program for admission which did not use racial criteria as a factor for admission. This special admissions program was based on the evaluation of an applicant's nonscholastic achievement. The percentage of minorities that were admitted to that program was probably higher, if one excludes the Asian Americans, than those who were admitted as minorities into the University of California under the *Bakke* case.

Included within the enrollment at Temple were a Puerto Rican from Brooklyn; a garage attendant, a Lebanese; and many others from diverse racial and ethnic backgrounds.

In addition, I recently had discussions with the representatives of the Hunter College High School in New York City which has an affirmative action program. That school is a special public high school in New York City run by Hunter College.

General admission to that school is by an examination. A child must be 3½ years ahead in math and in English in order to be eligible to take the examination for admission.

In addition to this regular admissions program on the basis of the test scores, each of the 32 school district superintendents in New York City are entitled to recommend for admission 2 students who come from socially and economically disadvantaged environments. These 64 students also take the test.

To the extent that they are within the top couple of hundred who are admitted to Hunter, they are admitted under the regular exam. To the extent that they do not qualify under the examination, they are admitted to a remedial summer program in which they receive special tutoring. Then they are admitted to the special program. In addition, if they have any difficulties during the course of the year, there are special programs available to them, as well as other students who have problems competing.

Again, that program has radically increased the number of black and Hispanic children who are admitted. In addition, under that program, I have been advised that Vietnamese children, Soviet Jewish children, and a whole host of other ethnic groups have been admitted.

Finally what I would like to mention is that there are many instances in which race-conscious affirmative action devices have, in our minds, been abused and misused.

However, despite these excesses and the excesses that are referred to in more detail in our testimony, we believe that affirmative action must not be abandoned as a social policy. It is a crucial step to making real our Nation's commitment to true equality. Moreover, minorities properly perceive it as a manifestation of Government's concern for their welfare.

Our point, however, is that Government must undertake the obligation to try to accomplish affirmative action by non-race-specific devices.

If time permits, I would like to answer at least some of the points that I think were raised with respect to some of the other questions. Maybe in that way I can also answer some questions that the Senator may have.

[The prepared statement of Mr. Dershowitz follows:]

THE PREPARED STATEMENT OF NATHAN Z. DERSHOWITZ

INTRODUCTION

The American Jewish Congress welcomes this opportunity to comment on Senate Joint Resolution 41 proposing an amendment to the Constitution of the United States relating to race conscious affirmative action.

The American Jewish Congress is a membership organization of American Jews founded in 1918. One of its deeply felt, and most vigorously pursued, organizational purposes is achievement of equal opportunity for all Americans regardless of race, creed, color and sex. To that end, the American Jewish Congress has filed briefs amicus in support of the plaintiffs in such landmark attacks on segregation as Shelley v. Kraemer, 334 U.S. 1 (1948); Sweatt v. Painter, 337 U.S. 629 (1950); Brown v. Board of Education, 347 U.S. 483 (1954); Keyes v. School District, 413 U.S. 189 (1973) and, most recently, Columbus Board of Education v. Penick, 443 U.S. 449 (1979) and Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979). In addition, the American Jewish Congress has supported the enactment of civil rights legislation such as Title VII of the 1965 Civil Rights Act and Title IX of the Education Amendments of 1972, and their state counterparts.

We are concerned as well, however, that the efforts to eliminate discrimination and to ameliorate its pernicious effects do not utilize methods which, in our judgment, are both unconstitutional and unwise. To this end, we filed briefs amicus in support of the plaintiffs in United Jewish Organizations v. Carey, 430 U.S. 144 (1977) and Regents v. Bakke, 438 U.S. 265 (1978) and have commented upon various legislative and administrative efforts to implement race conscious affirmative action plans. It is in keeping with both of these aims that we submit these comments.

We believe that Congress should take steps to return affirmative action to its original meaning. However, we are opposed to doing so by constitutional amendment. We believe that the Constitution embodies fundamental law and should not be tampered with by amendment to deal with every social issue which arises. This is particularly true here, because Congress, under Section 2 of the Thirteenth and Fifteenth Amendments, Section 5 of the Fourteenth Amendment, as well as the Commerce Clause, can pass legislation which would effectively deal with those abuses which have developed. These Supreme Court cases which have dealt with race conscious affirmative action are permissive only. They do not require race conscious affirmative action nor do they authoritatively decide that it is good public policy.

I. REMEDYING DISCRIMINATION

Among the nation's most intractable social problems is the continuing failure to overcome fully the effects of official discrimination. Although over the last thirty five years great progress has been made towards this goal, much remains to be done. The racial ghettos in urban areas, the disproportionate impact of unemployment and poverty on members of minority groups, as well as the disproportionate number of minorities and women holding low paying, dead-end jobs, are all problems which urgently demand solution.

If these problems are not resolved, America could still become, as the Kerner Commission warned thirteen years ago it would, two societies, one white and one minority. While this nation's racial problems are complex, those who presently suffer the effects of past discrimination must be assured that government -- their government -- is concerned with their problems and is attempting to solve them. In our view, there are three distinct elements which must comprise this effort.

1. State and federal anti-discrimination laws, applying to a wide spectrum of activities, represent a significant national commitment to the elimination of racial and other invidious forms of discrimination. Those laws must be vigorously and fairly enforced. Unfortunately, the agencies charged with this task have not always done so. Indeed some sometimes appear to be more interested in achieving racial proportionality than in enforcing non-discrimination laws.

2. In addition to vigorously enforcing non-discrimination laws, government can, without casting eligibility for particular programs in racial, ethnic or sexual terms, do much to overcome the relegation of minority groups to a disfavored place in this society, by carefully designing those programs so as not to reinforce existing patterns of isolation.

There has been little or no systematic effort to insure that federal programs even inadvertently do not injure or exclude any group. Because of the lingering effects of discrimination, nominally innocuous provisions often have a disproportionate impact on minorities. Programs such as highway construction and FHA guaranteed mortgages have contributed to racial segregation in many urban areas. A consciousness of race by government, and a flexibility to restructure programs to minimize or eliminate these undesirable and unnecessary exclusionary effects will do much toward solving the nation's pressing racial problems.

3. In our view, even if the first two actions are fully implemented, some sort of "affirmative action" is necessary. As we said in a Resolution adopted in 1974:

> For more than a quarter of a century we have placed our principal reliance on anti-discrimination laws as a means of insuring equality. For more than a decade, we have recognized that these laws have not been working effectively. We have therefore supported special efforts which emphasize the obligation of employers, schools and other regulated enterprises to act affirmatively to insure recruitment of blacks and other minorities.

We continue to believe that the affirmative steps are a necessary part of the national commitment to equality. It would be a serious mistake for this society to abandon these efforts -- both because of the chilling effect that would have on the just aspirations of minority groups, and because of the symbolic meaning that such a change of policy would have for members of those groups.

II. THE NEED TO REEVALUATE

We believe, however, there is a need for a fundamental reevaluation of what is meant by "affirmative action," for that concept, which originally called for going beyond mere non-discrimination, has been perverted into a new form of discrimination.

As first used by Presidents Kennedy and Johnson, affirmative action connoted a positive effort to identify and encourage qualified individuals denied opportunities because of their race or national origin. As a result of such affirmative efforts, such persons would now have a better chance to fairly compete on their own merits. This concept of affirmative action remains sound.

Because of the urgent need to "do something," however, the concept of affirmative action has been transformed from an effort to guarantee equality of opportunity into an effort to guarantee equality of result, with result being defined as the distribution of societal benefits so that certain groups are represented in proportion to their presence in the population. This result oriented concept is frequently implemented by quotas and other numerical devices, wholly antithetical to the great principle embodied in the concept of equal protection of the laws and raising a whole host of subsidiary questions.*

While the questions noted in the margin are difficult, they merely illustrate the basic underlying problem -- that the undergirding principle of color blindness and equal opportunity for all as individuals are being subsumed by these group based preferential treatment plans.

We welcome these hearings at this time because we believe that the divisiveness engendered by race conscious affirmative action must be dealt with immediately, for the harm inflicted on the body politic by race conscious affirmative action is not merely transitory damage to an as yet unrealized principle of individual equality. If the present race conscious affirmative action policies of federal and state governments are allowed to continue much longer, the perception will arise -- probably beyond remediation -- that every government and private benefit -- be it a loan, a job, a place in graduate school, participation in a government program -- is to be apportioned along racial, religious, ethnic and sexual lines. While many who support race conscious programs suggest that they are only short term necessities, there is little agreement as to when these programs can be eliminated. Moreover, it is likely that the beneficiaries of these programs will be unwilling to surrender the security that they provide. If that happens, our multi-ethnic, multi-racial, multi-religious society will break down completely.

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* In addition to the philosophic difficulties we have with this concept, we should note the existence of a broad range of secondary questions posed by these developments, but not yet adequately addressed or answered -- such as what groups qualify for preferential treatment, and how an individual qualifies as a member of such a group. Moreover, there are serious difficulties in defining the statistical base against which "affirmative efforts" are to be measured. Is it the population at large, those now eligible for consideration, or those who could become eligible?

III. RACE CONSCIOUS AFFIRMATIVE ACTION

Race conscious affirmative action is based upon principles which we reject. It is the rejection of the use of race as a criterion for allocating benefits which is the ultimate basis for all our civil rights laws. That government now teaches that race is a valid criterion when it benefits some, but not others, threatens to undermine the social consensus about non-discrimination laws.* As Justice Brandeis remarked in Olmstead v. United States, 277 U.S. 438, 485 (1925) "Our Government is the potent, omnipresent teacher. For good, or for evil, it teaches the whole people by its example." Race conscious affirmative action sets a dangerous example.

We as a society have not always implemented the ideal that every individual should be allowed to progress as far as his or her abilities will allow. But, as a society, we have now firmly committed ourselves to the realization of that goal. More -- much more -- remains to be done. But there is no reason for abandoning the principle just when it has obtained broad scale public support.

The warning of Justice Jackson in his perceptive dissent in Korematsu v. United States, 323 U.S. 1214 (1943), (the Japanese exclusion case) about the harm of validating racial discrimination is also apt. He wrote that once government approves a racially discriminatory policy, "The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."

Just as Justice Jackson predicted, advocates of affirmative action both in and out of government have pressed the claim of an urgent need to use the "loaded weapon" of race conscious affirmative action. Again, as Justice Jackson prophetically warned forty years ago, "Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes." Ibid.

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* The controversy over race conscious affirmative action has also resulted in attacks on legitimate, non-race conscious programs. All affirmative action is a form of social engineering. Social engineering can succeed in our individualistic society only when it has broad public support. Support for affirmative action efforts -- which we believe exists -- is dissipated when we use the "quick fix" concept of race conscious preferential treatment.

IV. APPROPRIATE AND INAPPROPRIATE AFFIRMATIVE ACTION

Although I have already outlined our position, I believe it would be helpful if I were more specific about what we are for and what we are against. We support programs expressly designed to bring disadvantaged minority groups into the mainstream of our society -- to give them a larger "piece of the action." We draw the line, however, at those programs and policies that mean that an individual is told that he or she may not receive a particular benefit -- a job, admission to college, and government loan solely because of his or her race, religion, sex, ethnic background, unless these programs are the only way of undoing a proven violation of non-discrimination law.

For example, it is permissible and desirable in our view for an employer to conduct recruiting efforts in areas where minorities, not previously sought out, are concentrated, but it is impermissible for the same employer to consider the race or national origin of a particular applicant in deciding whether he or she gets a job.* Similar principles apply to affirmative action in the educational setting and elsewhere.

Those who support race conscious remedies often dismiss the opposition to these devices as a sophisticated attempt to preserve white domination of this society. We reject this charge. Any change in the status quo, including the passage of anti-discrimination laws, is likely to disappoint the expectations of some. Affirmative action, by enlarging the number of competitors, will no doubt cause some to have their expectations disappointed.

If blacks, for example, are, as a result of affirmative action, able to attend professional schools, some who might otherwise have been accepted will now be rejected because other, more qualified, applicants are competing for the same spaces. But such a rejection is not likely to create resentment along racial lines -- and to the extent that it does cause such resentment, it can be dismissed on the now broadly accepted principle of non-discrimination.

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* Although the subject is too lengthy for full exposition here, we do wish to note that government anti-bias agencies have sometimes adopted definitions of discrimination which are only thinly disguised efforts to insure proportional hiring. Certain aspects of the Uniform Guidelines on Employee Selection are examples of this, as is the EEOC's concept of "bottom line" enforcement. However, we believe that reforms in this area must proceed with great caution lest subtle forms of discrimination go undetected.

However, when an applicant is turned down not because of his or her own relative lack of qualifications,* but because of membership in the "wrong" group, racial resentment is inevitable. This resentment cannot be easily explained away by reference to the principle of racial neutrality because there is, in fact, no neutrality at work.

It was this kind of individual, racially based, affront, multiplied millions of times across the country, that generated the just passions that resulted in adoption of federal and state civil rights laws. It is the same affront that is now generating passionate hostility to all affirmative action, whether race conscious or not. But that is one of the reasons why we believe that we are paying too high a price for this form of remediation. As Chief Justice Hale of the Washington Supreme Court wrote in his dissent in DeFunis v. Odegaard, 82 Wash.2d 11, 507 P.2d 1169, vacated as moot, 416 U.S. 312 (1974):

> Preferential treatment under the guise of "affirmative action" is the imposition of one form of racial discrimination in place of another. The questions that must be asked in this regard are: must an individual sacrifice his right to be judged on his own merit by accepting discrimination based solely on the color of his skin? How can we achieve the goal of equal opportunity for all if, in the process, we deny equal opportunity to some?

We do not believe that the potential for creating racial divisiveness, however, is always a bar to race conscious action. In those situations in which a particular employer or other institution has been found to be in violation of an anti-bias law and adoption of a race conscious remedy is the only available means to undo that violation, race conscious programs become necessary. Even the use of quotas may be appropriate in this limited situation, where their use is delimited by the scope of the violation, and they become unnecessary once the violation is cured.

It is quite a different matter to apply race conscious criteria not just to a limited number of law violators but to every aspect of society. When that is done, every applicant for a job, for admission to a school, or for a governmental program knows that the success of the application depends upon his or her color, religion or origin. The danger is that the remedy adopts the basic principle of racial discrimination and the principle and exception become confused. That is one of the things that supporters of civil rights laws were hoping to get rid of.

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* The term qualified is subject to a wide variety of meanings. We do not equate qualification with good testing scores. On the contrary, the development of alternative measures of ability is necessary for proper affirmative action. Neither, however, are we prepared to accept definitions of qualified which empty that word of all meaning. Nor do we think that race, national origin, sex or creed are, in any but unusual circumstances, qualifications.

Proponents of race-conscious affirmative action argue that experience has shown that no other remedies, including non-race conscious compensatory programs, bring about progress. The strength of this argument is, however, greatly undercut by society's failure to vigorously pursue non-race conscious alternatives, particularly those designed by the private sector. We turn now to a review of some examples which support our view.

The government, for ten years, has had an announced policy for encouraging minority businesses to become government contractors. Those charged with administering the program asserted that only a race-conscious program would be effective. But a 1975 U. S. Civil Rights Commission study indicated that minority contractors were failing to do business with the government, not because there was any significant discrimination against them but because minority firms could not obtain performance bonds, because they lacked the financial wherewithal to await payment, because the bidding procedures were too complicated for small firms to contend with and because they were unaware of the existence of contracting opportunities.

As even those who support race-based set-asides for minority businesses admitted during Congressional debates several years ago, these are problems faced generally by many small businesses seeking to do business with the government. Yet it was only recently that the problem of performance bonds was dealt with by the SBA and then somewhat tentatively. The other problems have yet to be dealt with systematically. The states, and in some cases, private industry, have gone much further in resolving these problems on a non-race conscious basis.

In defending the University of California in the Bakke case, the government asserted that race conscious admission programs were necessary to insure that minorities in significant numbers were admitted to graduate schools.* The government, however, has consistently ignored evidence that it is possible to design a non-race conscious affirmative action program. The Temple University School of Law, under the leadership of Dean Peter Liacouris, has implemented just such a program which has been quite successful in increasing minority enrollment and which has been copied by other schools. This special admission program is based on an evaluation of an applicant's non-scholastic achievements.

Hunter College High School also seems to have a non-race specific affirmative action program. The school is a special public high school in the City of New York run by Hunter College. General admission is by examination with a requirement that students must be performing at 3-1/2 years above grade average in English and mathematics to even take the exam. Aside from those eligible for consideration based on their own achievement, each of the 32 school district superintendents in New York City can recommend two students who come from "socially or economically disadvantaged environments." Those 64 students also take the special Hunter examination. If they score high enough they are admitted through the regular program. In addition, many of these students, depending on how well they tested, are admitted to a special summer program for remedial work. They proceed with the special summer program and are then admitted into the regular program. We are advised that this program has resulted not only in large numbers of Blacks and Hispanics but also in Vietnamese, Soviet Jews, and a whole range of other ethnic minorities being admitted to Hunter High Schools.

In addition, there are examples of government using race conscious devices even when non-race conscious methods are readily available.

The SBA recently decided to target its direct loans to handicapped and minorities. It explained that given the small number of direct loans available, it was necessary to target those loans to those who had no access to traditional credit sources. But the statute already prohibited the SBA from making any direct or guaranteed loan to anyone who could not demonstrate an inability to obtain a loan from traditional sources. Enforcement of that provision by itself would have increased the number of minorities receiving such loans. A recent report of the General Accounting Office documented SBA's failure to enforce this provision. It is true that, after intervention by the AJCongress and others, the White House ordered this targeting changed to all "socially and economically" disadvantaged persons, a classification which, while not explicitly racial, is certain to increase the number of minorities participating in the program. What is significant, however, is that instead of resorting to a readily available non-race conscious device, the government chose a race conscious one.

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* It also bears emphasizing that presently racial criteria are frequently overbroad, in that they grant preferences without any particularized showing of need, to those who do not need them, and exclude those who in fact do merit special consideration, but are of the wrong racial or ethnic group. For this reason, we prefer the use of "social and economic" disadvantage as a criterion for affirmative action.

Still more recently, the Community Service Agency announced a blanket exemption for all black colleges from a requirement that a grantee match government grants with its own funds. The stated rationale was that many of these institutions were unable to meet the matching funds requirement. There was no explanation of why a racially neutral criterion of financial inability to meet the requirement was not used.

These instances, and there are others, indicate that affirmative action has too often been race conscious when other devices which would have the same effect are available. No doubt if greater efforts were expended, other non-race conscious affirmative action plans could be devised.

At a minimum, we think race conscious affirmative action should never be required or allowed where enforcement of non-discrimination law will do as well.

Thus, for example, regulations promulgated by the Internal Revenue Service three years ago, relating to discrimination by tax exempt private schools confused non-discrimination with race conscious affirmative action. These rules mandated that private schools with an "inadequate" number of minorities take race conscious steps to overcome this "deficiency." The IRS defended those regulations as necessary to ensure compliance with court decisions prohibiting the grant of tax exemptions to discriminatory schools.

We believe that those regulations were promulgated because enforcement of existing law by the IRS had been inexcusably lax and because race-conscious affirmative action is equated in the minds of many government officials with non-discrimination. Instead of stringently enforcing existing law against segregated academies, the IRS proposed a complex set of rules imposing race conscious recruiting duties on private schools, as well as certain curriculum modifications. As we testified at the time, the IRS's decision was not without heavy costs for those who were innocent of discrimination, for it seriously impinged on the free exercise rights of Jewish and other religious schools which were not guilty of racial discrimination.

We believe that legislation should be enacted to guarantee that the misuse of affirmative action does not continue.

Despite the excesses referred to above, we believe that affirmative action must not be abandoned as a social policy. It is a crucial step to making real our national commitment to true equality. Moreover, minorities properly perceive it as a manifestation of governmental concern for their welfare.

CONCLUSION

Our policy, therefore, leads to three conclusions with respect to S. J. Res. 41: 1) To the extent the proposal is intended to and can be interpreted as, outlawing all programs which are designed to increase the presence of minorities in a particular endeavor, regardless of whether it uses racial criteria, we oppose it; 2) To the extent the proposal would outlaw certain abuses in affirmative action -- specifically the use of race conscious criteria and the concept of group entitlement and proportional allocation of benefits along racial, ethnic and sexual lines, we support the proposal. 3) However, of overriding concern to us is the view that a constitutional amendment on the subject of race conscious remedies and activities is inappropriate and unnecessary. We believe that the Constitution embodies fundamental law and should not be tampered with by amendment except by overriding questions which cannot be dealt with otherwise. An amendment to outlaw affirmative action does not fit that overriding category and can be dealt with by legislation and proper administrative actions.

Senator HATCH. Thank you. We appreciate hearing from you. Your full statement will be placed in the record.

In a footnote in the *Fullilove* opinion, Justice Stevens quoted at length from the laws of the German Reich in defining what constituted a "Jew." The definition was a fairly elaborate one reflecting upon a variety of ancestral and cultural identifications.

Given that this Nation chooses to pursue policies of affirmative action, is it possible, in your opinion, to avoid having to establish comprehensive definitions of who belongs and who does not belong to various beneficiary groups?

Furthermore, once these definitions are established, how then are they to be administered and adjudicated? In short, is there any basis to the concern that affirmative action is bringing back the difficult Jim Crow-related problems of racial classification and definition?

Mr. DERSHOWITZ. I think that you are hitting upon one of the critical problems with affirmative action. What is necessary under an affirmative action program is to determine who is eligible for special consideration.

Once you make a determination that someone is eligible for special consideration, you have to determine what are the characterizations that are the predicates for entitlement.

If you determine that the predicate for entitlement is being black, then you must determine if someone is black. If it is Hispanic, you must make a determination of who is Hispanic. By the way, I think that category is one which many Hispanics find quite distressing. There are many different Hispanic communities in this country.

However, I think what inevitably must happen is that you categorize people not on the basis of who they are as individuals but who they are because of their group identification. I think that is inherently dangerous. I think it is very much antithetical to the principles which we believe in; namely that a person is entitled to rights because he is an American, because he is a citizen, and because of who he is as an individual, not because he is a member of a particular group.

I think there is also the concern that once you have a group entitlement concept, the question becomes what are you entitled to? Are you entitled to a proportional percentage depending upon how many of you there are in society?

Once you do that, you have done something very dangerous. You have institutionalized a concept of proportional allocations turning on factors which I think are illegimate.

Senator HATCH. In your opinion, is there any basis for the distinction that has been drawn between invidious discrimination against traditionally deprived groups and noninvidious discrimination against nontraditionally deprived groups? Is that a fair distinction?

Mr. DERSHOWITZ. I am not sure where the distinction leads and what the function of the distinction is.

There are certainly groups in this society who have been discriminated against by society, by Government through governmental action. To the extent that Government has discriminated against someone, it has an obligation to take steps in order to remedy that situation.

The American Jewish Congress takes a unique position, at least in terms of the Jewish organizations to which reference has been made. We are not fully opposed to quotas. We believe, as Chief Justice Burger said in *Fullilove,* that when you are dealing with a situation where there has been a specific incident of past discrimination, a court or administrative agency must remedy that situation and, if it believes that that is the only alternative, it may remedy that situation by use of quotas.

The point is that one cannot take a remedial device, a device which is necessary to remedy a specific incident of past discrimination, and make that into a generalized societal concept. Once you do that, you are saying that every judgment must be made on that basis. We reject that principle.

Again, I think that is an underlying principle in the determination that was made by Chief Justice Burger in his opinion in *Fullilove* and is the predicate, according to that opinion, for why Congress determined to set aside 10 percent in the Public Works Act because of its view that it was remedying something quite specific.

I have questions as to whether that was a proper determination, but, in any event, it was intended as a remedy. I view specific remedial devices for specific harm as different than a general conceptual across-the-board allocation of resources.

Senator HATCH. Would you apply those only if there were gross or flagrant instances of discrimination?

Mr. DERSHOWITZ. I would apply it only if it is a necessary remedy. If you can give me another remedy which would be effective, I would prefer other remedies which are not divisive. If a quota is the only remedy, then I believe it is proper to use the remedy even of quotas.

Senator HATCH. However, you would use that only in the last instance?

Mr. DERSHOWITZ. That is correct, and only for a short term and only as long as is necessary.

Senator HATCH. And in individual cases of remedy rather than in an across-the-board manner?

Mr. DERSHOWITZ. Also, I would require findings of past discrimination as a predicate to its use.

Senator HATCH. Proponents of affirmative action constantly emphasize that such programs do not result in the deterioration of standards because they are aimed only at insuring increased opportunities for qualified minority individuals. How do you respond to this defense of affirmative action?

Mr. DERSHOWITZ. Economic factors are crucial to the whole discussion of affirmative action. To the extent that there is a smaller pie at the present time, the divisiveness of affirmative action is increased. I think that affirmative action was a lot less divisive when the economy was expanding.

When you have a constricting economy, you have greater divisiveness in terms of affirmative action. There is a greater fight for the individual places.

I am not wedded at all to the concept of merit based upon tests, for example. I think one can use many, many different methods for determining eligibility. I think anything which is equal across the board for determining eligibility is appropriate so that the system, for example the Temple University system, which allowed three-quarters in on tests and another quarter in on the basis of nonscholastically measurable alternatives, had a merit class, a class that was fairly reflective of merit.

I would in no way suggest that other methods of allowing people in necessarily dilute the quality. What I do say is that when you say that a person is entitled to special treatment solely because of race, that is inappropriate because what is happening then is that there are situations where the wrong people receive the benefit.

One of the major criticisms of the Harvard admissions model which was used by the Court in *Bakke* was that it gives an added plus to somebody who is a member of a certain racial category. But all those who are close to being admitted and who receive the plus may not be those who were subjected to racial discrimination, or at least to the degree of racial discrimination.

A system which then evaluates who is more entitled would probably be a better system. To simply say that, because of your race, you get a plus does not deal with the problem. It does not deal with the problem of discrimination. It deals with categorical classes and fails to evaluate people as individuals.

Again, any group entitlement concept is a concept that we reject.

Senator HATCH. Thank you.

This committee is an extremely interesting committee because we have a great number of these very important civil rights issues before the committee, not the least of which is the immediate one. We will be working soon to try and resolve problems with regard to the Voting Rights Act, for example.

By the way, Bill, you may want to give some thoughts to that measure, if you would—as well as our other witnesses.

I am extremely concerned about that bill. We are going to need the very best thinking we can get on that subject. We hope that all of you will aid us and help us with regard to it. It is a serious problem, one that must be extended by August of next year. There are widely divergent viewpoints throughout the Senate with regard to the Voting Rights Act.

I would like to challenge all of you to give us the best you can on this. We are willing to read and study and look at your viewpoints.

Of course, this committee also has jurisdiction over school busing, fair housing, the civil rights commission, and a variety of other civil rights issues.

As you can imagine, as a freshman Senator, I have a lot to learn. I am certainly willing to try to do this. I have appreciated the differing points of view here today as well as the differing points of view that we have had in the past. We are trying to look at this from an all-embracing standpoint.

In the Labor Committee, as well we will be looking at it from a slightly different standpoint. That is, how well do the EEOC and the OFCCP operate in this area? How is affirmative action being administered?

These are questions that have to be answered; this is a major social question and we have to examine it.

I will try to keep an open mind on it and I hope that all of you will also.

With that, we will recess these hearings until next week when we will have further hearings.

[The subcommittee was adjourned at 11:35 a.m.]

AFFIRMATIVE ACTION AND EQUAL PROTECTION

THURSDAY, JUNE 18, 1981

U.S. Senate,
Subcommittee on the Constitution,
Committee on the Judiciary,
Washington, D.C.

The committee met, pursuant to recess, at 9:55 a.m., in room 2228, Dirksen Senate Office Building, Senator Orrin Hatch (chairman of the subcommittee) presiding.

Staff present: Stephen Markman, general counsel; Peter Ormsby, professional staff assistant; and Claire Greif, clerk.

STATEMENT OF ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator Hatch. The hearing will come to order.

This marks the third in a continuing series of hearings by the Subcommittee on the Constitution on the subject of affirmative action and equal protection.

As I have already observed at these earlier hearings, this represents the first effort on the part of Congress to explore thoroughly the issue of affirmative action, the first effort on the part of Congress more than a decade after the Philadelphia Plan, nearly a decade after the *Griggs* v. *Duke* case, three or four years after *Bakke* and *Weber,* and one long year after the *Fullilove* case.

It is quite remarkable in my view that as important a public policy as affirmative action has developed and nearly become institutionalized in this country entirely without a genuine legislative mandate. This is not surprising since public opinion polls consistently show overwhelming percentages of the American people, of all races and colors, in opposition to the principles of affirmative action.

Affirmative action is almost purely a creature of the executive and legislative branches of the national Government. It is long overdue that Congress, the elected representatives of the people, and others begin to have an imprint upon this policy.

During these hearings, we will continue to explore the constitutional, legal, social, philosophical, and economic implications of affirmative action programs and policies.

Whatever else these hearings achieve, and I frankly do not know how many of my colleagues in the Senate share my concerns about affirmative action, I am determined that Congress is not going to be able to remain silent much longer about affirmative action. We are not going to be permitted the continuing luxury of allowing other branches of Government to make all of the hard decisions about affirmative action.

Affirmative action strikes far too deeply at traditional American values and principles to allow this state of affairs to continue any longer.

It is my hope that these hearings and the record that they create and the focus that they place upon the issue will enable my colleagues to make a more informed decision about this matter when they are confronted with it.

Let me clarify once more what this subcommittee means by affirmative action.

It has been my experience that there are as many interpretations and definitions as there are individuals discussing the issue.

By affirmative action, I am referring to public policies and programs which accord preferential treatment to individuals on the basis of race, color, sex, or national origin. I am referring to policies which require or permit quotas, timetables, goals, ratios, or numerical objectives on the basis of race, color, sex, or national origin. I am referring to policies which identify discrimination on the basis of statistics and charts and numbers, rather than on the basis of some demonstration of discriminatory intent or purpose.

In short, I am referring to color-conscious public policies—policies that violate what Justice Harlan referred to as a color-blind Constitution in his famous dissent in *Plessy* v. *Ferguson.*

Affirmative action is not—and I emphasize not—intended here to cover the development of public programs administered totally without racial classification that may be expected to result in enhanced opportunities for groups of individuals, a disproportionate share of whom may be minorities.

I am looking forward to today's hearing with great anticipation. We are privileged to have with us today four of the most articulate and knowledgeable individuals in the Nation on the matter of affirmative action.

While they have widely varying perspectives on this policy, each of them has demonstrated in his writings and in his activities a deep commitment in behalf of equal opportunities for all citizens.

I am particularly proud to have these four gentlemen with us here today.

I will introduce them, in turn, as they make their opening statements in our panel discussion.

Last but not least, I might mention that we are not only examining this issue in the Subcommittee on the Constitution of the Judiciary Committee, but we will be examining these issues—particularly the way the EEOC and OFCCP function in the area of affirmative action—on the Labor and Human Resources Committee, which I also chair.

We will continue to try in every way to have balanced hearings so that all points of view on this terribly important subject can be heard.

Our first witness today will be Prof. Ralph Smith who is with the University of Pennsylvania School of Law. He has previously taught at Harvard, Boston College, and Northeastern University. He is a founding board member of the Affirmative Action Coordinating Center and past chairman of the Section on Minority Groups of the Association of American Law Schools.

He has written extensively on the subject of affirmative action and appeared as counsel for the amicus brief in the *Bakke* and *Fullilove* cases.

Professor Smith, we are very happy to have you with us. We will begin with your testimony.

STATEMENT OF RALPH R. SMITH, ASSISTANT PROFESSOR OF LAW, UNIVERSITY OF PENNSYLVANIA

Mr. SMITH. Thank you, Mr. Chairman.

Thank you for affording me the opportunity to share my thoughts on the status and the future of affirmative action.

Senator HATCH. If I may just interrupt you, Professor Smith, you have an extensive statement which is very thorough. I am hopeful that you can summarize so we will have time for questions.

I would hope that we could all summarize our statements, this morning, although we want to give you enough time to get your viewpoint across.

Mr. SMITH. I think I can get someplace close to the 10 minute limit.

Senator HATCH. We would appreciate it.

Mr. SMITH. What I will attempt to do is summarize most of the statement and attempt at the beginning and the end of my remarks to put it in some sort of context for the Senator.

Senator HATCH. If you need more time, we will be happy to grant it. But, if we can do it that way, it leaves time for questions. I think sometimes that is where we really get into this matter most comprehensively.

Mr. SMITH. I do look forward to the discussion.

You see, Senator, affirmative action remains one of the most important and one of the most misunderstood issues in the Nation's current agenda.

I hope that my remarks here today will help to alleviate, in part, and not compound the confusion.

I am really honored to have the pleasure of joining William Coleman, Martin Kilson, Vilma Martinez, and Robert Sedler in urging this committee to lend its weight and to raise its voice in support of affirmative action.

I feel particularly privileged to add to the record not only my own prepared remarks but a statement from working women, a national membership organization with local affiliates in 13 cities across the country.

That statement, which is entitled, "In Defense of Affirmative Action: Taking the Profit Out of Discrimination," provides an insightful perspective on many aspects of affirmative action. This document is submitted as appendix A to my prepared statement.

Senator HATCH. That will be inserted in the record.

Mr. SMITH. I would also like to add to the record an excellent history and analysis of the Federal Contract Compliance Program, which was compiled by Barry Goldstein of the NAACP Legal Defense and Educational Fund. This document is entitled "The Importance of the Contract Compliance Program: Historical Perspective." It should be required reading for anyone seeking to understand this area. This document is submitted as appendix B to my prepared statement.

Senator HATCH. We will also add that to the record.

Mr. SMITH. While I appear here today in defense of affirmative action, mine is not the role of dispassionate counsel. I am a supporter of affirmative action, and I believe strongly that affirmative action is an appropriate and a necessary response to the prevailing realities of contemporary America.

This position is one that has been reinforced by my own active involvement as a lawyer, as a teacher, and as a scholar during much of the decade-long debate on affirmative action.

My formal statement is built on four assertions.

The first is that as these hearings indicate, the issue now at hand is the political viability of affirmative action and not its legality and not its constitutionality and certainly not its morality.

Second, affirmative action is politically viable since it is not only responsive to the legitimate concerns of a broad-based constituency, but because it seeks responsibly to balance competing legitimate interests, needs and aspirations.

Third, none of the arguments against affirmative action can withstand serious scrutiny.

Fourth, the arguments for affirmative action are compelling, in light of the urgency of addressing now the problems of institutional discrimination, political isolation, and economic exclusion.

After it was announced that I would appear here today, several of my friends and colleagues called me to express their concern and to offer their advice. They were concerned that these hearings came at a time when there appeared to be a wholesale retreat from so many of the programs and policies that have addressed the needs and concerned themselves with the plight of those who were poor and powerless in this powerful land of plenty.

They were concerned that these hearings held ominous implications that yet another retreat was in the offing; that is, a retreat from a commitment to move affirmatively to dismantle the process of discrimination and to remove the barriers to full participation in the Nation's political process and economy.

Being well aware of the position of the Chair of this subcommittee, a position taken publicly, articulated forcefully and well, and repeated often—as recently as last Friday in Philadelphia——

Senator HATCH. You have been much nicer to me than a number of other people.

Mr. SMITH. I am just beginning. [Laughter.]

Senator HATCH. I think you are doing an excellent job. I hope it continues along those lines. [Laughter.]

Mr. SMITH. You see, sir, I was unable, knowing all that, to do anything to allay their concerns. [Laughter.]

All I could say is that notwithstanding your public position, you had given your assurance that you were sincerely interested in hearing all sides and that you had given every indication that you would approach the matter fairly.

Since I could say no more, I decided to listen to their advice. The message that they carried was unanimous and clear. It said: Tell Senator Hatch and tell the subcommittee that affirmative action is working.

I had already said that in my prepared statement, this did not seem to be particularly valuable advice.

Since I have normal academic distrust for anecdotal information and other soft data, I thought that I would spend most of my time responding to the arguments against affirmative action.

Then after hearing the same refrain again and again, I realized that my colleagues were saying something to me as well as to you. They were saying that those of us who support affirmative action have been on the defensive for so long that we respond reflexively to criticism and arguments against affirmative action.

As I reviewed my formal statement here, I found that I too am prone to that response. In my statement, I confront and offer rebuttal to the most serious accusations leveled against affirmative action.

What I did not do enough of in the statement, Senator, is to share with you the real operational side of affirmative action.

You see, affirmative action is more than just policies and programs, inputs and outcomes, arguments and responses. Affirmative action is a real-life, flesh and blood, human and humane, phenomenon.

This is something that many of us in the academia and many of us in Congress forget. That is why we do not say often enough, clearly enough, and loudly enough that affirmative action works.

Affirmative action worked for both the black and the white workers, for both the men and the women, in the Kaiser Aluminum plant in Gramercy, La.

Prior to 1974, when Kaiser wished to hire craftworkers, the company would go outside and hire people who had previous craft experience. As a consequence, no Kaiser production workers, whether they were black or white, male or female, had any opportunity to advance to the higher-paying craft positions.

In 1974, Kaiser and the United Steelworkers of America entered into a collective bargaining agreement that contained, among other things, an affirmative action plan, designed to eliminate the conspicuous imbalance in Kaiser's then almost-exclusively white craft forces.

The linchpin of this plan was an on-the-job training program, which for the first time would allow production workers, black and white, men and women, the opportunity to acquire the skills to become craftworkers.

We all know that one white employee sued during the first year of that program. However, what is often ignored is the fact that the rest of the white workers did not sue.

To the contrary, their union defended the plant agressively right up to the U.S. Supreme Court where they ultimately prevailed.

The union and the workers realized that affirmative action consideration had served to encourage Kaiser to rethink its employment practices and to change those practices in such a manner as to increase the real opportunities for all workers.

If we move from Gramercy, La., to Detroit, Mich., and we move from production and craftworkers to police officers, we find that neither the change of locale nor of employment affects the assertion that affirmative action works.

In Detroit, we have a city that was torn by racial tension that twice erupted into major civil disturbances. It was a city in which tension was attributed to the fact that the half-black city was policed by an all-white police force which was considered an army of occupation.

One of the first things that the new mayor did was to institute a plan which would increase minority presence at all levels of the police department. As could be expected, there was a lawsuit. The lawsuit was brought by white officers who perceived their chances of promotion as being adversely affected by any plan that would take account of race.

That lawsuit failed in the Sixth Circuit Court of Appeals. It failed because the sixth circuit realized something that had been argued below.

> The argument that police need minority officers is not simply that blacks communicate better with blacks or that a police department should cater to the public desires. Rather it is that effective crime prevention and solution depend heavily on public support and cooperation, which results only from public respect and confidence in the police.

What we have found is that a significant number of black police officers, now on the force in Detroit, has significantly increased the flexibility of the Detroit Police Department.

We find that the task of preventing crime and apprehending criminals has been made easier. We find that the law enforcement function in Detroit seems to be working. There are fewer confrontations between citizens and police. Fewer police are being killed. Fewer complaints are being filed about police brutality. Attitudes toward the police have been improved.

In another time and another era, these may seem inconsequential. From the perspective of those who deal daily with the problems and tensions of urban America, what has happened to Detroit is an accomplishment of great magnitude that could not have happened without affirmative action.

If we move from the police academy to the academic community, the fact remains the same.

We have seen a change for the better in academia. We have seen that the minority presence, which has come about because of affirmative action, has enlivened the learning environment and has enriched the intellectual content and has enhanced the educational experience of students and faculty alike.

The positive impact of affirmative action on higher education goes well beyond access. At most institutions, the curriculum now reflects the concerns and contributions of the new constituency. Affirmative action has encouraged the strengthening of grievance procedures for all employers. Moreover, as in other industries, higher education has had to rethink its excessive reliance on credentials for the nonacademic side of its workforce.

The new constituency, which has come about as a result of affirmative action, has played a large role in helping educational institutions to realize that although they may function as employers, landlords, and investors, those activities and those roles must be conducted in so responsible and forthright a manner as to be consistent with their primary role as institutions of higher learning.

Whether we look at the production line in Gramercy or the patrol car in Detroit or the campus in Los Angeles, we find that affirmative action is affecting our social, economic, and political landscape for the better.

I will not read the rest of my remarks, but I will remove quickly to the end.

In my remarks, after rebutting and discussing the various arguments, I attempted to urge the Senator and this society to begin to move beyond affirmative action.

I note that we must move beyond affirmative action, because there are other more pressing and important problems in our society.

To move beyond affirmative action, we must first get to affirmative action.

It is true that affirmative action will neither house the homeless nor employ the jobless nor educate the illiterate. Affirmative action, however, could provide hope where there is now hopelessness.

Affirmative action could assure those who remain excluded that the exclusion is not a permanent phenomena, because there will be a cadre within the political process and within the economic mainstream to articulate their aspirations, to advance their interests, and to protect their rights.

In large measure, the arguments against affirmative action ignore the sad history that brought it forth.

These programs are not handouts; they are not the misguided products of some noblesse oblige. They represent the tangible manifestations of a political compromise.

The first Executive order was issued by President Roosevelt only after A. Philip Randolph threatened to have 100,000 blacks march on the Nation's capital.

That process, once set in motion, evolved only because at each step of the way blacks and other minorities were willing to agitate and demand and then to settle for less than they deserved.

Blacks and other minorities were silent during the 1970's when the Nation's economic malaise retarded the progress which began in the 1960's and inflicted upon the poor and the powerless a disproportionate burden of inflation, recession, and stagflation.

It would be a cruel irony that just as this new Republican administration offers the promise of better days if now this society should choose to renege not only on the promise that things would get better but also to seek to undo unilaterally the progress which was made in earlier decades.

The effort to destroy affirmative action amounts to refusal to face difficult issues and to make tough choices. In this regard, history repeats itself.

This society is now confronted with a choice that is facing every generation of Americans—whether to move decisively to include blacks and other similarly situated minorities into the body politic and into the economic mainstream or to ignore their plight and risk the consequences.

Each generation has found an excuse and a rationalization for passing the problem on to the next.

The generations of the 1880's were quick to abandon the modest efforts to ease the suffering and to protect the rights of the formerly enslaved blacks. In so doing, they occasioned untold human suffering for blacks and whites alike, just as earlier generations had condemned their children to fight and die in a civil war.

The generation of the 1920's and the 1950's refused to avail themselves of the opportunity to assure those who had fought to make the world safe for democracy—they and their children—could safely exercise democratic rights here at home. Our cities still bear the scars of the rebellion that ensued.

Now this generation can choose. It can commit to continuing affirmative action and then to moving beyond, or it can hide behind the problem. It can use rationalizations, and it can allow the problem to go unresolved into the next generation.

We know from experience that the interest on this historic debt is paid for in human misery. We know that institutions of the future are going to be strained severely as the Nation attempts to cope with the reality of limited and shrinking national resources and to adjust and to define itself in an ever-changing world.

Knowing all this, it is grossly unfair and downright immoral to require the next generation to mortgage its future and to risk its survival by passing on to them untouched and undiminished the accumulated costs of two centuries of discrimination and deprivation, isolation, and exclusion.

Thank you, sir.

Senator HATCH. Thank you so much, Professor Smith.

Your statement is an outstanding one. You have responded to many of the arguments that are made against affirmative action. I appreciate that.

I have to read your statement again, but I am going to do that.

We will withhold questions until we go through all of the testimony this morning.

Your entire prepared statement will be made a part of the hearing record at this point.

[The prepared statement of Mr. Smith and additional material follow:]

PREPARED STATEMENT OF RALPH R. SMITH

INTRODUCTORY REMARKS

Mr. Chairman and Members of the Subcommittee:

Thank you for affording me the opportunity to share my thoughts on the status and future of affirmative action. The affirmative action issue remains one of the most important and one of the most misunderstood issues on the nation's current agenda. It is my fervent hope that these remarks will help to alleviate and not to compound some of that confusion. My name is Ralph R. Smith.* I am currently an Assistant Professor on the faculty of law at the University of Pennsylvania.

I am honored to have the opportunity to join the likes of William T. Coleman, Martin Kilson, Vilma Martinez and Robert Sedler in urging this Subcommittee to lend its weight and raise its voice to support a worthy cause -- that cause being the strengthening of affirmative action. Moreover, I feel particularly privileged to add to the record of these proceedings not only my own prepared statement but a statement from Working Women, a national membership organization with local affiliates in thirteen cities throughout the United States. That statement, entitled "In Defense of Affirmative Action: Taking the Profit Out of Discrimination", provides an insightful perspective on many aspects of affirmative action. I would also add to the record the excellent history and analysis of the federal contract compliance effort which was prepared by Barry L. Goldstein, Assistant Counsel of the NAACP Legal Defense and Educational Fund, Inc. This document, entitled "The Importance of the Contract Compliance Program: Historical Perspective", should be required reading for anyone seeking to understand this area.

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* Professor Ralph R. Smith, a member of the National Conference of Black Lawyers, the National Bar Association and a Founding Board member of the Affirmative Action Coordinating Center, is recent Past Chair of the Section on Minority Groups of the Association of American Law Schools. He teaches in the corporate area (Corporations and Securities Regulations) and has written and lectured extensively on affirmative action and civil rights. He appeared as counsel for _amici_ in _Bakke_ and _Fullilove_ in the United States Supreme Court, in _DPOA_ v. _Young_ in the U.S. Court of Appeals for the Sixth Circuit and in _Scarpelli_ v. _Rempson_ in the Supreme Court of the State of Kansas.

While I appear today in defense of affirmative action, mine is not the role of dispassionate counsel. I am a supporter of affirmative action and I believe strongly that affirmative action is an appropriate and indeed a necessary response to the prevailing realities of contemporary America. This position is one that is reinforced by my own active involvement as lawyer, teacher and scholar during much of the decade-long debate on affirmative action.

My formal statement is built upon four assertions. One. The issue now at hand is the political viability of affirmative action, not its legality, nor its constitutionality, nor its morality. Two. Affirmative action is politically viable since it is not only responsive to the legitimate concerns of a broad-based constituency, but also because it seeks responsibly to balance competing legitimate interests, needs and aspirations. Three. None of the arguments against affirmative action can withstand serious scrutiny. Four. The arguments for affirmative action are compelling in light of the urgency of addressing now the problems of institutional discrimination, political isolation and economic exclusion.

After it was announced that I was invited to appear here today, several of my friends, acquaintances and colleagues called to express their concern and to offer their advice. They were concerned that these hearings came at a time when there appeared to be a wholesale retreat from so many of the programs and the policies that addressed the needs and concerned themselves with the plight of those who are poor and powerless in this powerful land of plenty. They were concerned that these hearings held ominous implications that yet another retreat was in the offing -- that is, a retreat from a commitment to move affirmatively to dismantle the process of discrimination and to remove the barriers to full participation in the nation's political process and economy.

Being well aware of the position of the Chair of this Subcommittee -- a position taken publicly, repeated often and articulated well -- I was unable to do much in the way of allaying these concerns. I could only say to them that, notwithstanding his public position, the Chairman had given his assurance that he was sincerely interested in hearing all sides and had given every indication that he would approach the issue conscientiously and would decide fairly.

Since I could not say more, I listened to their advice. The message was unamious and it was clear: Tell the Subcommittee that affirmative action is working.

Since I had already said just that in the statement I had prepared for the Subcommittee, this did not seem a particularly valuable piece of advice. But then, after hearing the same refrain again and again, I developed a better understanding of what my friends and colleagues were saying. And it was as much a message to me as it was to this committee.

Those of us who support affirmative action have been on the defensive for so long that we respond reflexively to the arguments against affirmative action. And, as I reviewed my statement here, I found that I too am prone to that response. In my statement I confront and offer rebuttal to the most serious accusations leveled against affirmative action. What I did not do enough of was to share with you enough of the real operational side of affirmative action.

Affirmative action is more than policies and programs, inputs and outcomes, arguments and responses. Affirmative action is a real life, flesh and blood human and humane phenomenon. This is something those of us who are members of academia and members of Congress forget. That is why we do not remember to say often enough, clearly enough, and loud enough that affirmative action works.

Affirmative action worked for both white workers and black workers, for both women and men in a Kaiser Aluminum plant in Gramercy, Louisiana. Prior to 1974, when Kaiser wished to hire craftworkers, it would go outside the company and hire people with previous craft experience. As a consequence, Kaiser production workers, whether black or white, male or female, were effectively denied an opportunity to advance to the higher-paying craft positions.

In 1974 Kaiser and the United Steelworkers of America entered into a collective bargaining agreement that contained among other things an affirmative action plan designed to eliminate the conspicuous imbalance in Kaiser's then almost exclusively white craftwork forces. The linchpin of this plan was an on-the-job training program -- a job-training program which for the very first time would allow production workers, black and white, men and women, the opportunity to acquire the skills to become craftworkers.

It is well known that one white employee who was not accepted into the program in its very first year instituted litigation to challenge the fact that some places were set-aside for blacks.[1/] What is often ignored is that the rest of the white workers did not sue. To the contrary, their union defended the plan agressively straight up to the United States Supreme Court where they ultimately prevailed. The union and the workers realized that affirmative action considerations had served to encourage their employer to rethink its employment practices and to change them in such a manner as to increase the real opportunities for all workers.

If we move from Gramercy, Louisiana to Detroit, Michigan and from production and craft workers to police officers, we find that neither the change of locale nor of employment affects the assertion that affirmative action works. In Detroit we have a city that was torn by racial tension that twice erupted into major civil disturbances; a city in which much of the tension was attributed to the poor state of police-community relations; a half-black city in which a virtually all white police force was looked on as an army of occupation.

Realizing the dangers inherent in the situation, one of the first things Mayor Coleman Young and his Police Commissioners did was to institute a plan to increase minority presence at all levels of the police department. As could be expected, there was a lawsuit brought by some white officers who perceived their chances of promotion as being affected adversely by any plan that would take account of race.[2/]

In finding for the City and reversing the trial court, the Court of Appeals for the Sixth Circuit conveyed its understanding of the real issue presented.

> The argument that police need more minority officers is not simply that blacks communicate better with blacks or that a police department should cater to the public's desires. Rather, it is that effective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police.[3]

There is ample evidence for optimism in the city of Detroit. Permit me to add on this point an excerpt from a brief submitted by a coalition of community organizations in support of the Detroit police department.[4]

> The availability of significant numbers of black police officers has demonstrably increased the flexibility of the Detroit department to respond to potential law enforcement crises. The tasks of preventing crime and apprehending criminals have also been made easier. As importantly, it appears that the community support so vital to the law enforcement function is more likely to be achieved. There are fewer confrontations between the citizens and police, fewer police are killed, fewer complaints are being filed with the Michigan Civil Rights Commission, attitudes toward police have improved. Both the police and the community feel that a larger proportion of the black community support police efforts.[5]

Perhaps in some other place and in another era, these may seem inconsequential. From the perspective of those who deal daily with the problems and tensions of urban America, what has happened in Detroit has been an accomplishment of great magnitude.

The proposition that affirmative action works does not change when we move from the police academy to the academic community. The minority presence that has come about because of the affirmative action era has enlivened the learning environment, enriched intellectual content, and enhanced the educational experience of students and faculty alike.

Affirmative action considerations in admissions and financial aid have served to sensitize faculty and administrators to the often artificial and arbitrary barriers erected by mandatory cutoffs and an exclusive reliance on numerical indicators. Thus there are now countless programs that carefully scrutinize applications of both whites and minorities in an effort to discern motivation and other not easily quantifiable qualities that might suggest the potential for success. One of the most highly touted of these programs is the Special Admissions Curriculum Experiment (Sp.A.C.E.) program at Temple University Law School. This program considers any number of qualities thus affording each applicant the opportunity to qualify for admission. No one at Temple will deny that the approach and the program was stimulated by affirmative action considerations.

The positive impact of affirmative action on higher education goes well beyond access. At most institutions the curriculum reflects the concerns and contributions of the new constituency. While many of the experimental courses may have been discontinued, many have flourished and have become integral components of the curriculum.

Affirmative action considerations have encouraged the strengthening (and in some instances the establishment) of grievance procedures for all employers. Moreover, as in other industries, higher education has had to rethink its excessive reliance on credentials for the non-academic side of its workforce.

The new constituency fostered by affirmative action has played a large role in helping educational institutions to realize that, although they may function as employers, landlords and investors, these activities must be conducted in so responsible and forthright a manner as to be consistent with their primary role as institutions of higher learning.

Whether we look at the production line in Gramercy, or into a patrol car in Detroit, or into a campus in Los Angeles, we find evidence that affirmative action is affecting our social, economic and political landscape and changing it for the better.

PREPARED STATEMENT

I

These hearings underscore the fact that the debate about affirmative action has shifted focus as well as forum. The question at hand is not whether affirmative action is moral, legal or constitutional. The significant question now is whether affirmative action remains a politically viable policy option. Because the issue is one of political viability, it is appropriate that affirmative action be reviewed to see whether it is responsive and responsible, that is, responsive to the legitimate needs and aspirations of an identifiable constituency and responsible in the sense of being cognizant of competing legitimate interests, needs and aspirations and, where possible, forging an accommodation.

Measured by this test, the survival of affirmative action seems assured. Affirmative action responds to a broad constituency. This constituency is not limited to the beneficiaries of affirmative action. Despite all reports to the contrary, there exists still in this country a broad base of support for deliberate measures to end the racial domination that has characterized and crippled American society. A recent strongly-worded letter to David Stockman opposing proposed changes in the federal contract compliance program numbered among its signatories Lane Kirkland, President of the AFL-CIO, Patsy Mink of the Americans for Democratic Action, Douglas Fraser of the United Auto Workers, Dorothy Ridings of the League of Women Voters of the United States and some thirty others representing organizations and unions, public interest groups and community groups across the country. These diverse groups made clear that, whatever their differences on other matters, they were "united in opposition to changes which would sound the death knell for the federal contract compliance program, for forty years a vital element in the national effort to provide equal employment opportunity".[6/]

The depth and breadth of support for affirmative action is due in large measure to the fact that affirmative action has been implemented in a reasonable and responsible manner serving those who have been historically deprived while remaining cognizant of those who might of necessity be temporarily denied. Those who pretend that affirmative action is an insensitive and perverted improvisation of a band of overzealous bureaucrats seem intent on conjuring up an image that bears little resemblance to reality.

Affirmative action programs and policies can be divided into three broad categories: court-ordered remedial measures; contractual conditions imposed on contractors and grantees; voluntary efforts undertaken by employers and institutions. None of these evince the overzealousness the critics assert.

Courts order race-conscious remedial measures only after protracted litigation resulting in specific findings of identified discrimination and even then only when lesser measures would not suffice.

Affirmative action requirements attached as conditions for receiving federal funds are focused primarily on the federal contract compliance program developed by way of Executive Order 11246.[7/] From 1941 to 1980 eight Presidents of both parties have contributed to the development of the current program. This bipartisan support has been due to constant tailoring of this program to avoid imposing overly burdensome requirements on the private sector. Contrary to the popular caricature, employers do not have to meet any single numerical target. Nor are they required to pass over better qualified candidates for entry or promotion decisions.

And voluntary efforts are certainly not going to be any less sensitive to the interests of white males. Institutions which have had closed doors for centuries are not likely to open those same doors so wide as to affect significantly the opportunities available to whites. An oft-overlooked but important fact is that with one exception, the cases which found their way to the Supreme Court involved modest voluntary efforts. In DeFunis v. Odegaard[8/], the controversy was over 18 places in a law school class of 150. In Regents of the University of California v. Bakke[9/], it was over 16 seats in a medical school class of 100. In Weber v. Kaiser[10/], it was over 7 places in a newly established training program. In none of these cases or the countless other challenges to voluntary efforts which have been filed in courts across the country can there be found an iota of evidence that unions, educational institutions, government agencies or private employers are so enchanted with affirmative action that they have forged ahead disregarding the rights of whites. And even were they inclined to do so, the Supreme Court has made it clear that a strong predicate must be established for each instance where affirmative action amounts to a racial preference. For public agencies, the Equal Protection Clause of the Fourteenth Amendment requires the program be substantially related to a compelling governmental interest. For the private sector, such voluntary efforts can be undertaken and only where there is an "arguable violation" of the civil rights laws.

Circumscribed on all fronts by this solicitude for the rights of white males, affirmative action is only a first and tentative step toward disestablishing the process of discrimination and ending political isolation and economic subordination. By any reasonable standard, it is a quite modest compromise.

But modesty offers no immunity from assault. Affirmative action has come under fire from those who challenge its legitimacy, contending that it is illegal and unconstitutional, that it is unfair and not moral, that it is violative of enduring values of the society, that it fosters racial antagonism; and that it is just unworkable. Notwithstanding the existence of a solid constituency for affirmative action and a proven ability to be cognizant of the need to balance the competing interests, proponents of affirmative action find themselves constantly forced to respond to the barrage.

II

The argument that affirmative action runs the risk of encouraging racial antagonism is an argument which should be dismissed summarily.

It would be relatively easy to argue that affirmative action does exactly the opposite, that affirmative action enhances communication across racial lines, and reduces the risk of a racial confrontation. These arguments are probably true and quite possibly could be proven. But that is not necessary. The racial antagonism argument is just a euphemistic way of saying that affirmative action upsets some white people. Thus the only appropriate response is to dismiss it.

White people got upset at proposals to abolish slavery and to repeal Jim Crow laws. White people got upset at the thought of desegregated lunch counters, bathrooms, hotels, water fountains and hospitals. White people got so upset about proposed anti-lynching laws that Congress repeatedly failed to pass legislation that would protect the lives of blacks from hostile mobs.

In the history of race relations the fact that white people get upset is nothing new. There are white people who get upset at any attempt to emancipate people of color from the bondage of racial domination. In this regard affirmative action is in excellent company.

The Colorblindness and Meritocracy Arguments

The argument that affirmative action contravenes some historic commitment to enduring values of colorblindness and merit should be accorded no greater significance. This argument brings to mind the storefronts that advertise ready-made antiques. No one even vaguely familiar with American history would dare argue that colorblindness and merit have played so large a role as opponents of affirmative action would have us believe. It was not that long ago that the best jobs in skilled trades and professions were handed down from one generation to the other, all within the family; that bright and talented students and scholars were excluded from the most prestigious institutions of higher learning simply because they were Jewish; that no matter how well-educated, women were denied careers outside of the home solely because they were women. Vestiges of nepotism, favoritism, and patronage abound to this day. Children of the influential and well-connected still enjoy preferential treatment as regards admission to the more selective educational institutions. Political affiliation may still be more important than proven competence in government employment. The old saw "it is who you know, not what you know" has withstood the test of time. Moreover, our present inheritance laws are structured in such a manner as to allow an often insurmountable advantage to be awarded even the mediocre if that mediocrity is coupled with the accident of being born into wealth.

In light of all this, it takes neither exaggeration nor cynicism to conclude that while merit may have had its moments, it most certainly has not been the rule.

As regards colorblindness, the "enduring value" argument fails even more miserably. There is absolutely no support for colorblindness in the nation's customs, traditions and institutions.

A century of race-based chattel slavery, recognized by the Constitution and supported by the Courts and Congress, negates any inference that this was a nation committed at the outset to colorblindness. The development of "Black Codes" and the imposition of Jim Crow laws forbid the conclusion that the abolition of slavery signalled the embracing of colorblindness even as an ideal. It should be remembered that the popular source of the colorblindness articulation was a dissenting opinion in Plessy v. Ferguson,[11/] the case that lent U.S. Supreme Court imprimatur to the race-based policy of legal apartheid known as "separate but equal".

It might be contended that the commitment to colorblindness was made on behalf of the nation by a unanimous Supreme Court in Brown v. Board of Education.[12/] But this was in 1954, hardly long enough for colorblindness to be deified as an enduring value. What's more even now, three decades later, the mandate of Brown has yet to be obeyed, the promise of Brown yet to be fulfilled.

George Bernard Shaw spoke of those who saw wrong and tried to right it. Devoid of either historical basis or precedent in experience, this newly discovered and hastily refurbished notion of colorblindness can be seen for what it really is. That is, neither more nor less than a contrivance of convenience having as its purpose and design to put out the eyes of those who would see injustice and try to remedy it.

The Legal and Constitutional Arguments

The arguments that affirmative action is illegal and unconstitutional have been given their day in court. In fact they have been given days, weeks, months, years and even a decade in court. In the final analysis, despite numerous opportunities, the opponents of affirmative action have failed to persuade the courts that affirmative action is either illegal or unconstitutional. Considering the magnitude of the effort, the array of legal talent and the enormity of the resources expended, the legal onslaught on affirmative action has been a gigantic failure. The affirmative action concept has survived the legal and constitutional challenge and must now be confronted on political terms.

The Moral Argument

It cannot be denied that whether any program or policy is accepted by the public at large may depend a great deal on whether that program or policy is perceived to be fair. However, the arguments about affirmative action have not focused on the practical consequences of any perceived unfairness. Instead these arguments have focused on the accusation that affirmative action is intrinsically unfair and immoral to the extent that it encourages and even requires that race be taken into account. These accusations, coming from some academics and carried on the pages of the nation's scholarly and popular publications, have helped to foster considerable suspicions of affirmative action programs and policies.

The problem is not that reasonable people disagree. The problem is that opponents of affirmative action act as though affirmative action must be placed in some sort of suspended animation until such time that consensus can be achieved on how to resolve the fairness dilemma.

That is a proposition supported by neither reason nor precedent. Ours is a political process that has never relied on policy by consensus. Despite sharply divergent views on the morality of capital punishment, abortion and nuclear power, we have managed to devise and implement policies even as debate continues on each. Despite the protests of those who find it unfair that this is a system of taxation that often takes from the poor and gives to the rich, the Internal Revenue Service manages to collect taxes every year so that the government can function. The presence in our society of those who object on moral grounds to war has not posed any insuperable obstacle to a national commitment to building a formidable war machine.

In all of these areas, there is an understanding that the political process in a democratic society is in fact a market-place where conflicting ideas, agendas, interests and concerns are traded and adjusted and from which workable compromises emerge. By their very nature, those compromises are bound to be something less than perfect and thus perfectly suited for this imperfect world.

The opponents of affirmative action would have us forget all this to embark on a quixotic quest for an ideologically pure, conceptually clean policy around which a consensus can be formed. They know well no such pristine principle exists, that this is a senseless quest, and that it serves only as distraction from the urgent task of fashioning real remedies for real injuries.

The "Failure to Work Argument"

The accusation that affirmative action has not and cannot work may be the unkindest cut of all. Economist Thomas Sowell says:

> Despite the shift in the meaning of affirmative action, from prospective opportunity to retrospective results, the affirmative action program itself has little in the way of results to show for its own wide-ranging, costly, activity.13/

To support his proposition, Professor Sowell often cites numerous studies on black-white income ratios and black-white occupational ratios. Moreover, as he has with his opposition to desegregation, Sowell enlivens the cold statistics with anecdotal examples, "worst cases" scenarios and, admittedly, "theoretical conclusions" based on his economic premises.

Even so, Professor Sowell's data provide only thin support for his sweeping con[illegible]ation. Affirmative action has not been without good results. While Sowell and other opponents of affirmative action may be able to point to a few of its failures, supporters can point to a far greater number of successes.

Consider the situation in legal education. In 1969 there were less than two dozen blacks on full-time faculties of the nation's predominantly white law schools. Ten years later there were 150. In 1969 there were 2,128 black law students enrolled in these schools. By 1978, black enrollment had more than doubled to 5,350. No one in legal education will deny that this turnabout in both faculty and student levels is due in large part to the pressures and consciousness brought on by the affirmative action era.

Law schools finally began to seek out blacks who had been qualified to teach all along. And, despite the fact that few law schools have advanced beyond a level of tokenism -- which Kellis Parker of Columbia refers to as the "none to one" strategy -- well over half of the ABA-approved law schools have at least one minority professor. Often with the assistance and upon the insistence of these new teachers law schools established the so-called "special admissions" programs which even today account for a large portion of black and minority enrollment.

This success is no isolated aberration. Similar results have occurred in medical schools and business schools.

Choosing professional school statistics might seem to underscore the claim that, to the extent it works at all, affirmative action benefits only the least disadvantaged of blacks. According to U.S. Senator Orrin Hatch, the beneficiaries of affirmative action are the "well educated, well-trained people who are capable of getting jobs anyway, and not the downtrodden". This bit of hyperbole uses as its frame of reference changes in the white collar occupations and the professions while ignoring completely the far more significant changes in other sections of the job market.

A review of the litigation docket of the NAACP Legal Defense Fund reveals that the cases resulting in court-ordered affirmative action involved entry-level and promotional opportunities in blue-collar jobs. The same can be said for the dockets of the Mexican

American Legal Defense and Education Fund and Lawyers Committee for Civil Rights Under the Law and those of other civil rights organizations.

Even the bulk of so-called "reverse discrimination" litigation has been around employment opportunities not likely to attract this "well-educated" elite group the Senator and others castigate. Notwithstanding the enormous attention afforded the DeFunis and Bakke cases, it is the Weber and Minnick cases that are most representative of the hundreds of lawsuits still being tried or on appeal. What Brian Weber and Wayne Minnick objected to were not some fancy programs targeted to the middle class. Instead, Weber involved an on-the-job training program for unskilled production workers at the Gramercy, Louisiana plant of Kaiser Aluminum. Minnick involved prison guards. DPOA v. Young, recently denied certiori, involves uniformed police officers. Certainly neither Professor Sowell nor Senator Hatch would wish to contend that these are jobs for which either well-educated blacks or well-educated whites are lining up.

III

It is possible to make a case for affirmative action on the strongest ground of all: It works. Even so, it has not produced as good results as many had hoped. But how could it? Even in the best of times, affirmative action could not help but be affected by the sustained assault to which it has been subjected. And these were certainly not the best of times. The 1970's witnessed an economic malaise that made even more difficult the task of reallocating opportunities so as to end exclusion from the economic mainstream.

There is little doubt that affirmative action was compromised almost as much by the source of the opposition as it was by its stridency. Among the most vociferous opponents of affirmative action have been found many self-proclaimed former allies of the civil rights movement. As importantly, the opposition included a most formidable group -- academics furious that their private preserve was no longer exempted de facto from affirmative action requirements. Using their superior and almost exclusive access to scholarly journals and other respected publications, the normally placid inhabitants of the ivory tower launched an invective-laden assault on affirmative action. They seemed unconcerned about joining forces with anti-intellectuals in pandering to the latent racism and baser instincts of the population. It was they who lent legitimacy to the anti-affirmative action forces by creating a fiction of affirmative action as an odious policy designed to provide employment and educational opportunity to undeserving minorities and women by denying these same opportunities to deserving white men.

Since it did not suit their purposes, the academics did not bother to mention that, despite the sound and fury of the DeFunis case, of the 53,000 new seats in the nation's law schools, both ABA-approved and ABA non-approved, only 8% were filled by minorities; and of the total enrollment in these schools, only 4% of the seats were filled by black students. Nor did they bother to mention that, even if every minority hired as a result of an affirmative action program were fired today, there would be virtually no effect on the unemployment rate of whites. Nor did they bother to say that the government enforcement effort was in fact a paper tiger. During the 13 year period between September 1965 (when OFCCP was created) and October 1978 (the effective date of President Carter's reorganization of equal employment agencies) only 12 of the more than 30,000 prime governmental suppliers were debarred for discriminatory practices.

As could be expected, affirmative action programs adopted pursuant to court-order were least affected by political opposition and economic malaise. Even so, as the "reverse discrimination" genre of cases gained notoriety, there were more and more collateral attacks on the judgments and settlements that terminated earlier litigation.

The "reverse discrimination" cases proved a substantial deterrent to voluntary affirmative action efforts. Until the Weber case was decided, employers felt caught in a "damned if you do and damned if you don't" dilemma. While their present practices would eventually give way to a charge of discrimination, a preemptive remedy would expose them to the greater certainty of a suit charging "reverse discrimination". To prevail against the latter lawsuit the employer would have to adduce evidence of prior discrimination that would then, in turn, expose them to the lawsuit they sought to avoid in the first place. Confronted with this situation, most employers chose to do nothing, awaiting some definitive assurance of immunity from the double whammy.

Because of the limitations inherent in court-ordered affirmative action and the chilling effect that "reverse discrimination" suits have had on voluntary efforts, the federal contract compliance effort carried a disproportionate amount of the burden and was exposed to a disproportionate amount of the opposition heaped on affirmative action.

Since 1969 the federal compliance program has been challenged in practically every district court and in every judicial circuit in the nation. It has been attacked with every conceivable argument. To their credit, the courts consistently have upheld the Executive Order and refused to stymie the administrative agencies' enforcement efforts. So has the Congress. But again it was not for the lack of someone trying. The Congressional Research Service of the Library of Congress confirms that in every Congress from 1969 on, at least one attempt has been made to curtail or dismantle the federal contract compliance programs. As recently as two weeks ago, the "Walker Amendment" made it to the Senate House Conference Committee before it was finally defeated. Had it not been defeated, this amendment could have sounded the proverbial death knell for what is now the most critical leg of the affirmative action triad.

It is against this background that the success or failure of affirmative action must be measured. Affirmative action survived despite being sandbagged, sabotaged, and suckerpunched. That the concept is facing here yet another assault is a tribute to its inherent strengths.

IV

Freed from the strictures of continual advocacy, none but the most ardent supporters of affirmative action will contend that it is a paragon of perfection. Affirmative action emerged from the 1970's with both scars and flaws. The strident rhetoric and dire predictions left more than a bit of conceptual untidiness. Despite the protracted debate, there is still the tendency to confuse the affirmative action concept with particular affirmative action measures, plans or programs and to ignore critical distinctions between the roles and limits of the judicial institution and the political process. Moreover, there is an excessive reliance on the notion of discrimination whether past or continuing.

The affirmative action concept simply recognizes that in some instances race-conscious measures may be appropriate and even necessary in order to dismantle a process of discrimination or to end isolation from the political process or to end exclusion from the economic mainstream. On this level affirmative action is not committed to any of the particular measures that may run the gamut from informal ad hoc decisions to established plans; from using race as one factor among many to distinguish among other qualified candidates, to using race as a dispositive basis for decision; from an unspecified "best efforts" approach to the more easily measured goals, targets, timetables, and even quotas. This distinction between the affirmative action concept and specific affirmative action measures is crucial. It provides a framework within which one can support affirmative action in general and simultaneously disagree about the wisdom, priority and necessity of using a particular measure in a given instance. The absence of such a framework accounts in part for the polarization that has characterized much of the debate thus far.

Similarly, there has not been a clear articulation of the necessary distinction between what the courts can do and what the political process can accomplish. Courts are limited to cases and controversies involving identified parties and specific factual allegations. Judicial decrees must be tailored to the dispute before the court. If affirmative action is to be ordered it must be addressed to the specific injury. This is the compensatory approach. Only in particular disputes is the court permitted to offer limited prospective relief. Consequently, it would be difficult and highly inappropriate for a court to attempt to frame a decree sufficiently broad so as to dismantle a process of discrimination.

The political process is not so bound. Its protection can be invoked before the injury occurs, and its reach goes far beyond that of any individual dispute. Thus it can appropriately consider, and does consider, corrective (as opposed to compensatory) and prospective relief. It is this understanding that underlies the enactment of legislation setting forth general proscriptions and establishing administrative agencies empowered to fashion rules.

The nature of the political process also allows it to break free from the moorings of past discrimination to consider how best to correct the pervading realities of political isolation and economic subordination. The interests of a democratic society that cherishes domestic tranquility are ill-served by conditions which lock identifiable groups out of the political process and the economy. The society would be denied permanently the resources and perspective and contributions of these groups. Having neither an effective voice nor an economic stake in the society, the groups will have no reason to join the cause, share the costs, and recognize the limits which are a part of the fabric of the society.

It is appropriate and indeed imperative that these concerns be taken into account in the making of public policy. And it would be equally appropriate if the society chose to take positive steps to assure inclusion without demanding proof of some clear nexus between exclusion and past discriminatory conduct or current discriminatory processes. If affirmative action is seen as a partial response to the imperative to end political isolation and exclusion from the economic mainstream, many of the already tenuous arguments against it become completely untenable.

Once these clarifications are made and a framework for discussion established, supporters and critics alike could turn their attention to the questions which are matters of genuine concern. Assuming the legitimacy of affirmative action, when is it appropriate? Under what circumstance? To what extent? For how long? These questions deserve to be discussed and answered. Especially as to the last question, the absence of an answer proves unsettling even to some who stand strongly in favor of affirmative action. Few people are willing to argue that affirmative action must go on forever. Fewer still have managed to fashion a principle by which to allow it time to be effective and yet to limit its duration.

In his testimony before the Senate Subcommittee on Constitutional Rights, the former Cabinet member William Coleman suggested indices that would signal that affirmative action is no longer needed.

> (1) Substantial equality in average wages between minorities and whites;
>
> (2) Approximately equivalent rates of unemployment among minorities and whites;
>
> (3) Substantial equality in housing conditions and opportunities;
>
> (4) Substantial equality in admissions to institutions of higher education and professional schools;
>
> (5) Substantial representation in membership in trade organizations and unions; and
>
> (6) Substantial representation in corporate board rooms, banks, the guiding bodies of the major political parties, the Congress and state legislatures -- in short, in the positions of influence and power in our society, where basic economic and political decisions are made.

In Mr. Coleman's words, "When we can show as a nation, that we have made sufficient progress in meeting these criteria, then the remedy of affirmative action will no longer be an essential tool in realizing our constitutionally recognized values."[14/]

Whether his approach is viable is a matter on which reasonable people can disagree. Mr. Coleman has in effect invited similarly concrete alternatives. In so doing, he may have initiated a useful dialogue and helped to implement this next most critical phase of affirmative action.

The United States Commission on Civil Rights has urged just such a responsible approach.

> A unifying and problem-solving approach to affirmative action that addresses the hard questions is needed now. It is time to consolidate the lessons learned from past studies, the case-by-case pragmatism of litigation, and a decade of experimentation and trial and error and develop an approach that gives concrete direction and assistance to ongoing and future affirmative action efforts.[15]

Eminently reasonable as this proposal is, the prospects for any such a development in the near future appear bleak.

Those who have problems with affirmative action continue to offer little in the way of constructive criticism. They seem content to issue salvos of destructive rhetoric. Rather than engaging in a dialogue as to how affirmative action could be made to work better, they appear more comfortable engaging in a guerrilla warfare so that it might not work at all. Feeling besieged by this sustained assault, many supporters resolve to defend affirmative action even at the cost of concealing the flaws and ignoring its blemishes.

The battle has gone on long enough. It must be brought to an end.

Those who oppose affirmative action should be challenged to put up or to shut up. They may have a better idea as to how to dismantle the process of discrimination and to end the isolation from the political process and the continued exclusion from the economic mainstream. If so, it should be put forward, measured against affirmative action and proven to work realistically, and realistically to work at least as well now. As evidenced by the testimony presented thus far to the Senate Subcommittee on Constitutional Rights, no such alternative is even being considered. Four of the most articulate opponents of affirmative action have managed to come up with only one idea among them. And that was Nathan Derskowitz's almost unintelligible proposal to continue affirmative action so long as it becomes "non race-specific".

Associate Justice Blackmun has responded to this as well as anyone could:

> I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this

> be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way.[16]

The politicians have thus far done no better. Proposed amendments to the Constitution and to the various civil rights statutes that merely outlaw affirmative action are insufficient since they do not address in any way the underlying problems that called affirmative action into being in the first place. Nor is the appeal for some reaffirmation of a nude promise of equality of opportunity. That appeal requires the embracing of an approach that has not worked in the past, does not work now, and holds no promise of working in the future.

Unless different and better alternatives are forthcoming, then those who oppose affirmative action would do well to heed the words of Mr. William Raspberry, columnist for the Washington Post·

> " ... Some of us are wide-open to at least listen to conservative approaches for solving the problems that the liberal approaches have left unresolved. But so far we have listened in vain. What we get is the 1980's counterpart of the 1960's rioters whose notion was to tear the system down without any thought of what to put in its place. Finally, you want to shout at them to stop telling you what you've done wrong for all these years, and tell you what to do now to solve your problems. And if they don't know, maybe they should just admit it and go away."[17]

Uncharitable as this might seem, Mr. Raspberry's might well be the most appropriate response.

V

While those who support affirmative action cannot afford to be cavalier about the opposition, we must not allow ourselves to be trapped in the quicksands of interminable debate. Of course, this is easier said than done. Endless debate over even the most modest efforts to deal with historic injury has become so commonplace as to seem required. The fact that the Congress of the United States is even now debating the merits of desegregation in public education, housing and employment, the necessity of providing legal services to the poor and the importance of protecting the voting rights of minorities, underscores the futility of any attempt to achieve consensus around affirmative action. That alone is reason enough to disengage from the current debate.

But there are other reasons to move quickly beyond affirmative action. The struggle over affirmative action is consuming much of the attention, intellectual resources and political capital that are necessary to address the urgent problems of those who are now trapped in a permanent underclass.

Professor William Julius Wilson, in his provocative book The Declining Significance of Race,[18/] has reminded us of the growing number of families confronted with the poverty of generations and the reality of economic dislocation. These families are now structurally barred and permanently excluded from any hope of participation in a productive economy. This nation, committed as it is to strengthening its economy, strengthening its defenses and assuring its place in the world, ignores at its peril those who have been victimized by its legacy of slavery and history of oppression and who even now are condemned to a life of poverty, denied adequate housing, gainful employment, effective education, dignity and hope.

We must move beyond affirmative action because as Wilson reminds us, no matter how well affirmative action works it will not dissolve the structural barriers "resulting from labor-saving devices, industry relocation, labor-market segmentation and the shift from goods-producing to service-producing industries."

To move beyond affirmative action we must first get to affirmative action. It is true that affirmative action will neither house the homeless, nor employ the jobless, nor educate the illiterate. Affirmative action, however, could provide hope, where there is now hopelessness. Affirmative action can assure those who remain excluded that exclusion is not a permanent phenomenon because there will be a cadre within the political process and the economic mainstream to articulate their aspirations to advance their interests and to protect their rights.

In large measure, the arguments against affirmative action ignore the sad history that brought it forth.

These programs are not handouts or misguided products of noblesse-oblige. They represent the tangible manifestations of a political compromise. The first Executive Order was issued by President Roosevelt only after A. Philip Randolph threatened to have 100,000 blacks march on the nation's capital.[19/] That process, once set in motion, evolved only because at each step of the way Blacks were willing to agitate and demand and then settle for less than they deserved.

Blacks and other minorities were silent during the 1970's when the nation's economic malaise retarded the progress begun in the 1960's and inflicted upon the poor and the powerless a disproportionate burden of inflation, recession and stagflation. It would be a cruel irony that just as the new administration offers the promise of better days that society were to renege not only on its promises that things would get better but would also seek to unilaterally undo the progress made in the earlier decades.

The effort to destroy affirmative action amounts to a refusal to face difficult issues and to make tough choices. In this regard history repeats itself. This society is now confronted with a choice that has faced nearly every generation of Americans: Whether to move decisively to include blacks and similarly situated minorities into the body politic and into the economic mainstream or to ignore their plight and risk the consequences.

Each generation has found an excuse and rationalization for passing the problem on to the next.

The generations of the early 1800's refused to abolish chattel slavery and thus caused their children to fight and die in the Civil War.

The generations of the late 1800's were quick to abandon the modest efforts to ease the suffering and to protect the rights of the formerly enslaved blacks. In so doing, they occasioned untold human suffering for blacks and white alike.

The generations of the 1920's and 1950's refused to avail themselves of the opportunity to assure those who had fought to make the world safe for democracy that they and their children could safely exercise democratic rights at home. Our cities still bear the scars of the rebellion that ensued.

Now this generation can choose. It can commit to continuing affirmative action and then to moving beyond. Or it can hide behind the countless rationalizations and excuses and allow the problem to go unresolved into the next generation.

We know from experience that the interest on this historic debt is paid for in human misery. We know also that the institutions of the future are going to be strained severely as the nation attempts to cope with the reality of limited and shrinking national resources and to adjust and define itself in an ever-changing world. Knowing all this, it is grossly unfair and immoral to require the next generation to mortgage its future and risk its survival by passing on to them untouched and undiminished, the accumulated costs of two centuries of discrimination and deprivation, isolation and exclusion.

NOTES TO TEXT

1. United Steelworkers of America v. Weber, 440 U.S. 954 (1979).

2. Detroit Police Officers' Assn. v. Young, 446 F. Supp. 979 (E.D. Mich. 1978): vacated and rev'd., 608 F.2d 671 (6th Cir. 1979).

3. Id. at 696.

4. This brief was submitted on behalf of Citizens for Affirmative Action in Detroit (CAADET), an unincorporated, voluntary Association of Detroit-based civic and professional organizations. CAADET's twenty-six constituent organizations represent a broad spectrum of the City's populace, which are joined together by a firm commitment to support and advance affirmative action concepts and programs to assure true equality of opportunity in the City of Detroit. Brief of amicus curiae in Detroit Police Officers Assn. et al. v. Coleman A. Young et al. (6th Cir., No. 78-1163).

5. Id. at 45.

6. Letter dated June 5, 1981 to David Stockman, Office of Management and Budget, signed by the following: Lane Kirkland, President, American Federation of Labor and Congress of Industrial Organizations; Johanna Mendelson, Director of Public Policy, and Amy Berger, Public Policy Assistant, American Association of University Women; Patsy Mink, President, Americans for Democratic Action; William Lucy, President, Coalition of Black Trade Unionists; Winn Newman, General Counsel, Coalition of Labor Union Women; Janet Beaudry, Chairperson, East Tennessee Coalmining Women's Support Team; Marylouise Uhlig, National

President, Federally Employed Women; Nancy Felipe Russo, President, Federation of Organizations for Professional Women; Richard Lowe, Associate Director, Institute of Public Representation; Douglas Fraser, President, International Union UAW; William L. Robinson, Director, Lawyers Committee for Civil Rights Under Law; Ralph Neas, Director, Leadership Conference on Civil Rights; Dorothy S. Ridings, First Vice President, League of Women Voters of the United States; Stephen Ronfeldt, Directing Attorney, Legal Aid Society of Alameda County; Antonia Hernandez, Associate Counsel, Mexican American Legal Defense and Educational Fund; Wilma Espinoza, President, Mexican American Women's National Association; Jack Greenberg, Director Counsel, NAACP Legal Defense and Educational Fund, Inc.; Benjamin L. Hooks, Executive Director, National Association for the Advancement of Colored People; Wilhelmina Rolark, President, National Association of Black Women Attorneys; John Crump, Executive Director, National Bar Association; Frederick L. Jones, Executive Director, National Black Veterans' Organization; Lauren Anderson, Associate Director, National Conference of Black Lawyers; Gerri Traina, Co-Director, National Congress of Neighborhood Women; Dorothy Height, National President, National Council of Negro Women; Ann Kolker, Associate Director, Washington Office, National Employment Law Project; Eleanor Smeal, President, National Organization for Women; Vernon Jordan, President, National Urban League; Iris Mitgang, National Chair, National Women's Political Caucus; Robert L. Becker, Staff Attorney, Puerto Rican Legal Defense and Education Fund; Samuel M. Church, Jr., President, United Mine Workers of America; Jane P. Fleming, Executive Director, Wider Opportunities for Women; Day Piercy, Executive Director, Women Employed; Norman Spector, National Coordinator, Women for Racial and Economic Equality; Carol Grossman, President, Women's Equity Action League; Judith Lichtman, Executive Director, Women's Legal Defense Fund; Karen Nussbaum, President, Working Women; Karen Sauvigne, Program Director, Working Women's Institute.

7. Executive Order 11246 requires that all government contractors and subcontractors take affirmative action in hiring, requiring an affirmative action clause in every contract with the government in excess of $50,000 or 50 or more employees. §202(1), 3 C.F.R. 169 (1974), reprinted following 42 U.S.C. §2000(E) (1970), amended by Executive Order 11375, 32 Fed. Reg. 14303 (1967). In 1971 it was estimated that the federal government spent approximately $70 billion in procurement, with the contracts involving approximately one third of the U.S. work force. See note, Executive Order 11246: Anti-Discrimination Obligations in Government Contracts, 44 N.Y.U.L. Rev. 590, 1969. Recent proposed regulations would significantly raise the dollar amounts (and employee numbers in contracting business), drasti- cally reducing the number of contractors subject to Executive Order 11246.

   Somewhat analogous "affirmative action" provisions are an integral part of the enforcement mechanisms under Titles VI and IX of the Civil Rights Act of 1964 and §504 of the Rehabilitation Act of 1973.

8. 416 U.S. 312 (1974).

9. 438 U.S. 265 (1978).

10. *Supra* note 1.

11. 163 U.S. 537 (1896).

12. 347 U.S. 483 (1954).

13. Thomas Sowell, *Weber and Bakke, and the Presuppositions of Affirmative Action*, 26 Wayne L. Rev. (No. 4) (1980) at 1326.

14. Statement of William T. Coleman, Jr., Chairman, NAACP Legal Defense and Educational Fund, Inc., "In Re Affirmative Action to End the Effects of Racial Discrimination and Segregation"

before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, Washington, DC., June 11, 1981.

15. U.S. Commission on Civil Rights, A Proposed Statement, *Affirmative Action in the 1980's, Dismantling the Process of Discrimination*, Clearinghouse Publication No. 65, January 1981.

16. *Supra* note 9, at 407.

17. *Washington Post*, Feb. 23, 1981.

18. William Julius Wilson, *The Declining Significance of Race: Blacks and Changing American Institutions*, Chicago: University of Chicago Press, 1978. See also *The Declining Significance of Race? A Dialogue Among Black and White Social Scientists*, Joseph R. Washington, ed., University of Pennsylvania Afro-American Studies Program Symposium, 1979.

19. The best analysis of the further development of affirmative action is John E. Fleming's *The Lengthening Shadow of Slavery, A Historical Justification for Affirmative Action for Blacks*, published in 1976 under the auspices of the Institute for the Study of Educational Policy at Howard University (ISEP). ISEP has conducted the most extensive research in this area and has published a series of comprehensive books, the latest of which is Dr. Lorenzo Morris' *Elusive Equality: The Status of Black Americans in Higher Education*. Other ISEP publications which are helpful in this area are *Equal Educational Opportunity for Blacks in U.S. Higher Education: An Assessment* (Howard University Press); *Directory of National Sources of Data on Blacks in Higher Education, 1976 Edition*; *Proceedings from the National Invitational Conference on Racial and Ethnic Data*, Elizabeth A. Abramowitz, ed.; *The Changing Mood in America: Eroding Commitment?* by Faustine C. Jones (Howard University Press); *Higher Education's Responsibility for Advancing Equality of Opportunity and Justice* by James E. Cheek (First ISEP Occasional Paper); *The Bakke Case Primer; Advancing Equality of Opportunity: A Matter of Justice*, Cynthia J. Smith, ed.; *The Case for Affirmative Action for Blacks in Higher Education* by John Fleming and David Swenson (Howard University Press).

APPENDIX A

CAMPAIGN TO DEFEND
WORKING WOMEN'S RIGHTS

Working Women
A NATIONAL ASSOCIATION OF OFFICE WORKERS

In Defense of Affirmative Action:

Taking the Profit Out of Discrimination

With the advent of the Reagan Administration, we are seeing an all-out attack on Affirmative Action, mounted by the Administration, the Congress, and the business community. Affirmative Action--the program which requires federal contractors to take positive steps to upgrade disadvantaged women and minority employees--is administered by the Department of Labor's Office of Federal Contract Compliance under President Johnson's Executive Order 11246. Affirmative Action is a necessary and effective means of changing the ingrained patterns of discrimination which still plague our nation. Its benefits--to women and minorities, to other employees, and to society at large--are many. Its costs have been exaggerated.

Orrin Hatch, the Senator from Utah, describes Affirmative Action as "an assault upon America, conceived in lies and fostered with an irresponsibility so extreme as to verge upon the malign."

Attorney-General William French Smith claims that "we have come perilously close in recent years to fostering discrimination" through Affirmative Action. He vows not to use Justice Department resources to support Affirmative Action solutions to problems of employment discrimination.

The Labor Department is busy redrafting Affirmative Action regulations in such a way--in its words-- as to "avoid unnecessary confrontation with employers."

And the employers? One executive told WORKING WOMEN his policy is "L.H.D." What is that? Love, Hinder, and Delay. Support Affirmative Action in public, but in private, do your best to make it inoperable.

The opponents of Affirmative Action usually take pains to assert their strong commitment to civil rights. Yet looked at carefully, their opposition to Affirmative Action is grounded in bias.

Let's look carefully at Mr. Hatch's arguments, set forth in an article in Policy Review (September, 1980) called "Loading the Economy:"

1) "If you leave people alone, they will tend to employ those who do the best job, and the overall production of wealth will be maximized."

   Translation: There is no such thing as discrimination.

2) Mr. Hatch complains of the "inefficiencies due to the employment and promotion of marginal labor" forced on employers by Affirmative Action.

   Translation: Women and minorities are less qualified than white men.

3) "Affirmative Action is a net cost to the economy."

None of these statements holds water. All of them prove Mr. Hatch to be no friend to the millions of women and minorities who have been systematically denied the opportunity to use their full potential in the workplace.

In an attempt to unfetter the business community, in the mistaken belief that all of society will thereby profit, the Administration and elements in the Congress would throw away a demonstrably effective means of bringing the talents of excluded groups into the economy. Theirs is a retreat from the hard-fought battle of women and minorities to overcome centuries of discrimination. In its place is an invitation to the business community to turn its traditional profit on discrimination.

WORKING WOMEN believes that:

--Affirmative Action is necessary in the face of the employment discrimination that is still an ugly reality;

--Affirmative Action has worked effectively to reduce discrimination;

--there is no available, workable alternative to Affirmative Action;

--the benefits of Affirmative Action far outweigh its costs.

Now is the time for streamlining and strengthening Affirmative Action, not for gutting it. With the support of 12,000 members in every state, we are prepared to defend our rights and take the profit out of discrimination.

Discrimination is Alive and Well

Discrimination is not a thing of the past. It is still alive and well in the vast majority of American corporations.

Some discrimination is blatant. Qualified women are still told point-blank that they cannot have a promotion because of their sex.

Some discrimination is "subtle." Women routinely train young men to be their own supervisors. One WORKING WOMEN member has trained four such men over the course of her career.

A study recently completed by WORKING WOMEN on the banking industry found a high concentration of women in the banking industry (63% of the workforce), with most of the clerical jobs held by women and most of the women holding clerical jobs.

In the past decade, for example, the proportion of bank tellers who are women increased from 73.6% to 92.9%. Pay for bank tellers is among the lowest in the country--close to minimum wage. Simultaneously, the position of bank teller has continued its exit from the career ladder. There are bank presidents today who boast of having made it from the tller's cage to the executive suite. But those days are over. More common today are female bank tellers who remain in these dead-end positions for years.

While virtually every occupation probably now boasts at least one female or minority employee, the basic pattern of women and minorities occupying low-level, low-paying positions remains. In fact, a higher percentage of women work as clerical and service workers (the nation's lowest paying jobs) than did twenty years ago. The percentage of women in management has increased by only a little over one percent.

In every occupation, women continue to be paid less than men for equal work. Most women work in so-called "women's jobs," which pay less than men's jobs even when the women's work requires more skill, effort, and responsibility than the men's.

The employment practices that perpetuate the wage gap and job segregation include:

--hiring practices that channel men and women into different jobs;

--lack of job posting; reliance on word-of-mouth and the old boys' network;

--lack of job training programs for women and minorities;

--stereotyping of jobs. Cultural stereotyping means that, for example, executives design their secretarial jobs so as to feed stereotypes of the office wife or the office sex object;

--women training men to be promoted above them.

All of these policies are targets of Affirmative Action investigations. An employer with a well-functioning Affirmative Action program is making an effort to root these policies out. An employer without such a program is less likely to be taking steps to reverse such policies.

Minority women, regardless of level of education, occupy positions with the lowest promotion opportunity and the lowest pay. Hispanic women earned 54¢, black women 59¢, and white women 63¢ for every dollar earned by white males in 1980. In 1978, only 7.9% of minority women college graduates were employed as managers or administrators--compared to 24.5% of male collage graduates.

The existence of Affirmative Action and other equal employment opportunity laws and regulations has opened up some opportunities for women and minorities.

But we are a long way from equity on the job. And we are a long way from institutionalizing employment policies that might eventually result in equity. This is the purpose of Affirmative Action.

Affirmative Action Works

There is no denying that discrimination remains a tremendous social and economic problem in America. Yet it is also undeniable that Affirmative Action enforcement has worked to reduce discrimination.

WORKING WOMEN examined the employment policies and profiles of banks before and after publicity generated by WORKING WOMEN and investigations by the OFCCP. We found that the banks which received the greatest government attention made the greatest progress in certain employment areas.

In Boston, the First National Bank, subject of an Affirmative Action review and target of a WORKING WOMEN publicity campaign, provided its employees with the first cost-of-living raise in four years and instituted job posting shortly after WORKING WOMEN demanded it. In Cleveland, Central National Bank carried out bank-wide job evaluations and upgraded the salary schedule for non-officer positions. National City Bank, the subject of an extensive government review, recently announced a management training program for non-degree employees affecting many women and minorities. Even banks not currently under investigation have begun new programs in response to the change they sense in Affirmative Action enforcement.

Overall, in Cleveland's five largest banks, the percentage of female officials and managers rose 20.4% in one to three years--years when WORKING WOMEN and the Department of Labor were actively involved in exposure and review of the banks' employment practices. Though this figure is still well below the national average claimed by the American Bankers Association, it is higher than the pre-1978 figure of 16%.

Minority participation in the workforce of these five banks rose from 14.5% to 20.4% in these years--higher than the national average. Minorities in management positions rose from 3.1% to 5.8%.

The banks' reports to the government show that while the percentage of managers who are women rose slowly before strong government enforcement (from 11.6% in 1950 to 12.2% in 1960), the percentage rose markedly once enforcement was stepped up (from 17.6% in 1970 to 31.6% in 1979).

Another industry that has benefited positively from Affirmative Action is the coal mining industry. According to federal statistics, there was no such thing as a woman coal miner in this country until 1973. By December of 1980, there were 3,295 women coal miners. In 1973, 0.01% of coal miners hired were women; by 1980, 8.7% of underground coal miners hired were women. In 1972, no women applied for mining jobs at Peabody Coal Company (the nation's largest coal producer) in Kentucky; by 1978, after the word had spread, 1,131 women applied for mining jobs at Peabody.

Even in 1981, there are numerous coal operators who openly decalre that they will never hire women or minorities until forced to do so, according to Betty Jean Hall of the Coal Employment Project (Senate Labor and Human Resources Committee testimony, April 21, 1981). Only strong government action can begin to correct this situation.

The available statistical data indicate that the job situation for women and minorities has improved with the aggressive aid of Affirmative Action enforcement.

Is There an Alternative to Affirmative Action?

> "I was selected for the job because of my merits. I was included in the selection pool because of Affirmative Action."
>
> --black woman

Even with all the pressure of government contracts and equal employment suits, progress is slow. After the famous sex discrimination settlement at AT & T, the next six years produced only small gains for women:

	1973	1979
% of mgrs who were women	22.4%	28%
% of middle mgrs who were women	11.2%	21.1%
% of top mgrs who were women	2.1%	2.8%

Professors F. Marion Fletcher and Linda P. Fletcher studied the status of women and minorities in the insurance industry from 1966 to 1975 ("Employment Patterns of Minorities and Women in the Insurance Industry, 1966 - 1975," Discrimination against Minorities and Women in Pensions and Health, Life, and Disability Insurance, a consultation sponsored by the U.S. Commission on CIvil Rights, Washington, D.C., APril 24-26, 1978, VOl I, Proceedings and Papers.) They found minority women moving into clerical jobs for the first time, and white women moving into manager jobs for the first time. They predicted that at this rate of improvement, white women will be represented in professional jobs at a rate proportionate to theri representation in the industry as a whole in only eight years. They will be proportionately represented in manager jobs in twenty-one years; in sales in ninety-seven years. Minority men are eight to ten years away from equity in professional and technical insurance jobs; thirty-six years away in manager jobs.

Some of these figures are encouraging; others are discouraging. All will worsen if Affirmative Action regualations are weakened.

For over twenty years, government Executive Orders urging voluntary Affirmative Action had no effect on federal contractors' hiring practices. As mandatory Affirmative Action requirements were developed and enforced, we began to see progress. Without the spur of government regulation, we can expect employers not to try so hard to bring women and minorities into full participation in the labor force.

The benefit to the employer of paying women and minorities less than white males is clear. Equally clear is the benefit in creating a racial or sexual job ghetto in which a large labor pool competes for a small number of jobs. But many discriminatory policies persist out of inertia or convenience. Word-of-mouth recruiting by white male managers, for example, is most common. It perpetuates a favoring of white males--those who hear about the jobs--to the detriment of women and minorities. An Affirmative Action plan requires the employer to supplement this method of recruitment with others more likely to reach groups outside the traditional company grapevine.

As columnist William Raspberry says:

> "Institutions tend to reproduce themselves unless something interferes with that process. Build an institution white for racist reasons, and it will tend to continue white even when the racism that founded it abates--unless, again, something interferes with that process. That outside interference is what I think of as affirmative action, and I'm prepared to defend it." (American Enterprise Institute Round Table, May 28, 1975, Washington, D.C., "Affirmative Action: The Answer to Discrimination?")

Critics of Affirmative Action, including those in the business community, often cite the Equal Employment Opportunity Commission, which enforces Title VII of the Civil Rights Act of 1964, as an adequate tool for fighting discrimination. Affirmative Action, enforced by the Department of Labor, is, they claim, unnecessarily duplicative. Yet an article in the American Banker (May 28, 1981) reveals that "EEOC...has not been a serious litigation threat in most instances." Indeed, while the EEOC cleared up its backlog during the recent tenure of Chair Eleanor Holmes Norton, it has never developed a workable approach to company-wide, "systemic" discrimination. The Labor Department's effectiveness in pursuing problems that require company-wide changes in policy have made it a great boon to those suffering from discrimination. And a great threat to those who profit from discrimination.

Mr. Hatch and his cohorts complain that they can't criticize Affirmative Action without embarrassment. They have cause to be embarrassed. They are proposing to remove an important and effective tool of protection from women and minorities. Yet they have proposed no alternative plans for bringing women and minorities into full participation in the economy.

Cost-Benefit Analysis of Affirmative Action

The cost-benefit analysis has become fashionable with the new Administration, adding as it does a cloak of scientific meansurement to their ideologically based policies. Yet neither business--which complains of the high cost of Affirmative Action--nor the government critics of Affirmative Action have produced a cost-benefit analysis which assesses the true advantages and disadvantages of Affirmative Action. Instead, they have selected out a small number of costs, neglected the benefits, and ignored the costs of discontinuing Affirmative Action. In fact, Affirmative Action has minimal costs and major benefits.

Costs to Business

Even using their own figures, the costs of Affirmative Action incurred by business are tiny.

Citicorp, America's third largest bank, spent more on auto racing in 1978 than it did on Affirmative Action in 1977. (Citicorp gave over half a million dollars to the U.S. Auto Club racing program on conditions that the drivers wear Citicorp patches on their driving suits or decals on their cars.)

A massive study prepared by the Business Roundtable studied 48 large companies which together represent 19% of U.S. corporate capital (The Cost of Government Regulation Study, March 1979). For banks, the cost of writing and implementing an Affirmative Action program averaged only 0.01% of gross revenues...or $12.30 per employee. The three giant banks studied--Chase Manhattan, Citicorp, and Continental Illinois--spent an average of $356,000 on Affirmative Action in 1977. These banks grossed $9.9 billion in revenues and employed 87,000 people.

In banking, the salary of the average chief executive is considerably higher than the cost of the Affirmative Action program. 1980 figures for the top officers' pay at the three banks cited in the Business Roundtable study are $710,000, $589,000, and $507,207. Walter Wriston, Chair of Citibank, earned $631,054 in 1977 in current and deferred income. This was the year that Citicorp spent somewhere around $356,000 on Affirmative Action. Most bankers have received hefty raises in the past several years; most banks reported hefty profits.

An additional cost to the companies is the cost of Affirmative Action litigation. Batteries of lawyers spend thousands of hours hoping to avoid

Department of Labor remedies, which typically consist of back pay, training programs, job posting, job re-evaluation, and job descriptions. The same money spent on litigation, if invested into the company's workforce, would benefit company and employee alike.

Costs to the Government

A Congressional Research Service document found that Affirmative Action cost the federal government $37.3 million in 1975. Subsequently the government program was streamlined, consolidating 33 agency programs into one, the Office of Federal Contract Compliance Programs (DOL) with a 1980 budget of only $15.6 million. The OFCCP oversees 350,000 companies employing nearly 40 million workers...an expenditure of only 39¢ per employee covered.

In fact, OFCCP's systemic approach is extremely cost-efficient when compared with agencies that work on an individual basis. The OFCCP estimates the cost of an individual complaint processing to be $4,000 to $5,000, while the entire cost of a field investigation of an entire corporation is only $10,000.

Social and Economic Costs of Discrimination

Underutilization

Educational attainment of American workers is rising. At the same time, educational requirements for American jobs are falling. Men and women receive about the same amount of education, and the underutilization of the skills and talents of women and minorities is especially pronounced. For example, in 1979, of all women 25 years and older who had some college education, over 30% were employed as clerical workers, in jobs for which college training is not required. Many women are thus overqualified for their jobs. They cannot gain promotions or find employment in other fields.

Sex and race discrimination at the workplace deprives the economy of the talents of millions. Anyone who has ever worked in a corporation knows that far from hiring the person best qualified for the job, employers often tend to hire someone they feel comfortable with. The concept of Affirmative Action merely asks employers to draw in addition upon the vast available pool of qualified women and minorities.

Depressed Purchasing Power of Discrimination Victims

When women and minority workers' careers are stunted at beginner's level, they never earn enough to buy a car or a home. Low purchasing power provides an insufficient stimulus for further job creation. In the words of economist

William Bryan, "The employer is destroying himself if her doesn't pay fair wages to women. Low wages do not justify a robust economy." (Economic Analysis of the State of Ohio, November, 1979).

Taxpayers Subsidize Job Discrimination

Some full-time bank tellers are eligible for food stamps. Because the banks will not pay a living wage, the taxpayers supplement the income of full-time workers at some of the nation's most profitable corporations. Over 90% of bank tellers are women.

Federal government payments to full- and part-time working people are substantial. A disproportionate amount goes to women and minority workers who are trapped in low-paying, dead-end jobs.

A specific example is the old-age support of women workers who retire into poverty. The average single woman worker retires with less than $1,000 in savings. 90% do not receive pension benefits. As a result the majority of the retired poor are women. Seventy percent of those receiving Supplemental Security Income are women. How many would be supporting themselves if their career aspirations had not been thwarted by discriminatory employers?

Benefits of Affirmative Action

The benefits of Affirmative Action mirror the costs of discrimination. Affirmative Action utilizes the talents of many who would otherwise be stifled by bias. By opening career opportunities, it increases the purchasing power of women and minorities, and reduces the burden on taxpayers to support those trapped in dead-end jobs for their entire careers.

In addition, Affirmative Action promotes fair and rational employment policies. Contractors who are found to underutilize women and minorities are encouraged to instituted job posting systems, training programs open to all qualified employees, accurate job descriptions, regular salary reviews. These little-publicized remedies benefit all employees, white men included.

The benefits of integrating women and minorities into all areas in the workforce can also be seen in the lessening of social and political alienation experienced by such workers. Job dissatisfaction takes a heavy toll on the economy, on health, on the family, and on the political system. A society which accords fair treatment to women and minorities is a stronger society by far than one which excludes them from full participation.

Correcting the Faults in Affirmative Action: A Positive Approach

If Affirmative Action is imposing an unfair regulatory burden on the nation's businesses, the Department of Labor can take several simple steps to ease that burden while bringing the benefits of Affirmative Action to all:

--Target the healthy, growing industries for vigorous enforcement. The office and service industries, with their burgeoning job opportunities, are ideal places to implement Affirmative Action with few repurcussions on white male employees or recruitemtn difficulties.

--Target industries as a whole. This will ensure that the costs of implementing fair employement practices (whatever they may be) will not unfairly put a single company at a competitive disadvantage.

--Simplify reporting procedures. Stress an annual summary report that breaks down the workforce by sex, race, and salary level.

--Use the full range of remedies and sanctions available--including back pay and debarment--as an incentive to compliance.

--Emphasize the institution of fair employment practices that have company-wide benefits.

The Campaign to Defend Working Women's Rights

Affirmative Action is an effective and important tool for bringing employment opportunity to women and minority workers. WORKING WOMEN, a national association of office workers, will defend our right to Affirmative Action across the country.

Our goal is the full attainment of the Working Women's Bill of Rights for Office Workers:

The RIGHT to respect as women and as office workers.

The RIGHT to benefits and pay equal to those of men in comparable jobs.

The RIGHT to equal access to promotion opportunities and training programs.

The RIGHT to fair and adequate compensation with regular salary reviews.

The RIGHT to a comprehensive written job description.

The RIGHT to a work environment free of discrimination on the basis of sex, race, age, marital status, or parenthood.

APPENDIX B

THE IMPORTANCE OF THE CONTRACT COMPLIANCE PROGRAM: HISTORICAL PERSPECTIVE

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THE HISTORICAL BASIS OF THE CONTRACT COMPLIANCE PROGRAM

I. SUMMARY AND ANALYSIS

A. Introduction

In 1941 President Roosevelt issued an Executive Order barring discrimination by defense contractors. For the past 40 years, eight Presidents have supported the program -- six Presidents have issued Executive Orders. The federal contract compliance program has been studied by executive committees and reviewed by congressional committees. The program has developed gradually, expanding as a result of experimentation and as a result of a growing political will to undo the history of discriminatory and segregated employment opportunity. Since 1941 each administration has enhanced the program and has contributed to its development. The federal contract compliance program has developed with bipartisan support.

At the present time, the compliance program is once again being analyzed by Congress and by the Administration. A review of the development of the program demonstrates its reasonableness and shows the necessity for its current form. Many individuals and groups have worked hard over a 40-year period to develop an effective program. Before discarding current approaches it is important to understand the reasons behind their existence.

This historical outline of the general principles underlying the compliance program has been prepared in order to provide an understanding of the reasons which support these general principles. In brief, the general principles include the following: the requirement of nondiscrimination by federal contractors; the requirement that federal contractors take affirmative action to end discriminatory practices and their effects; and the use of sanctions to enforce the nondiscrimination and affirmative action requirements when voluntary compliance fails.

Before turning to the historical analysis of the program, Section II, it is helpful to summarize four separate but interrelated issues which are central to the development of the current program: purpose and scope of the program; method of enforcement; affirmative action; and relationship between this executive branch program and Congress.[1/]

B. Purpose and Scope

The purpose of the current compliance program was fully set forth twenty years ago by President Kennedy in Executive Order No. 10925: The program is necessary since

> discrimination because of race ... is contrary to the Constitutional principles and policies of the United States......, it is the plain and positive obligation of the United States Government to promote and ensure equal opportunity for all [employed on government contracts]... [and] it is in the general interest and welfare of the United States to promote its economy, security, and national defense through the most efficient and effective utilization of all available manpower.

This strong expression of national policy closely followed President Eisenhower's justification for the issuance of Executive Order No. 10479. President Eisenhower stated that the "full utilization of [American] manpower" was important in order to promote the Nation's "security" and "economy". Moreover, Eisenhower asserted that it is the national policy to "promote" equal employment opportunity "because such persons are entitled to fair and equitable treatment in all aspects of employment on work paid from public funds." (Emphasis added).

President Eisenhower's justification for the Order established for the first time that the fair employment provisions should cover "all aspects" of employment sponsored by public funds and that, regardless of the benefit to the government's procurement efforts, employees are entitled to equal employment opportunity. The Orders issued by Presidents Roosevelt and Truman had specifically referred to national

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[1/] The references to the historical material are set forth in Section II; these references are not repeated in this summary and analysis.

defense acts and were primarily directed to enhancing the pool of workers available for defense production.

In fact, the initial Order promulgated by President Roosevelt in 1941 recognized that during that time of national emergency "needed workers have been barred from employment in industries engaged in defense production solely because of considerations of race...." Blacks responded in large numbers in support of the war effort: in early 1942 only 3% of the workers in defense industries were black, whereas by 1944 8% of the workers were black. Unfortunately, after the national emergency the Committee on Fair Employment Practice was abolished and black workers were laid-off first, just as black workers had been the last hired.[2] Even though the Executive Order provisions against discrimination had remained in effect the nondiscrimination clause, as reported by the Committee on Government Contract Compliance established by President Truman, had become "almost forgotten, dead and buried under thousands of words...."[3]

Presidents Eisenhower and Kennedy made clear that the national policy of fair employment applied throughout the economy and that minorities were entitled to fair employment opportunity for work paid for with government funds. When Title VII was amended in 1972 Congress affirmed that the contract compliance program was "an important and viable tool in the government's efforts to achieve equal employment opportunity."

C. Method of Enforcement

In 1971 the congressional committees which reviewed the implementation of the fair employment laws prior to reporting out amendments to Title VII observed that the contract compliance program "has always suffered" from the failure of administrators to debar contractors and that there was "far too much... negotiation" and that there was an unwillingness to use "sanctions." This criticism echoed similar conclusions made almost thirty years earlier. In its Final Report issued in 1946, the Committee on Fair Employment Practice observed that "[d]iscriminatory practices were too ingrained to be wholly carved out even by patriotism and Presidential authority" and that the "revival of discriminatory practices" at the end of the war could only be checked by measures stronger than the declaration of a nondiscrimination policy. The last chairman of the Committee found that the Committee used "mild sanctions" and that the Committee "had not been given the tools to do the job."

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[2] See R. Weaver, Negro Labor, A National Problem (New York; Harcourt, Brace & Co., 1946).

[3] M. Sovern, Legal Restraints on Racial Discrimination in Employment (1966), Appendix G.

President Eisenhower made the nondiscrimination clause more specific and empowered the Government Contract Committee, which he had established to implement the Order, to receive "complaints of alleged violations of the non-discrimination provisions of government contracts." However, the Committee in its Final Report stressed that basic changes were necessary to insure equal opportunity. In particular, in its 1960 Report the Committee found that "the indifference of employers to establishing a positive policy of non-discrimination" (emphasis added) was the principal obstacle to fair employment opportunity.

Following the report of the Eisenhower Committee, President Kennedy issued Executive Order No. 10925. The Kennedy Order set out specific and strong penalities, including debarment, for noncompliance. Unfortunately, as Congress recognized in 1972, the Office of Federal Contract Compliance failed to use the sanctions adequately.

It was only after the directions of Congress, the determinations of the need for sanctions in several government reports, and the issuance of judicial opinions requiring the implementation of enforcement regulations, that the Office of Federal Congract Compliance regularly began to use sanctions at the end of the 1970s. It has been recognized repeatedly that investigation, conciliation and voluntary compliance can not by themselves achieve the goals of the compliance program. After reviewing the effectiveness of the program, successive administrations reached the same conclusion -- more enforcement power was needed to implement the program.

D. Affirmative Action

In 1953 President Eisenhower created the Government Contract Committee to supervise the implementation of the Executive Order and to suggest any changes needed for the enforcement of the Order. After eight years of supervising the Order, the Committee in its _Final Report_ stated that contractors should be required to take "positive action" in order to insure equal employment opportunity. In fact, prior to the issuance of the Report, the Committee had often urged contractors to take affirmative efforts to hire blacks.

President Kennedy agreed with the Eisenhower Committee. Executive Order No. 10925, issued by Kennedy in 1961, provided that "it is the plain and _positive_ obligation of the United States Government to promote and _ensure_ equal opportunity for all... employed ... on government contracts...." (Emphasis added). The Order specifically provided that contractors "will take affirmative action" to ensure fair employment.

The Labor Department stated that the focus of affirmative action was upon "results", the means were left to the "ingenuity" of the contractor. However, the lack of a definition of "affirmative action" more than, as one Director of OFCC stated, "anything you have to do to get results", provided difficulty for the government and for the OFCC. The difficulty reached a critical point in 1968 when the Comptroller General ruled that the requirement for affirmative action failed to meet the specifications of the procurement law that prospective bidders be informed of the minimum standards for a contract. In order to meet the objection of the Comptroller General and the need for a more definite description of the affirmative action requirement, the Department of Labor provided that under the Philadelphia Plan construction firms must make "good faith" efforts to attain goals for the employment of minorities. The purposes of this measurable, numerical approach were (1) to provide the amount of certainty required by procurement law, (2) to provide a target, which if met, established presumptive compliance with the affirmative action obligation, and (3) if the target were not met, to serve as a standard to trigger an investigation of the compliance status of the contractor.

In 1970, the administration extended the use of numerical goals to the monitoring of the compliance of non-construction contractors. As in the case of the Philadelphia Plan, a contractor was required only to make a "good faith" attempt to meet the numerical targets. The use of numerical targets was challenged in the courts and in Congress; but both the courts and Congress approved the use of goals as a measure of a contractor's compliance with the Executive Order. Thus, the need for affirmative action has been recognized for over 20 years and for over 12 years three administrations have required the use of measurable standards to assist in monitoring and ensuring compliance with the program.

E. Relationship with Congress

During the process of amending Title VII in 1972, Congress reviewed several critical questions regarding the Executive Order: whether Title VII should be the exclusive means to insure equal employment opportunity, whether goals should be used, and whether the EEOC should enforce the Order. After recognizing the importance of the Executive Order to the attainment of the public policy of fair employment, Congress elected to permit the continuation of the Executive Order, the use of goals and the enforcement by the Department of Labor.

As it did in Title VII of the Civil Rights Act of 1964, Congress specifically referred to the executive order program in the Equal Employment Act of 1972, thereby including the program in the overall congressional strategy for achieving fair employment. Furthermore, the congressional support for the program in 1972 followed several years of close congressional review of the program and its use of numerical goals. For example, in 1969 Congress was close to approving a limitation on the appropriation of funds to implement programs like the Philadelphia Plan. President Nixon adamantly opposed the limitation and stated that Congress "faces an historic and critical
civil rights bill." Congress rejected the rider to the appro-

priations bill which would have limited the use of goals in the compliance program. Thus, both Congress and the Executive have reviewed periodically the compliance program and either directly or tacitly approved the development of the program.

II. HISTORICAL OVERVIEW OF THE CONTRACT COMPLIANCE PROGRAM

A. Executive Orders Promulgated During the 1940s

1. Executive Order No. 8802 -- The First Order

On June 25, 1941, President Roosevelt signed Executive Order No. 8802, 6 Fed. Reg. 3109, 3 C.F.R., 1938-43 Comp. 957. This Order established for the first time a national policy supporting equal employment opportunity "regardless of race, creed, color, or national origin." The Order stated that it was promulgated because "it is the policy of the United States to encourage full participation in the national defense program by all citizens ... in the firm belief that the democratic way of life within the Nation can be defended successfully only with the help and support of all groups within its borders...." The Executive Order was essential because "needed workers have been barred from employment in industries engaged in defense production solely because of considerations of race...."

The Order provided (1) that federal agencies concerned with vocational and training programs for defense production "shall take special measures appropriate to assure" the nondiscriminatory administration of the programs; (2) that federal contracting agencies shall include in all "defense contracts" a provision obligating the contractor not to discriminate; (3) that the Committee on Fair Employment Practice in the Office of Production Management be established; (4) that the Committee "shall receive and investigate complaints of discrimination in violation of the provisions of this Order and shall take appropriate steps to redress grievances which it finds to be valid"; and (5) that the Committee shall recommend measures necessary "to effectuate the provisions of this Order."

2. Background to Executive Order No. 8802

The institution of the Executive Order was a response, in part, to the civil rights protests and demands and to the pervasive practices of job discrimination which threatened to disrupt the supply of labor for the defense industry. A. Philip Randolph had organized the March on Washington Movement (MOWM). Under the dynamic, persistent leadership of Randolph, the President of the Sleeping Car Porters Union, MOWM threatened to rally thousands of blacks to demonstrate on July 1, 1941, at the Lincoln Memorial in a protest against employment discrimination. When Executive Order No. 8802 was issued six days in advance of the planned, mass demonstration, Randolph "postponed" the march. The Executive Order was issued "following the threat of a Negro march on Washington, which would have revealed to the world a divided country at a time when national unity was essential." United States Commission on Civil Rights, 1961 Report: Employment, Book 3, p. 10.[4/]

The frustration of blacks caused by employment discrimination was fueled by the catastrophic effect of the depression on black workers -- a much more severe effect than was felt by white workers. In 1937 a census of the unemployed found that 22 percent of black males were unemployed whereas 15 percent of white males were unemployed. When Negroes March, supra, p. 19.[5/] During the depression the proportion of blacks on public relief rolls was almost twice as high as the proportion of whites. The position of urban blacks was particularly desperate and much more severe than the position of urban whites. For example, in Pittsburgh in October 1933, 43.4 percent of all blacks were receiving public relief, whereas only 5.7 percent of all whites were receiving public relief, Id. p. 18.

As the Reports of the Fair Employment Practice Committee make clear the increase in employment caused by the initial expan-

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[4/] See generally, H. Garfinkel, When Negroes March (Glencoe, Illinois: Free Press, 1959).

[5/] See generally, I. Bernstein, The Lean Years (Boston: Houghton Mifflin Company, 1960); R. Wolters, Negroes and the Great Depression (Westport, Conn.: Greenwood Publishing Corporation, 1970). A detailed description of the effect of the depression on black workers is provided in R. Weaver, Negro Labor, A National Problem (New York : Harcourt, Brace & Co., 1946), pp. 8-15. Weaver examines the effects of discrimination and the process by which "[a]lmost a half of the skilled Negro males in the nation were displaced from their usual types of employment during the period 1930 to 1936 ...." Id., p. 9.

sion of the defense industry had little effect on minorities. The FEPC's First Report indicates that in March 1942, only 2.5 to 3 percent of all workers employed in war production were black. L. Ruchames, Race, Jobs & Politics - The Story of FEPC (New York: Columbia University Press, 1953), p. 159. In its Final Report Wash., D.C., GPO: 1947), pp. 1-2, the FEPC detailed the problems confronted by minorities:

> At the beginning of the defense period, Negro workers were mostly on farms, in service, or at unskilled jobs. The percentage of Negroes in manufacturing was lower than it had been 30 years before. Although every tenth American is a Negro, only 1 Negro in 20 was in defense industry. Every seventh white American was a skilled craftsman; only 1 Negro in 22 had a skilled rating. Many trade unions had constitutional barriers to Negro membership ....
>
> The million and a half Mexican-Americans in the labor force were similarly underutilized, the vast majority being confined to common labor.
>
> The defense period opened with a sizeable reserve of the unemployed. The white unemployed were first called back, trained and put on the job. Negroes remained disproportionately unemployed and on relief.
>
> Discriminatory hiring habits, in 1941, squarely barred the entrance of millions of minority group Americans into the factories and shipyards where productive skills were about to begin their race against the destruction of American lives and property.

3. Executive Order No. 9001

In order to effectuate the provisions of the "Act to Expedite the Prosecution of the War Effort," President Roosevelt promulgated Executive Order No. 9001, 6 Fed. Reg. 6787, 3 C.F.R. 1938-43 Comp. 1054 (December 27, 1941). The Act had granted the War and Navy Departments and the Maritime Commission broad contracting authority. The implementing Executive Order provided that "all contracts shall be deemed to incorporate by reference a provision that the contractor and any sub-contractors thereunder shall not" discriminate on the ground of "race, creed, color or national origin." (Emphasis added). Thus, the need to cover all contractors, whether prime contractor or subcontractor, and all contracts, whether express or by reference, was recognized.

4. Executive Order No. 9346 -- The Expansion of the Coverage of the Executive Order and the Power of the FEPC

President Roosevelt expanded the scope of the program when he issued Executive Order No. 9346, 8 Fed. Reg. 7183, 3 C.F.R. 1938-43 Comp. 1280, (May 27, 1943). The Order provided that "it is the duty of all employers, including the several Federal departments and agencies, and all labor organizations... to eliminate discrimination in regard to hire, tenure, terms or conditions of employment, or union membership because of race, creed, color or national origin." The Order required a nondiscrimination clause "in all [government] contracts" and required the contractor "to include a similar provision in all subcontracts." The power of the Committee to receive and investigate complaints was enhanced by expressly providing that the Committee "may conduct hearings, make findings of fact, and take appropriate steps to obtain elimination of such discrimination." In response to a Comptroller General's opinion that the Order was directive and not mandatory, President Roosevelt emphasized the compulsory nature of the Order, Letter to the Attorney General, 8 Fed. Reg. 15419 (Nov. 10, 1943):

> There is no need for me to reiterate the fundamental principles underlying the promulgation of the Executive Order, namely, that the prosecution of the war demands that we utilize fully all available manpower, and that the discrimination by war industries against persons for any of the reasons named in the Order is detrimental to the prosecution of the war and is opposed to our national democratic purposes.
>
> I realize the hesitancy of the Comptroller General to withhold payments on Government contracts in which these provisions have not been included where there is doubt as to whether the Order is mandatory. I therefore wish to make it perfectly clear that these provisions are mandatory and should be incorporated in all Government contracts. The Order should be so construed by all Government contracting Agencies.

While Executive Order No. 9346 expanded coverage of contracts for which there was a required nondiscrimination clause, the Order was essentially based upon the President's war mobilization powers and was largely directed at increasing the pool of workers available for defense production.

5. An Evaluation of the Executive Orders in Effect During the Second World War, Recommendations by the FEPC, and a Failure of Commitment

In December 1945, President Truman signed Executive Order 9664, 10 Fed. Reg. 15301, 3 C. F. R., 1943-48 Comp. 480. The Order continued the FEPC for a limited period of time as provided in the National War Agencies Appropriation Act. Moreover, the Order directed the FEPC to "investigate, make findings and recommendations, and report to the President with respect to discrimination in industries ... or to the effective transition to a peacetime economy."

The FEPC concluded that the Executive Order had a positive effect and that many war industries had accepted minorities either as a result of the necessity of staffing the plants or as a result of persuasion by the FEPC. Thus, while blacks comprised only 3% of the workers in war industries in March 1942, blacks comprised 8% of the workers in war industries by the end of the war. Ruchames, Race, Jobs & Politics, supra, p. 159. However, the FEPC emphasized that although there was improvement this "is not to say that the policy [of nondiscrimination] was not repeatedly and consistently breached within all groups under FEPC jurisdiction." Final Report, supra, p. 3. The FEPC observed that "[d]iscriminatory practices were too ingrained to be wholly carved out even by patriotism and Presidential authority". The last chairman of the FEPC, Malcolm Ross, observed that "its [FEPC] mild sanctions were seldom applied.... [It was] concerned and diligent; [but it] simply had not been given the tools to do the job."[6]

The FEPC stressed that,

> the wartime gains of Negro, Mexican-American and Jewish workers are being lost through an unchecked revival of discriminatory practices.
>
> The war veterans of these minority groups today face far greater difficulties than other veterans in obtaining training and finding work.
>
> Government action was effective in reducing wartime discrimination, but the gains made by minority group workers

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6/ Malcolm Ross. "Some Wartime Lesson on Ending Job Discrimination," The Washington Post, July 28, 1963, p. E-3, quoted in R. Nathan, Jobs & Civil Rights (Wash., D. C. : GPO, 1969), p. 150 n. 5.

> began to disappear as soon as wartime controls were relaxed.
>
> Nothing short of congressional action to end employment discrimination can prevent the freezing of American workers into fixed groups, with ability and hard work of no account to those of the "wrong" race or religion.
>
> This denial of equal opportunity, if allowed to become permanent, cannot fail to create civic discord and to be a cause of embarrassment to the United States in its international relations. Final Report, p. VIII.

As a result of the "long history of industrial discrimination against minority workers", the wartime opposition to equal employment opportunity, and the "current revival" of discrimination, the FEPC in its letter of resignation to President Truman made three general recommendations, Final Report, supra, pp. V-VI.

1. The adoption of fair employment practice legislation by Congress.
2. The adoption by the Government of measures to enhance the policy of nondiscrimination by government contractors since the "mere existence of a Federal policy of nondiscrimination will not in itself result in fair employment practices...."
3. The development and maintenance of statistics regarding the employment and unemployment by race because the "employment handicaps of minority-group workers are not fully known because of the incomplete reporting [of such statistics]."

Unfortunately, the proposals of the FEPC were not acted upon and the progress in equal opportunity which occurred during the War evaporated with the "revival" of racial discrimination. Tragically, the results were properly predicted by the FEPC -- "civic discord" and "embarrassment to the United States in its international relations."

The failure to continue the FEPC resulted in part from the "strong congressional opposition" engendered by the Executive Orders. Nathan, Jobs & Civil Rights, supra, pp. 87-88. In 1944 Congress required congressional approval for all funds for agencies which had been established by Executive Order and which had been in existence for more than one year. Although Congress approved two appropriations for the FEPC, the second approval in 1945 was specifically earmarked for concluding the Committee's business. Id. During the 1940s there was a persistent campaign in Congress for legislation which would establish a permanent FEPC. The campaign reached its high points in the Seventy-ninth Congress (1945-1946) and in the Eighty-first Congress (1950); but the legislation failed to pass Congress. See generally, Ruchames, Race, Jobs & Politics, supra, pp. 199-213.

The difficulty in establishing the FEPC and the enormous problem of discrimination which confronted the United States are captured in comments made by the first and the final Chairman of the FEPC. Mark Ethridge, the publisher of the Louisville Courier-Journal, was the first Chairman of the FEPC. Mr. Ethridge's remarks at an FEPC public hearing in Los Angeles on October 20, 1941, reflected the discriminatory attitude that was prevalent and, at least in his opinion, the limited scope of the Executive Order:

> Although he defended the granting of civil rights and equal opportunity to Negroes, he also affirmed his personal support of segregation in the South. Stressing that "the committee has taken no position on the question of segregation of industrial workers," he emphasized that "Executive Order 8802 is a war order, not a social document," that it did not require the elimination of segregation, and that had it done so, he would have considered it "against the general peace and welfare... in the Nazi dictatorial pattern rather than in the slower, more painful, but sounder pattern of the democratic process." Ruchames, Race, Jobs, & Politics, supra, p. 28.

Mr. Ethridge was replaced as Chairman in 1942. Malcolm Ross, an author and former information director of the National Labor Relations Board, was appointed Chairman in October 1943 and remained in that position until the FEPC was dissolved in 1946. Ross, who had tried hard to make the FEPC work, commented upon the obstacles which were created by political opposition:

> There were Jews and many Negroes in this agency. Let's face it. That fact was the subject not only of whispering campaigns but of derisive shouts on the floor of Congress. Until Congress itself comes to believe citizenship is not a class prerogative, there is little hope of settling the problem at the grass roots. M. Ross, All Manner of Men (New York: Greenwood Press, 1969), p. 83.

In conclusion, as Herbert Hill, former Labor Director for the NAACP has commented, the extensive documentation and investigation of employment discrimination by the FEPC as well as the government's commitment to equal employment opportunity were steps in "the evolution of contemporary legal prohibitions against discrimination...." H. Hill, Black Labor and the American System (Wash., D.C.: BNA, 1977), pp. 173-74. However, the "FEPC, with no direct enforcement power, was not able to eliminate discriminatory job patterns and, in retrospect, had little effect in changing the status of nonwhite workers." Id., p. 173. As both Ethridge and Ross indicated from quite different perspectives, the establishment of a nondiscriminatory policy in the American workplace was frustrated by entrenched segregation and the failure of political will. In one sense, the Executive Orders served their purpose -- the war industries needed workers and the Orders opened the employment door to minority workers who responded in large numbers. But with victory in the Second World War and the return of millions of white soldiers to the workforce, the need for minority workers lessened and the FEPC was dissolved.

B. Executive Orders Promulgated in 1951 by President Truman

There was a five-year lull in activity regarding the implementation of the nondiscrimination clause in federal contracts from 1946 through 1951. On February 2, 1951, President Truman signed Executive Order No. 10210, 16 Fed. Reg. 1049, 3 C.F.R. 1949-53, Comp. 390, which transferred to the Department of Defense the power to contract which had been previously contained in Executive Order No. 9001, see section A-3, supra. The Executive Order maintained the provision which barred discrimination by contractors or subcontractors. Subsequently, President Truman signed five additional Executive Orders which extended the powers and responsibilities listed in Executive Order No. 10210, including the nondiscrimination provision, to other agencies engaged in defense related procurement. Contractors Assn. of Eastern Pennsylvania v. Schultz, 442 F. 2d 159, 169 n. 31 (3rd Cir.), cert. denied, 404 U.S. 854 (1971).

President Truman expanded the enforcement effort when he created the Committee on Government Contract Compliance, Executive Order No. 10308, 16 Fed. Reg. 12303, 3 C.F.R., 1949-53 Comp. 837. The Committee was established because "it is necessary and desirable to improve the means for obtaining compliance with [the] nondiscrimination provisions" in government contracts. The Committee was empowered to "study" the rules and regulations of government contracting agencies, "confer and advise" with officers of the agencies, and where appropriate, make recommendations. The Committee was not given direct enforcement powers.

Although several of Truman's Executive Orders referred to the President's authority under the "Constitution and statutes," all of the Orders referred specifically to national defense acts.

C. Executive Orders Promulgated by President Eisenhower : The Expansion of Coverage

On August 13, 1953 President Eisenhower signed Executive Order No. 10479, 18 Fed. Reg. 4899, 3 C.F.R., 1949-53 Comp. 961, which dissolved the last Truman Order and created the Government Contract Committee. The Order substantially broadened the justification for and the scope of the coverage of the nondiscrimination clause. First, the Order relied upon the need for the full utilization of manpower in the interest of the Nation's "security" and "economy". Similarly, this was the first Order which was not specifically based upon defense production or defense acts. As the Third Circuit stated, "[n]o less than in the case of defense procurement it is in the interest of the United States in all procurement to see that its suppliers are not over the long run increasing its costs and delaying its programs by excluding from the labor pool available minority workmen." Contractors' Ass'n. v. Schultz, supra, 442 F.2d at 170.

Second, the Order unequivocally stated that it is the policy of the United States to "promote" equal employment opportunity "because such persons are entitled to fair and equitable treatment in all aspects of employment on work paid for from public funds," (Emphasis added). Regardless of any benefit to the government with respect to its specific procurement efforts or with respect to its general interest to expand the efficiency of the economy, this Executive Order was issued because workers were "entitled" to equal employment opportunity.

Third, the Committee was empowered to receive "complaints of alleged violations of the nondiscrimination provisions of government contracts." Although Roosevelt had granted this power to the FEPC, Truman had not granted this power to the Contract Compliance Committee.

Fourth, the Order empowered the Committee to engage in activities which were not directly related to procurement: to encourage the futherance of educational programs by employer, labor and other groups "in order to eliminate or reduce... discrimination in employment"; and to establish cooperative relationships with state and local governments, as well as with nongovernmental bodies, "to assist in achieving the purposes of this order." Moreover, in order to increase the prestige of the Committee, Eisenhower appointed Vice President Nixon as its Chairman.

The Executive Order provided that the Committee should report on the implementation and enforcement of the Executive Order. In its First Report[7] the Committee indicated that it had established standards for "making the program effective."

> These standards are (1) precontractual discussions, (2) reasonable field checks of contracts on a sampling basis, (3) investigation and conciliation of alleged violations, and (4) report system of experiences of the agencies. Id. pp. 2-3.

The Committee attempted to develop a comprehensive plan for insuring that government contractors provided equal employment opportunity. In pursuing this goal the Committee

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7/ President's Committee on Government Contracts, First Report (Wash., D. C., 1954).

"found that the nondiscrimination clause being used... was not sufficiently clear to many contractors." The Committee "also believed it was necessary for the contract provision to require the posting of a notice which would inform the employees and applicants for employment of the obligation of employers and rights of employees under Federal contracts." Id. p. 3. Thus, the Committee developed a system for enforcement and proposed making the Executive Order more specific by modifying the standard contract language.

In signing Executive Order No. 10557, 19 Fed. Reg. 5655, 3 C.F.R., 1954-58 Comp. 203, (September 3, 1954), President Eisenhower approved the language proposed by the Committee for the more specific nondiscrimination contract provision and obligated the contractors and subcontractors to post appropriate notices. The provision established by President Eisenhower in 1954 still remains in effect.[8/]

The Final Report of the Committee[9/] emphasized that despite the expansion of the program during the 1950s, basic changes were necessary in order to insure equal employment opportunity. Two important primary conclusions of the Committee, which were adopted by President Kennedy, have had a substantial influence on the implementation of the program in the past twenty years.

[8/] The Executive Order required that the agreement not to discriminate, "shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination.; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post hereafter in conspicuous places, available for employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this non-discrimination clause."

This language is currently in Section 202 of Executive Order No. 11246. The introductory language has been changed by the addition of "sex" to the categories of forbidden discrimination, and by the substitution of "religion" for "creed", see section F, infra.

[9/] Committee on Government Contracts, Pattern for Progress, Final Report to President Eisenhower (Washington, D. C. 1959/1960).

The Committee determined that "[o]vert discrimination... is not as prevalent as is generally believed. To a greater degree, the indifference of employers to establishing a positive policy of nondiscrimination hinders qualified applicants and employees from being hired and promoted on the basis of equality." (Emphasis in original). *Id.* p. 14. Moreover, the Committee concluded that "[t]here is no justification for discrimination ... in work performed by contractors paid by Federal funds. The Committee advocates that this policy be carried into the whole broad scope of Federal grant-in-aid programs." *Id.*, p. 14. The Committee's major conclusions -- the need for "positive" action and the extension of the program beyond federal procurement to federal grants-in-aid -- were implemented, at least in part, by President Kennedy.

In fact, the Committee had for several years recognized the need for affirmative action. "The Committee often urged Government contractors to take affirmative steps to hire Negroes, but sometimes met the objection that this policy gave preference to Negroes and therefore violated the nondiscrimination clause...." United States Commission on Civil Rights, *Employment*, *supra*, p. 75 (1961). The Committee's recommendation for the need for "positive action" and the subsequent inclusion of the term in Executive Order No. 10925 was directed, in part, at overcoming such objections.

D. Executive Orders Promulgated by President Kennedy -- the Introduction of Affirmative Action and the Extension of the Program to Federal Grants for Construction Projects

1. Executive Order No. 10925

On March 6, 1961, President Kennedy signed Executive Order No. 10925, 26 Fed. Reg. 1977, 3 C.F.R., 1959-63 Comp. 448. President Kennedy made several significant changes in the contract compliance program when he signed this Order. First, the Order emphasized and enlarged the broad justification first stated by President Eisenhower for the Executive Order. The Executive Order is necessary since "discrimination because of race... is contrary to the Constitutional principles and policies of the United States;... [since] it is the plain and positive obligation of the United States Government to promote and ensure equal opportunity for all ... employed ...

on government contracts;... [and since] it is in the general interest and welfare of the United States to promote its economy, security, and national defense through the most efficient and effective utilization of all available manpower."

Second, the Order expressly stated, as suggested in the Report prepared by the President's Committee on Government Contracts submitted to President Eisenhower one year earlier, see Section C, supra, that "it is the policy of the executive branch of the Government to encourage by positive measures equal opportunity for all qualified persons within the Government", (emphasis added). Accordingly, the "affirmative action" provision was added to the Executive Order, Section 301 (1):

> The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.

Third, the Order stated that "a review and analysis of existing Executive orders, practices, and government... employment and compliance with existing non-discrimination contract provisions reveal an urgent need for expansion and strengthening of efforts to promote full equality of employment opportunity." Accordingly, the Order expressly provided that the President's Committee on Equal Employment Opportunity "may hold, or cause to be held, hearings... prior to imposing, ordering, or recommending the imposition of penalties and sanctions under this order...." The Kennedy Order for "the first time set out strong and highly specific penalties [including termination of a contract] for noncompliance." Nathan, Jobs & Civil Rights, supra, p. 88.

The President's Committee requested from the Attorney General a formal opinion on the legality of the contract clause which included the affirmative action provision in federal contracts and the imposition of sanctions. The Attorney General concluded that the Order was lawful. 41 Op. Att'y. Gen. 97 (1961). The Opinion stated that the Government had broad power to set the conditions of contracts, that contractual provisions might be used to further public policy, that the Order implemented "firmly established" policies of the United States, that the program of four successive Presidents "had been acquiesced in by successive Congresses," and that the United States, "like any other contractor, is entitled to pursue any appropriate remedies [or sanctions]".

2. Executive Order No. 11114

In signing Executive Order No. 11114, 28 Fed. Reg. 6485, 3 C.F.R., 1958-63 Comp. 774 (June 22, 1963), President Kennedy required that the nondiscrimination clause and affirmative action convenant which previously had been required only in procurement contracts be included in construction contracts.

E. Passage of the Civil Rights Act of 1964

The first comprehensive congressional response to the problem of employment discrimination was the passage of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. In passing Title VII Congress considered the existence of the Executive Order program and the relationship between Title VII and the Executive Order. Senator Tower proposed an amendment which would have made Title VII the exclusive remedy for employment discrimination and which would have expressly removed the President from the business of enforcing the national fair employment policy through the Executive Order.[10] The amendment was rejected. 110 Cong. Rec. 13,652 (1964).

On the other hand, the House rejected a provision in H.R. 7152, which eventually became the Civil Rights Act of 1964, which would have given specific authorization for an executive order program.[11] The Minority Report opposed the provision because the language in the section which authorized the President "to take such action as may be appropriate" allowed for an "unlimited issuance of Executive orders". **Equal Employment Opportunity Commission, Legislative History of Titles VII and XI of the Civil Rights Act of 1964, p. 2087.** The problem with the provision was its "blank check" approval to whatever the President might do in the future. The provision was struck after a representative of the opponents and a representative of the proponents of the provision agreed that Title VII would "not have any effect upon existing Presidential power." 110 Cong. Rec. 2574-75 (1964).

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[10] In pertinent part, the amendment read as follows: "[T]he provisions [of Title VII] shall constitute the exclusive means whereby any department, agency or instrumentality in the executive branch of the Government ... may grant or seek relief from ... any employment practice ... covered by this title...." 110 Cong. Rec. 13,650 (1964).

[11] Section 711(b) of the bill read as follows: "The President is authorized to take such action as may be appropriate to prevent the committing or continuing of an unlawful employment practice by a person in connection with the performance of a contract with an agency or instrumentality of the United States." Equal Employment Opportunity Commission, Legislative History of Titles VII and XI of the Civil Rights Act of 1964, p. 2014.

Furthermore, the important interpretative memorandum[12] presented by Senators Clark and Case, the "bipartisan captains" of Title VII, emphasized that Title VII was not intended to restrict the enforcement of the compliance program but rather Title VII was intended to leave intact the authority of the President to "deal with" discrimination by federal contractors.

> The President's Committee on Equal Employment Opportunity was created by Executive Order 10925, March 6, 1961, and its authority was extended by Executive Order 11114, June 22, 1963. It presently supervises the administration of an equal employment opportunity program with respect to employment... by contractors and subcontractors on contracts with the Federal Government and by contractors and subcontractors on construction financed with Federal financial assistance. Title VII, in its present form, has no effect on the responsibilities of the committee or on the authority possessed by the President or Federal agencies under existing law to deal with racial discrimination in the areas of Federal Government employment and Federal contracts.... (Emphasis added). 110 Cong. Record 7215 (1964).

Most importantly, Congress specifically referred to the Executive Order in Title VII, approved its continuation, and relied upon the Order in establishing the enforcement procedure of Title VII:

> **Where an employer is required by Executive Order 10925... or by any other Executive Order proscribing fair employment practices... to file reports relating to his employment practices... and he is substantially in**

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[12] **The Supreme Court has stressed the importance of this memorandum for determining the intent of Congress. "Senators Clark and Case were the 'bipartisan captains' responsible for Title VII during the Senate debate. Bipartisan captains were selected for each title... by the leading proponents of the Act in both parties. They were responsible for explaining their title in detail, defending it, and leading discussions on it." Teamsters v. United States, 431 U.S. 324, 351 n.35 (1977).**

> compliance..., the Commission shall not require him to file additional reports pursuant to subsection (c) of this section. Section 709(d) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-8(d) (1970).

As stated by the Third Circuit, "[t]he express reference in [Title VII] to Executive Order No. 10925 or any other Executive Order proscribing fair employment practices for Government Contractors, 42 U.S.C. §2000e-8(d), indicates, however, that Congress contemplated continuance of the Executive Order program." Contractors' Ass'n v. Schultz, supra, 442 F.2d at 171. Of course, in 1964 the Executive Order required "affirmative action" and provided for the levying of sanctions, see section D, supra, but the Order had not yet been used to require the establishment of "goals" and "timetables". The congressional approval of the Order existing in 1964 included at least tacit approval of the general concepts of affirmative action and sanctions; specific congressional consideration of goals and timetables would occur within several years.

F. Executive Order No. 11246 -- The Current Executive Order

1. Executive Order No. 11246

In 1965, President Johnson signed Executive Order No. 11246, 30 Fed. Reg. 12319. Although President Johnson retained the policy changes made by President Kennedy, he altered the administrative structure of the program and he expanded the scope of the coverage of the contractual provision.

Under Executive Order 11246 the responsibility for supervising the implementation by the contracting agencies was transferred from the President's Committee chaired by the Vice President to the Secretary of Labor. The Office of Federal Contract Compliance (OFCC) was created within the Labor Department in order to manage the compliance program. This transfer was partly a response to congressional criticism (similar to the congressional concern in the 1940s, see section II, A, 5, supra) of the funding of the Committee by contributions from various agencies rather than from an appropriation by the Congress as must be provided for the Labor Department under Executive Order No. 11246. Nathan, Jobs & Civil Rights, supra, p. 89.

President Johnson enhanced the effect of the fair employment clause inserted in federal contracts by removing the limitation that the clause applies only "[i]n connection with the performance of work under this contract...."[13/] The commitment that a government contractor not discriminate and take affirmative action applies to all of the contractor's operations.

2. Modifications of Executive Order No. 11246

There have been three modifications to Executive Order No. 11246. First, "sex" was added to the list of prohibited discriminations and discrimination based on "creed" was changed to discrimination based on "religion" by Executive Order No. 11375, 32 Fed. Reg. 14303 (Oct. 13, 1967). Second, Part I of Executive Order 11246, which pertained to federal employment, was repealed and replaced by Executive Order No. 11478, 34 Fed. Reg. 12985 (Aug. 8, 1969), as amended by Executive Order No. 11590, 36 Fed. Reg. 7831 (April, 23, 1971). Third, the functions for the enforcement of the compliance program were transferred from the contracting agencies to the Secretary of Labor by Executive Order No. 12086, 43 Fed. Reg. 46501 (Oct. 5, 1978), see section L, *infra*.

G. Development of the Use of Goals and Timetables

1. "Manning" Tables

Since 1961 federal contractors were obligated to use "affirmative action". Initially, the OFCC did not define affirmation action precisely. In 1967, Edward C. Sylvester, Jr., Director of the OFCC, attempted to define affirmative action in terms of results:

> There is no fixed and firm definition of affirmative action. I would say that in a general way, affirmative action is anything that you have to do to get results. .... Affirmative action is really designed to get employers to apply the same kind of imagination and ingenuity that they apply to any other phase of their operation. Report of 1967 Plans for Progress Fifth National Conference, pp. 73-74, quoted in Nathan, Jobs and Civil Rights, p. 93.

[13/] Compare Section 301, Executive Order No. 10925 with Section 202, Executive Order No. 11246.

Although not a precise definition, the direction of the OFCC was to require "results" and to leave the development of precise means to the "ingenuity" of the contractor.

In order to coordinate construction industry compliance activities, the OFCC established a series of special area programs in 1965. Jones, The Bugaboo of Employment Quotas, 1970 Wisc. L. Rev. 341,343. The program was intended to "assure minority group representation in all trades and in all phases of the work". Id. 343-44. The process required the low bidder prior to the award of the contract to submit an affirmative action plan which was intended to "have the result of assuring that there was minority group representation in all trades...." Id. 346. In order to meet this general requirement a contractor under the Cleveland area program set forth a specific proposal in which he detailed the total number of employees he would use in each trade and how many of that number would constitute his "goal" of minority employment. Nathan, Jobs and Civil Rights, 109. Soon the decision was made to require similar manning tables for all federal construction in the Cleveland area.[14]

2. Philadelphia Plan and the Dispute Regarding Goals and Timetables

In 1967 and 1968 the pre-award Philadelphia Plan was similar to the Cleveland Plan. The contractor who submitted the low bid had to present a satisfactory affirmative action plan during pre-award negotiations. The "manning" table procedure and the pre-award negotiation scheme created considerable controversy. In response to a request from Congressman Cramer, the Comptroller General[15] issued an opinion that the Philadelphia Pre-Award Plan did not meet the requirements for competitive bidding. 48 Comp. Gen. 326 (1968). The Comptroller General did not suggest that the affirmative action provisions were unlawful under Title VII but rather relied upon the fact that the plan lacked standards. This deficiency could be remedied by "informing prospective bidders of definite minimum requirements to be met by the bidder's program and any other standards or criteria by which the acceptability of such program would be judged." Id., 328

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[14] Also in 1967 the Justice Department filed a lawsuit against a major construction union in the Cleveland area. The Department sought affirmative relief. The Sixth Circuit stated that affirmative action was necessary because "[a]ssuming ... that the new leadership [of the Union] is in utter good faith, it has no mean task ahead in eliminating ingrained discriminating practices of past decades." United States v. IBEW, Local 38, 428 F. 2d 144, 151 (6th Cir.), cert. denied, 400 U.S. 943 (1970).

[15] The Comptroller General directs the General Accounting Office which is "independent of the executive departments." 31 U.S.C. §41.

In early 1969, the Department of Labor moved to reestablish the Philadelphia Plan which had been suspended after the Comptroller General's Opinion. The Department sought the informal advice of the Department of Justice in establishing a plan which would be permissible under the procurement laws, Title VII and the Constitution. See Jones, The Bugaboo of Employment Quotas, supra, 1970 Wisc. L. Rev. at 365.

The major provision in the revised Philadelphia Plan required that contractors bidding on federal or federally-assisted construction submit goals for minority employee utilization which were within a range established by the government, and commit themselves to make "good faith" efforts to achieve such goals. The plan was issued to the heads of all federal agencies on June 27, 1969, and an implementing order was issued on September 23, 1969.[16]

The purpose and use of the numerical goals are articulated by Professor Jones who was an Associate Solicitor of Labor and head of the division which provided legal services to the OFCC during the period of the development of the Philadelphia Plan:

> The numerical elements of the Philadelphia Plan are expressed in terms of ranges, related to labor market factors, within which a contractor is required to use minority manpower goals and commit himself to make good faith efforts to achieve the goals. The ranges, and the goals set within the ranges, serve three legal functions: (1) they provide the requisite amount of certainty prior to bidding as required by procurement law; (2) they provide a target, which if met, is a presumption of compliance with the affirmative action obligation; (3) if the goals are not

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[16] The development of the Philadelphia Plan is also described in Comment, The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 Chi. L. Rev. 723 (1972) and Contractors Ass'n v. Schultz, supra.

> achieved, they serve as a measuring device to trigger an investigation of the overall compliance status of the contractor.
>
> All that a contractor has to do to be eligible for a contract is make a *commitment* to seek in good faith to meet his *self-imposed* goal. There is neither *per se* compliance nor *per se* violation associated with the goals or the ranges. Minority utilization above or below the goals, or above or below the ranges, at most is *presumptive evidence of compliance* on the positive side, and on the negative side, evidence of *probable cause to believe that a review* of a contractor's overall compliance posture is warranted. (Footnotes omitted).

The Bugaboo of Employment Quotas, *supra*, 1970 Wisc. L. Rev. at 379.[17]

H. Dispute in Congress Regarding Goals and Timetables in the Compliance Program: Round One, the Fanin Rider

Senator McClellan requested an opinion from the Comptroller General regarding the legality of the method of implementation of the compliance program; the Senator in his letter charged that the Secretary of Labor was requiring the use of illegal preference schemes. The Comptroller General accepted the invitation to opine on matters beyond the proper application of the procurement powers and stated that the Philadelphia Plan was illegal because it established quotas in violation of Title VII. 49 Comp. Gen. 59, 71 (1969). On September 22, one day before the issuance of the implementation order for the Philadelphia Plan, the Attorney General issued an opinion stating unequivocally that the Executive Order program in general and the Philadelphia Plan in particular were lawful: "I ... conclude that the Revised Philadelphia Plan is not in conflict with any provision of the Civil Rights Act [of 1964], that it is a lawful implementation of the provisions of Executive Order 11246, and that it may be enforced in accordance with its terms in the award of Government contracts." 42 Op. Att'y. Gen. 405, 408 (1969)

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[17] The Philadelphia Plan was found lawful. *Contractors' Ass'n v. Schultz, supra*. See also *Southern Illinois Builders Association v. Ogilvie*, 471 F.2d 680,686 (7th Cir. 1972) (The Court affirmed a similar plan stating that "[i]n this case we believe that 'numerical objectives may be the only feasible mechanism for defining with any clarity the obligation of federal contractors to move employment practices in the direction of true neutrality'.")

The Comptroller General responded by requesting that a Senate Subcommittee include in a pending supplemental appropriations bill a "limitation on the use of funds to finance any contract requiring a contractor or subcontractor to meet, or to make every effort to meet, specified goals of minority group employees." 115 Cong. Rec. 40,018, 40,019 (1969), quoted in Comment, The Philadelphia Plan, supra, 39 U. Chi. L. Rev. at 747-48. The issue was joined when the Committee attached a rider to continuing resolutions for several Departments which provided:

> No part of the funds appropriated or otherwise made available by this or any other Act shall be available to finance either directly or through any Federal aid or grant, any contract or agreement which the Comptroller General of the United States holds to be in contravention of any Federal Statute. 115 Cong. Rec. 40,013(1969).

"The purpose of the rider was clearly to affirm the [supposed] congressional intent in the 1964 Civil Rights Act to outlaw programs like the Philadelphia Plan." Comment, The Philadelphia Plan, supra, 39 U. Chi. L. Rev. at 748. Senator Ervin had held hearings before the Subcommittee on Separation of Powers of the Judiciary Committee for the purpose of examining whether the Philadelphia Plan violated the separation of powers principle because it was contrary to the intent of Congress in the Civil Rights Act of 1964. Senator Ervin placed the statements made by the Comptroller General into the Congressional Record in support of the rider.

The position of the administration was clear. In August 1969, Arthur Fletcher, Assistant Secretary of Labor, in a speech before an association of contractors articulated the problem which the compliance program confronted :

> Historically, as we all know, those dollars from federal contracts flowed from the contractors into white workers' hands.... With minor exceptions, the minority communities were left out of this economic cycle which began with the federal contract. White-owned companies got the contracts, they hired white workers and subcontracted with white companies.
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> * * * * * *
>
> It [OFCC] stands at the one point where the government can affect the use of those dollars, where it can either close its eyes and let those dollars

> continue to support institutionalized racism or where -- if it chooses -- it can see that all groups in our society... have full opportunity.... BNA, Daily Labor Report, August 25, 1969, p. E-1.

Mr. Fletcher stated that OFCC "just has not been tough enough," and that requests for "voluntarism" and good will had not succeeded. Fletcher stressed that the way to achieve "concrete results" is to set "specific goals." Id., E-2.

Despite the firm opposition of the administration, the Senate passed the rider as drafted 115 Cong. Rec. 40,039 (1969). Prior to the House vote the administration expressed its strong commitment to the compliance programs. President Nixon stated "[t]he House of Representatives now faces an historic and critical civil rights vote." 115 Cong. Rec. 40,906 (1969). The House rejected the rider. 115 Cong. Rec. 40,922 (1969). The President appealed to the House-Senate conferees "to permit the continued implementation of the Philadelphia Plan..." BNA, Daily Labor Report, December 19, 1969. The Senate reconsidered the rider and reversed its position by voting to strike the rider from the appropriations bill. 115 Cong. Rec. 40,749 (1969).

The use of affirmative action and goals and timetables in the Executive Order program had survived after an extensive congressional debate.

I. Revised Order No. 4: The Expansion of the Use of Goals and Provision for Requiring Contracts to Remedy the Effects of Discrimination

In 1968 the OFCC issued specific affirmative action regulations. The regulations required contractors to evaluate the minority representation or utilization in all job categories, to develop an affirmative action program for each facility, and to prepare an annual report of the results of the program. United States Civil Rights Commission, The Federal Civil Rights Enforcement Effort-1974, Volume V, To Eliminate Employment Discrimination, 236. After the development of the Philadelphia Plan, the OFCC extended the concept of goals and timetables to all nonconstruction contractors. This major modification of the affirmative action regulations was made in 1970 and then revised in 1971; it is commonly known as Revised Order No. 4. 41 C.F.R. §60-2.[18] Revised Order No. 4 requires federal contractors to undertake an availability analysis in order to determine if there are fewer women[19] or minorities than would be expected according to their availability for work. If this analysis shows an underutilization of minoritires or women then the contractor is required to develop measurable targets, goals and timetables to obtain a full utilization of minorities and women as soon as possible. As in the case of the Philadelphia Plan, a contractor is required to make a "good faith" attempt to meet the numerical targets.

Revised Order No. 4 also provides that contractors remedy the effects of their past discrimination and presently provides that relief shall include "back pay where appropriate". 41 C.F.R. §60.2.1(b). While the term "back pay" was not added to the regulation until 1977 the OFCC at least since 1967 and regularly since the early 1970s has been requesting and obtaining back pay for incumbent workers who have suffered economic loss due to discriminatory practices. See affidavit of Louis G. Ferrand, Jr., Counsel for Civil Rights in the Office of the Solicitor, Department of Labor, attached to Department of the Treasury's Reply Memorandum, U.S. Dept. of Treasury v. Harris Trust and Savings Bank, C.A. No. 78-OFCCP-2 (Dept. of Labor).

J. Dispute in Congress Regarding Goals and Timetables in the Compliance Program: Round Two, the Equal Employment Opportunity Act of 1972

Title VII was thoroughly revised by Congress in 1972. The Congress considered whether the use of goals in the Executive Order program or in other contexts should be permitted. Moreover, Congress considered whether the compliance program should be continued or whether Title VII should be made the exclusive remedy for employment discrimination. The challenge to the use of goals or numerical targets is discussed in this section while the general challenge to the Exeuctive Order program is discussed in the next section.

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[18] There have been several modifications to Revised Order No. 4, but for the purposes of this outline of the history of the compliance program the modifications of these regulations are not critical.

[19] Revised Order No. 4 for the first time required contractors to develop an affirmative action program for women.

Senator Ervin introduced two amendments which would have ended the use of goals in the Philadelphia Plan and in Revised Order No. 4. The first amendment provided:

> No department, agency, or officer of the United States shall require any employer to practice discrimination in reverse by employing persons of a particular race... or a particular sex in either fixed or variable numbers, proportions, percentages, quotas, goals, or ranges. 118 Cong. Rec. 1662 (1972).

In opposition to the amendment, Senator Javits specifically defended the Philadelphia Plan and the Third Circuit's decision upholding the plan, Contractors' Ass'n. v. Schultz, supra. 118 Cong. Rec. 1664 (1972). It was also pointed out that the breadth of the amendment could deprive courts of the power to remedy proven cases of discrimination. Id. The amendment was defeated. 118 Cong. Rec. 1676 (1972).

Senator Ervin then attempted a more limited approach which would have amended §703(j)[20/] by adding "Executive Order Numbered 11246 or any other statute or executive order". 118 Cong. Rec. 2275 (1972). The amendment would have permitted the continued judicial imposition of remedial goals but it would have precluded their institution under the Executive Order. With the issue focused squarely on the use of goals in the compliance program, the Senate voted not to prevent their continued use, 118 Cong. Rec. 2276 (1972), and "at long last unequivocally approved the affirmative action program of the

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20/ This section states that nothing in this "Title [VII] shall be interpreted to require ... grant[ing] preferential treatment to any ... group because of the race ... of such group on account of an imbalance [in the racial proportion of those employed]...." The opponents of the Philadelphia Plan argued that section 703(j) made the Plan unlawful. The Third Circuit rejected this agreement because "the source of the required contract provision is Executive Order No. 11246. Section 703(j) is a limitation only upon Title VII, not upon any other remedies, state or federal." Contractors' Assn. v. Schultz, supra, 442 F. 2d at 172. If passed, the amendment would have resulted in the §703(j) limitation applying to the Executive Order.

executive." (Footnote omitted), Comment, The Philadelphia Plan, supra, 39 Chi. L. Rev. at 757.[21]

K. Relationship Between the Equal Employment Opportunity Act of 1972 and the Executive Order Program

Both the House Committee on Education and Labor and the Senate Committee on Labor and Public Welfare which reviewed the 1972 equal employment legislation closely reviewed the contract compliance. Their analysis and conclusions were similar. First, the Committees stressed the importance of the compliance programs in the overall fair employment efforts and the failure of the program to live up to its potential:

> The rights of minorities and women are too important to continue this important function in an agency that has not really been able to achieve the promised results. The contract compliance program is an important and viable tool in the government's efforts to achieve equal employment opportunity. S. Rep. No. 92-415, 1st Session 92d Cong. 31 (1971)

> Despite the increasingly strong Presidential commitment to the goals of equal employment opportunity, despite the strength of the sanctions available to secure this goal, and despite the potential effectiveness of the Federal monitoring mechanism, the contract compliance program has not been successful. H.R. Rep. No. 92-238, 92d Cong. 1 st. Sess. 15 (1971).

Second, the Committees agreed that this program which "looks good on paper" needed greater enforcement efforts and use of sanctions in order to be effective. S. Rep. No. 92-415, 1st Sess. 92d Cong. 30-31(1971). For example, the Senate Committee observed that there has been "far too much non-public discussion and negotiation and far too few understandable results" and a failure to invoke "sanctions." Id. The House Committee stated that "the

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[21] The legislative history of the Act in the House is more ambiguous. The Philadelphia Plan or the use of goals and timetables was not presented as clearly as in the Senate. However, an amendment which constituted a substitute bill was proposed by Congressman Dent which contained a provision precluding the use of numbers in the Executive Order program. The amendment was defeated. Comment, Philadelphia Plan, supra, 39 U. Chi. L. Rev. at 754.

Federal contract compliance program has always suffered from the great reluctance of administrators to use debarment and contract termination." The House Committee concluded that the "compliance program could be strength (sic) considerably if alternative remedies were made available." H.R. Rep. No. 92-238, 92d Cong. 1st. Sess. 16 (1971).

Third, the Committees determined that one way to improve the enforcement of the compliance program was to transfer the responsibility for enforcement from the Secretary of Labor to the EEOC. In large part, the basis for this conclusion was predicated upon the fact that the bills reported out by the Committees contained cease-and-desist authority for the EEOC, an authority which was not contained in the final Act.

The debate regarding the transfer of the compliance program to the EEOC focused upon the most effective method for enforcing the program. Both sides agreed, as did the Committees, that greater enforcement was necessary. Senator Saxbe who introduced the amendment opposing the transfer, stated that he "most of all [liked] the affirmative approach" and he opposed any interruption in the program. Senate Committee on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972, p. 927. Senator Saxbe stated that "[i]t has been the 'goals and timetables' approach, which is unique to the OFCC's efforts... coupled with extensive reporting and monitoring procedures that has given the promise of equal employment opportunity a new credibility." Id., 915. The Senator traced the affirmative action concept to the report prepared at Vice-President Nixon's direction and concluded that the program, which was beginning to show a positive effect, should be retained, id., see also statement submitted by Senator Percy, id., 938. After the support of the affirmative action program of the OFCC by the opponents of the transfer provision, the amendment was passed and the Secretary of Labor retained control of the compliance program. 118 Cong. Rec. 1398 (1972).

Congressional support for Executive Order enforcement independent of Title VII was emphasized when the Senate defeated the Hruska amendment which would have made Title VII the exclusive federal remedy in the field of employment discrimination. Legislative History, supra, pp. 1406-07, 1519-20. In opposing the amendment, Senator Williams, one of the floor managers of the bill, referred to the Philadelphia Plan when he stated:

> Furthermore,... this amendment can be read to bar enforcement of the Government contract compliance program at least, in part, I cannot believe that the Senate would do that after all the votes we have taken in the past 2 or 3 years to continue that program in full force and effect.

Finally, in §718[22] Congress recognized and approved within certain limits the debarment of contracts because of a failure to abide by the affirmative action provision of the Executive Order.[23] Thus, after reviewing the Executive Order program in detail, Congress recognized that it was "vital", that it needed greater enforcement effort, that the affirmative action effort was central to the program, and that the program should be continued. The Ninth Circuit observed that "there can be no doubt that the essential feature of the affirmative action program reflected in the regulations promulgated in Revised Order No. 4 were effectively ratified by Congress in adopting the Equal Employment Opportunity Act of 1972." Legal Aid Society of Alameda County v. Brennan, 608 F.2d 1319, 1329-30 n. 14 (1979), cert. denied, 445 U.S. 946 (1980).

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[22] Section 718 reads in partinent part:

> No Government contract ... shall be denied ... by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months without first according such employer full hearing and adjudication ... Provided, that if such employer has deviated substantially from such previously agreed to affirmative action plan, this section shall not apply ....

[23] Congress also increased the reporting responsibility of contractors by eliminating the exemption, which had existed in §709(d) of the Civil Rights Act of 1964, see Section E, supra, for reporting to the EEOC for certain employers covered by the Executive Order.

L. Conclusion: Enforcement of the Program Since 1972

After the issuance of Revised Order No. 4, see section I, *supra*, and the review of the program by Congress during the passage of the Equal Employment Opportunity Act of 1972, see sections J and K, *supra*, the general scope of and enforcement mechanism for the compliance program were firmly in place. Since 1972, the major questions regarding the compliance program have related to enforcement: the preparation of appropriate regulations, the consolidation of the organizational structure, and the development of the necessary political will for enforcement.

The development of the regulations, and the current proposed issuance of modified regulations for public comment,[24] are matters beyond the scope of this history of the evolution of the compliance program. This outline reviews the general principles established by the various executive orders; an analysis of the regulatory development requires a detailed examination of the mechanics of the compliance program.[25]

The problems created by the fragmented nature of the compliance program had been repeatedly recognized.[26] The compliance program was administered by many separate federal agencies which operated under the supervision of the Labor Department. In 1978 the responsibility for enforcing Executive Order 11246 was consolidated. Prior to consolidation, 11 federal agencies shared the responsibility for enforcing the Order with the Office of Federal Contract Compliance Programs (OFCCP) in the Department of Labor. Executive Order 12086, 43 Fed. Reg.

24/ The Secretary of Labor and the Solicitor of Labor outlined in separate meetings on May 11 and 12, 1981, to business and labor representatives as well as to representatives of those groups covered by the OFCCP that the administration expected to send proposed regulations to the OMB by the end of May. It is planned that the proposed regulations will be published for public comment at the end of June.

25/ The regulations published by the Carter administration on December 30, 1980, 45 Fed. Reg. 86216, and "frozen" by the Reagan administration, were developed over several years and after numerous consultations with representatives of contractors and covered groups.

26/ *The Federal Civil Rights Enforcement Effort-1974*, *supra*, p. 663; Comptroller General, *Major Federal Equal Employment Opportunity Programs for the Private Sector should be Consolidated* (1978), pp. 28-29; see

46501 (Oct. 10, 1978), consolidated all federal contract compliance functions into the Deaprtment of Labor. The OFCCP devoted substantial resources and efforts to the training of the 1,000 employees transferred from the 11 different agencies as well as to the integration of the responsibilities of these 11 agencies. See Office of Management and Budget, Civil Rights Activities, Special Analysis J (1981), pp. 297-98.

The compliance program has been hampered by weak enforcement. In 1972, the Senate Committee on Labor and Public Welfare criticized the lack of enforcement: "until two days after introduction of this bill, no sanctions had ever been imposed for violation of the Executive Order. Since then, only one small contractor (10 employees) has been subjected to sanctions." S. Rep. 92-415, 92 Cong. 1st Sess. 30-31(1971).[27/] As Congress had recognized, a substantial part of the problem was the failure to rely upon sanctions other than contract debarment, see section K, supra. In a 1973 memorandum to compliance agencies, the Acting Director of OFCCP, stated that the contract debarment sanction

> may in certain instances prove too severe for the deficiency found to exist in a contractor's equal employment opportunity posture. Consequently, in some instances where contractor's [sic] violations of the equal opportunity clause were not sufficiently serious to warrant contract cancellation and/or debarment, these deficiencies were not redressed at all by the compliance agency concerned. Quoted in The Federal Civil Rights Enforcement Effort-1974, supra, Volume V, p. 253.

In a report issued in 1975, the General Accounting Office criticized the enforcement efforts:

> Compliance agencies are reluctant to initiate enforcement action when contractors are not in compliance with the Executive order; instead,

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26/(Footnote continued) generally, Comptroller General, The Equal Employment Opportunity Program for Federal Nonconstruction Contractors Can Be Improved (1975).

[27/] Prior to 1971 the OFCCP, had occasionally succeeded in obtaining remedy for the victims of discrimination through the use of conciliation, see section I, supra.

> they rely on extended conciliations and negotiations with contractors to achieve compliance.
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> From July 1, 1971, through March 31, 1974, the compliance agencies conducted about 45,400 nonconstruction reviews. A total of 535 show-cause notices were issued, which represented about 1.2 percent of the reviews conducted. Two agencies imposed stronger enforcement actions against 14 contractors. In one case a contractor was debarred from future Federal contracts. *The Equal Employment Opportunity Program for Federal Nonconstruction Contractors Can Be* Improved, *supra*, p. 27.

The General Accounting Office recommended that the Secretary of Labor "require compliance agencies to take timely enforcement action on contractors not complying with the Executive Order." *Id*, p. 37.

Moreover, a federal district court in California found that one compliance agency, the Department of Agriculture, failed to enforce the Executive Order. The court determined that the Department approved affirmative action plans prepared by contractors which clearly did not satisfy the regulations. *Legal Aid Society of Alameda County* v. *Brennan*, 381 F. Supp. 125 (N.D. Cal. 1974), *aff'd*, 608 F.2d 1319 (9th Cir. 1979). The government settled a similar suit which charged two other compliance agencies with failure to enforce the Executive Order.[28] *Women's Equity Action League* v. *Weinberger*, Civil Action No. 74-1720 (D.D.C.)

After the clear statements in repeated Executive Orders and government reports, after the directions of Congress, and after several court orders, the OFCCP has undertaken serious efforts to enforce the nondiscrimination and affirmative action provisions of the Executive Order.

The OFCCP still does not rely on its strongest sanction, debarment. In fiscal year 1980, the OFCCP only debarred three nonconstruction contractors and two construction contractors. Office of Management and Budget Documents. All of the debarments were the result of a contractor's refusal or failure to comply with regulations such as record keeping or providing access to documents. Id. However, the OFCCP has used other available sanctions and procedures to enforce the Executive order, such as the identification of affected classes and the negotiation of conciliation agreements including back pay. See OMB, Civil Rights Activities, Special Analysis J (1981), pp. 297-98. After years of plans and commitments, the OFCCP has begun to implement regular efforts to enforce the public policies in the Executive Order.

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[28] One OFCCP official admitted that the case was "as solid as a rock." United States Civil Rights Commission, *The Federal Civil Rights Employment Discrimination: A Sequel* (1977), p. 143. "As a result of the suit, the OFCCP issued directions to the compliance agencies to clarify compliance review procedures 'to insure that reviews result in either enforcement actions for noncompliance or conciliation agreements to achieve compliance.'" *Id*.

Senator **Hatch**. Our second witness will be Dr. Thomas Sowell, who is the senior fellow at the Hoover Institution at Stanford University.

He has taught economics at Cornell, Brandeis University, and for many years at UCLA.

Professor Sowell has been project director at the Urban Institute, a consultant to the Rockefeller Foundation's Urban Coalition, and the author of numerous studies on the subject of affirmative action.

Professor Sowell's latest work is on the history of ethnic groups in America.

We have been friends for a long time; there is no one that I admire and respect more.

We are happy to have you here, Tom, and we will look forward to what you have to say.

STATEMENT OF THOMAS SOWELL, SENIOR FELLOW, HOOVER INSTITUTION, STANFORD UNIVERSITY

Dr. **Sowell**. Thank you, Mr. Chairman.

Like any other policy, affirmative action must be judged by what it actually does and not by its rhetoric, promises, or hopes.

It is ironic that a policy that so stresses statistical results when confronting other people has so little to offer in the way of empirical evidence of its own effectiveness.

I do not regard anecdotes as evidence in that sense. I am sure there are some very good anecdotes about the benefits that have come out of World War II, but most of us would have preferred to have gotten those benefits some other way.

In the decade since numerical goals and timetables transformed the general concept of affirmative action into specifically quantitative terms, whether called quotas or by some other euphemism, several things have happened.

Black family income, as a percentage of white family income, has declined. The income of black males without a college education and with relatively little labor force experience has also declined relative to that of whites of the same description. The income of black faculty members with Ph. D.'s has declined relative to that of white faculty members with Ph. D.'s

These data are suggestive and not conclusive. However, I have looked in vain for the positive evidence of affirmative action.

Advocates of affirmative action usually resort to one of two tactics as substitutes for real evidence. One is to lament that the minority gains that were dramatic during the 1960's have slowed, stopped, or reversed in the 1970's and to use that as a reason why we need affirmative action more than ever. This ignores the fact that affirmative action, in its current numerical sense, is the policy of the 1970's, in contrast to the straightforward equal opportunity policies of the 1960's. To say that the 1970's results show the need for more affirmative action is to say that the policy that failed is now needed more than ever, while the policy that was succeeded should not be tried.

The other tactic is to lump together the equal opportunity and the affirmative action periods together and show the advancement of minorities today, compared to decades ago. No one is suggesting returning to the pre-civil rights era, so that is not even an issue.

A third tactic may be worth mentioning, though not worth answering. It simply impugns the real motives of those who question affirmative action, saying, for example, that racism is "a necessary explanation of its critics' behavior, even if not a sufficient one." (Ralph Smith in Wayne Law Review, July 1980, p. 1348) The origins of this divine power, to know that one's adversaries are all wicked, is left unspecified.

Much of the justification for affirmative action proceeds as if we were God on Judgment Day, looking back at history. Human beings can condemn history, but the past is beyond our reach. Every human decision has to consider future consequences, based on incentives and constraints created by their decisions. The question is: What incentives and constraints are created by equal opportunity laws and policies on the one hand and affirmative action laws and policies on the other?

Equal opportunity laws and policies requiring decisions without regard to race, religion, sex, and so forth, simply penalize demonstrable individual discrimination. Higher costs are thus created for discriminatory employers than for nondiscriminatory employers.

Affirmative action creates conflicting incentives. An employer's legal costs and administrative penalties are lowered in the short run by hiring from the list of Government-designated groups. But future liability for such costs and penalties are increased by the greater access of such employees to the courts if their future pay, promotion, and discharge records happen not to fit the assumptions of Federal agencies. It is not necessary that all such employees, or even most such employees, take legal action. If one such employee goes to court, the cost to the employer can run into the hundreds of thousands of dollars. The point here is not the plight of the employer but the likelihood that he will act in such a way as to avoid that plight and act in such a way as to make affirmative action counterproductive to minority applicants.

The net effect of these opposite incentives to hire or not to hire from the Federal list of preferred applicants is not nearly as clear-cut as in the case of equal opportunity policies.

What is more clear is that this mixture of incentives makes more valuable than otherwise those particular minority applicants with sufficiently substantial track records and/or degrees to allow them to be hired with minimal fear that their future pay and promotions patterns will not match those of other employees. Conversely, such incentives increase the cost to an employer of hiring minority applicants without a sufficient track record or formal credentials.

For historically disadvantaged groups, such as blacks, these incentives stay with a small number of more fortunate individuals who already have the experience, the degrees, or other accomplishments that minimize the danger that their future performance and reward will fall below par and become subject to costly administrative or legal processes. But such incentives handicap the larger number of disadvantaged minority individuals who have only just begun to enter the market or to enter high-level occupations or whose abilities are either average or not yet clearly revealed.

In short, the incentives created by affirmative action policies favor those who already are more fortunate, at the expense of those who need all the help they can get.

The factual data cited in my study submitted to this committee show a pattern completely consistent with this analysis. So, too, does new data published since then by another economist in the May 1981 American Economic Review.

A study of 50,000 faculty members showed that blacks with Ph. D.'s from highly rated departments and with several scholarly publications earned higher incomes than whites of the same description. At the very same time, blacks without doctorates and without publications earned less than whites of the same description. This is precisely what should be expected from the incentives created by affirmative action.

More recently, an analysis of census data by Professor Welch of the Rand Corp. and UCLA showed that black males who were college graduates or who had more than 5 years of work experience continued to rise in income during the seventies, both absolutely and relative to the incomes of white males of the same description, while at the very same time those black males with less than a college education or with 5 years or less of work experience had incomes that declined relative to the incomes of white males of the same description.

Overall, black/white income differences are obviously affected by the state of the economy. However, these opposite internal patterns among blacks cannot be so easily explained that way. Again, those who were already more fortunate benefited, while those who had the greatest disadvantages showed negative effects from affirmative action.

There are other reasons why affirmative action policies make it difficult for disadvantaged groups to advance. By turning the employment decision into something that must be justifiable on paper before third parties, affirmative action increases the relative importance of the so-called objective credentials—diplomas, degrees, and the like—which are disproportionately lacking among disadvantaged minority individuals who may nevertheless be perfectly capable of doing the work.

Because of the successive extension of affirmative action and preferential status to groups who now constitute a majority of the American population, truly disadvantaged groups are now lost in a much larger mass of people with generally better paper credentials, as well as other advantages.

George Gilder estimates that those given preferential treatment under affirmative action policies now constitute 70 percent of the American population and control 75 percent of the wealth of the country.

Looked at another way, affirmative action now authorizes discrimination against nearly one-third of the population.

The many groups covered by affirmative action create other difficulties. The bitter intergroup antagonisms that have grown out of affirmative action are not simply those between the more fortunate and the less fortunate. Each of the Government-designated minorities has an incentive to fight against the others over the division of anticipated benefits—however illusory these benefits might ultimately prove to be.

This internal strife has also been the pattern in other countries that have tried preferential treatment schemes. In India, for example, numerous groups fought for the right to be designated by the Government as a backward caste, making them eligible for special treatment. Earlier this year, there were riots and bloodshed in India over preferential treatment to medical schools.

Heightened politicization of race and ethnicity has wreaked havoc on nations around the world. Multi-ethnic political parties have become ethnic bloc parties within a few years in Malaysia, Guyana, and Trinidad, all to the accompaniment of race riots in the streets. Lebanon has not dared to hold a census for more than 40 years for fear that the results would set off new battles among its various factions. It is much easier to drift into this kind of escalating polarization than it is to find a way back out again.

We have not had affirmative action and a major depression simultaneously in this country. I hope that I never see those two things occurring.

Nor is this internal strife the price of progress. In country after country, those groups who began in poverty and eventually rose to prosperity did not do so through political action.

The overseas Chinese who migrated as poverty stricken laborers into Indochina, Malaysia, and the rest of Southeast Asia, rose to dominate the economies of those nations but deliberately refused to become involved in politics. Similar patterns can be found in South America where the German and Italian immigrants came in and worked, never having any political power whatsoever. On the other end of the spectrum, the most spectacular political success in American history was the success of the 19th Century Irish. They were also the slowest rising of any European ethnic group in this country. As late as 1890, most Irish Americans were still unskilled laborers or domestic servants. The current prosperity of Irish Americans happens to have occurred while the great Irish political machines were crumbling away.

The central assumption of affirmative action is that inter-group economic differences demonstrate and measure discrimination. Neither logic nor evidence have been produced to show that racial or ethnic groups would be proportionally represented in occupations or income brackets in the absence of discrimination.

Virtually nowhere in the world, in virtually no important human activity, are people proportionally represented, not even in activities totally within their control, such as their choice of television programs to watch, card games to play, and political party to vote for. A whole industry exists in television to study the demographic and economic profile of viewers of particular programs, because those who watch 60 Minutes differ from those who watch game shows and soap operas.

Nowhere I have looked, and I am currently engaged in the study of race and ethnicity internationally, can I find anything approaching proportional representation; nor do I find that those groups that are discriminated against generally occupy lower posts than those who do the discriminating.

In Malaysia, for example, the Chinese are outnumbered by the Malays in liberal arts 3 to 1. They outnumber the Malays 8 to 1 in science and 15 to 1 in engineering. The Italians in Argentina at the turn of the century had many forms of discrimination. Yet in Buenos Aires, the Italians owned twice as many food and drinking establishments as the Argentines, three times as many shoe stores, and ten times as many barber shops. You can go down the whole list. Among blacks in the United States, studies of high-IQ blacks find that women outnumber the men by 3 to 1 to 5 to 1.

Examples may be endless, without being conclusive. What I am looking for is any demonstration that there is generally proportional representation, even in the absence of discrimination.

When all empirical evidence fails, advocates of affirmative action turn to the moral argument for historical redress, putting the Government's thumb on the scale, as it were. It is a bitter fact that Government itself has been the greatest discriminator, from the Jim Crow laws of the past to the disastrous ghetto public schools of the present.

Even aside from that, the principle of institutionalized compensatory bias is not taken seriously in any other context. If the Government violates some group's right to free speech, it has never been suggested that they violate their opponent's right to free speech, so that it will all come out even in the long run.

If Germans commit genocide against the Jews, it is never suggested that the Jews have the right to commit genocide against Germans.

Those who oppose genocide say never again, and those who oppose discrimination should, likewise, say never again.

Thank you.

[Articles by Mr. Sowell follow:]

[From the New York Times, July 28, 1980]

AFFIRMATIVE ACTION HARMS THE DISADVANTAGED

(By Thomas Sowell)

The supreme irony of "affirmative action" is that it demands hard statistical results from others but has none to offer itself. This is the tenth year of numerical "goals and timetables" in employment—quotas, for those who prefer plain English. Yet the actual results of a decade of this controversial program are seldom mentioned.

Before "goals and timetables" were mandated by federal guidelines in 1971, Puerto Rican family income was 60 percent of the national average. Today it is 50 percent. Black family income, as a percentage of white family income, has never in the past decade exceeded the level reached in 1969. Usually, it has been lower.

No doubt there are many factors behind these numbers. But imagine an employer with similar statistical trends trying to explain to EEOC or the courts that it was all due to other circumstances beyond his control. Yet that is what affirmative action proponents are reduced to. The results simply are not there to justify this bitterly divisive program.

Progress has not stopped completely for disadvantaged racial and ethnic groups. But the rate of progress is not as rapid as it was in the equal opportunity phase of the 1960s that preceded affirmative action quotas in the 1970s. Indeed, some proponents of affirmative action cite the slowing down of progress as a reason that this program is needed more than ever.

There are economic as well as statistical reasons for considering affirmative action counterproductive. The incentives created by quota pressures seem to increase the demand for "representatives" of the various groups designated by the government for special consideration. But at the very same time, these pressures make it more dangerous to have such people on the payroll.

Their future pay, promotion, and discharge patterns can easily land the employer in costly legal proceedings, even if he ends up completely vindicated. But the plight of employers is not the central issue. The real problem is that disadvantaged groups can be damaged by the way employers seek to protect themselves.

One way out of the employer's dilemma is to hire minority applicants who are sufficiently above average that their future pay, promotions and discharge patterns are unlikely to be worse than those of the other employes. But while the demand for these unusually well-qualified individuals tends to be increased by affirmative action pressures, the demand is decreased for minority or female applicants who are below average, or who do not have enough of a track record for an employer to take a chance.

Some recently published data on black males illustrates the point. Between 1967 and 1978, the income of college-educated black males rose dramatically, both absolutely and relative to the income of college-educated white males. In 1967, college-educated black males who were in the labor force a few years earned 74 percent of the annual income of their white counterparts. By 1978, this was 98 percent.

But over exactly the same span of time, black males with less education were falling further behind white males with less education. For example, black males who were in the labor force a few years, but who had less than 12 years of schooling, earned 79 percent of the annual income of white males of the same description in 1967. By 1978, that was down to 69 percent.

One may try to explain over-all black/white ratio changes by general economic conditions in the 1970s, rather than by affirmative action. But it is hard to explain diametrically opposite trends among blacks this way.

A more narrowly focused study of 50,000 academics showed a very similar pattern. Those black faculty members who had completed their Ph.D.s in highly ranked departments and who had published were earning more than whites of the same high qualifications. But those black faculty members who had not yet completed their doctorates and had not yet published earned less than their white counterparts. Again, the demand seems to have been artificially increased for the highly qualified black and artificially decreased for the more average black or the black who had not yet made a track record.

A number of responsible people have said off the record that they are reluctant to take on risks, with either minority or female applicants, because of the time and money that can be lost in legal proceedings if they later have to be discharged or even promoted more slowly. One black woman in a high position, when informed of this reasoning, replied that that was how she herself operated in considering applicants. "I have no time to spend at EEOC or in the courts," she said.

Affirmative action harms disadvantage groups in other ways. The number of groups covered by this program has successively expanded to the point where it now includes a majority of the American people. George Gilder in his best seller "Wealth and Poverty" estimates the coverage at 70 percent of the population, controlling 75 percent of the country's wealth.

This means that blacks, for example, are lost in a sea of other people. Moreover by requiring employment decisions to be justifiable to third parties, affirmative action increases the importance of paper credentials—which are disproportionately lacking among disadvantaged minority individuals, even when they are perfectly capable of doing the work.

Like many other public policies, affirmative action needs to be judged by what it actually does, not by what it intends or hopes to accomplish. The crucial question is what incentives and constraints it creates—what it rewards and penalizes. We all know what road is paved with good intentions.

Even the supporters of affirmative action seem to sense its bankruptcy. They generally steer discussions as far away as possible from hard facts about the actual results achieved. They talk instead about history, as if this policy were going to be applied to the past instead of to the future. They impugn the motives of those who criticize their efforts, in a manner reminiscent of Sen. Joe McCarthy. In short, anything to evade the grim facts.

Quotas and preferences have been tried in a number of countries. Nowhere has any racial or ethnic group risen from poverty to prosperity by these methods, though many have done so by all sorts of other methods. The Chinese in Southeast Asia, Italians in Argentina, Germans in Brazil, Japanese in the United States, and Jews in various European countries have begun in poverty and ended in affluence, while avoiding politics. Where preferential treatment has been tried, it has not merely failed to achieve its object but has torn countries apart with internal strife. India, Indonesia, Malaysia and Guyana are just some of the places where such efforts have led to bloodshed in the streets.

After 10 years, it is time to ask what affirmative action has achieved for the disadvantaged, and what it has done to this country.

(Mr. Sowell is a Senior Fellow at the Hoover Institution.)

[The New York Times, Aug. 11, 1981]

POOR AIM IN WAR ON BIAS

(By Thomas Sowell)

Adam Smith and John Rawls each say that justice is the paramount virtue of society, but they mean very different things. Adam Smith's argument is that without some justice in the society, the society cannot survive. There cannot be a society without some predictability, and that predictability must be based upon some principle. John Rawls makes the very different argument that every increment of justice is categorically more important than any increment of any other benefit.

It is very hard to see why one would be concerned about justice unless there is some value to the objects of that justice. No one is likely to get worked up over the fact that, when we leave the beach, we each go home with different numbers of grains of sand in our hair; because we do not put any value on those grains of sand. There has to be some prior concern about the things that we are justly distributing or unjustly distributing. If A and B both have value, then it is hard to justify the statement that every increment of B is more valuable than every increment of A. Yet time after time we take actions aimed at securing a bit more justice, with virtually no thought to the costs of doing so. Once we admit that there are costs to justice, it is by no means clear that every increment of justice is desirable. Someone must pay those costs, and that undefined someone is no less important than those we have explicitly categorized and set at the center of our discussion.

An example of that sort of situation can be found in our experiences with "affirmative action." One of the tragedies about affirmative action is that there is very little empirical evidence of any benefits to blacks or women out of affirmative action. Further there is reason to believe that it may be counterproductive. The equal opportunity laws (which were superseded by affirmative action) simply provided penalties for discrimination. The employer could avoid all penalties if he did not discriminate, and incur penalties if he did. It was a very straightforward incentive system. Affirmative action says something very different. Under affirmative action there are two sets of incentives created with respect to hiring and firing communities. The first incentive discourages hiring from these groups, those employers will get the Government off their back immediately by doing so. But down the road, they are buying more trouble, because if the subsequent pay and promotion pattern of people hired from those groups do not meet the expectations of the Government, then emloyers are incurring a very large legal cost—regardless of whether they discriminate.

As a case in point, consider the academic world. Here you have an up-or-out system of promotion. A junior faculty member has to be either promoted or fired after a certain period of time. He cannot just be continued in that same job. Under these circumstances, affirmative action increases the demand for those members of minority groups who have a proven track record, so that they will not be let go at the end of three or four years. This is particularly true of the large research universities, where it is common for a very large majority of all assistant professors to be let go at the end of their contract, and certainly not kept on for tenure positions.

Enter affirmative action. Will the university now hire a woman who is fresh out of graduate school, with a 9 out of 10 chance that it is going to fire her in 3 years, opening itself for legal liability which could cost hundreds of thousands of dollars if she chooses to file a lawsuit? Affirmative action has created an incentive not to hire from these various groups. In the process, it has provided some benefits to those minority individuals who have top degrees and a long list of publications. But they would have been doing all right anyway. Those who are just coming out of the graduate school untested (and given the history of minorities, these will be the great majority of the people in the group), have been made less attractive risks. "Justice" has had a high cost to the intended beneficiaries, as well as to the larger society. Perhaps observers will be physically benefited, by feeling that they are promoting a more just world. But is increasing the physic income of third parties the real purpose of income redistribution?

(Thomas Sowell, a senior fellow at the Hoover Institution on War, Revolution and Peace, is author, most recently, of "Ethnic America, A History." This article, excerpted here from the summer 1981 issue of Policy Review, is adapted from the forthcoming book, "The Limits of Goverment Regulation," edited by James F. Gatti. This is the first of two articles.)

WEBER AND *BAKKE*, AND THE PRESUPPOSITIONS OF "AFFIRMATIVE ACTION"

THOMAS SOWELL[†]

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The Supreme Court's upholding of racial quotas in the *Weber* case, just one year after striking them down in the *Bakke* case, adds another strange chapter to a story that began with its declaring moot the same issue in the *DeFunis* case.[1] Yet the inconsistencies may be more apparent than real. The majority in *Weber*, like the four concurring justices in *Bakke*, emphasized the narrowness of the issue they resolved,[2] and that it turned on purely statutory construction, rather than being a constitutional landmark.[3] In this sense, the two cases are consistent with each other in avoiding a once-and-for-all pronouncement on quotas which both sides had hoped for. Indeed, *Bakke* and *Weber* are also consistent with *DeFunis*, in avoiding a pronouncement of principle. How consistent these cases are otherwise — how consis-

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[1] United Steelworkers of America v. Weber, 443 U.S. 193 (1979); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); DeFunis v. Odegaard, 416 U.S. 312 (1974).

[2] United Steelworkers of America v. Weber, 443 U.S. 193, 200 (1979); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[3] United Steelworkers of America v. Weber, 443 U.S. 193, 200 (1979); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 410-21 (1978).

tent with each other or with the Civil Rights Act or the Constitution — is another and larger question.

Before attempting to analyze these larger questions, it is necessary to dissect the issues behind the controversies — not only the explicit points of contention, but also the barely articulated presuppositions which form the foundation of an elaborate superstructure of beliefs and imperatives.

The controversies which have raged around the concept of "affirmative action" have not clarified these fundamental matters. On the contrary, they have made it even more necessary to define the basic terms of the discussion, as well as to reconsider its premises and conclusions. The discussion here will include (1) the evolution of "affirmative action" as a concept, (2) its presuppositions about social processes, and (3) the implications of the *Bakke* and *Weber* decisions specifically.

I. EVOLUTION

The central idea behind "affirmative action" is that it is often not enough to "cease and desist" from some harmful or proscribed activity. Sometimes the future consequences of the past activity must also be proscribed or mitigated. This idea was not new or peculiar to the civil rights issues of the 1960's.

In 1935, the Wagner Act used the identical phrase, "affirmative action," to describe an employer's duty to undo his past intimidation or harassment of union organizers and members, by posting notices of a new policy and by reinstating (with back pay) workers fired for union activity.[4] Otherwise the future effect of past intimidation (physical and financial) would inhibit the "free choice" elections guaranteed by the Act. For the employer merely to cease and desist would not end the future detrimental effects of his past conduct.

Similar principles apply in the racial or ethnic area. The common employer practice of hiring new workers by word-of-mouth referrals from existing employees meant that a formerly discriminating employer with an all-white work force would probably continue to have an all-white work force, even after discrimination among applicants had ceased, because his applicants would be the relatives and friends of his existing employees. The effects of the past racially discriminatory choices of employees would be perpetuated after the policy of racially discriminatory choices among applicants had ended. In a similar vein, general channels of information and recruiting would tend to reflect past practices in the selection of students, executives, craftsmen, and in a wide variety of other selection situations

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[4] National Labor Relations Act, 29 U.S.C. §§ 151-68 (1976).

and procedures. For this reason, to eliminate discrimination only at the decisionmaking point (employment, college admission, etc.) would not eliminate *de facto* discrimination — intentional or non-intentional — in the process as a whole, including information channels and recruiting networks established in an earlier era to reach some desired segments of the population, but not others. Therefore, "affirmative action" *of some kind* was considered necessary to make non-discrimination a reality throughout a whole information-recruiting-choosing process, at least until new informal information networks could form and special recruiting activities by employers, universities, and others could overcome fears among previously excluded groups that they would not be considered eligible or would not be judged fairly.

A. The Distinction Between Information Networks and Decision Points

"Affirmative action," as it was first applied in a racial or ethnic context in the 1960's, meant various activities aimed at spreading information about newly opened employment or other opportunities, so as to increase the number of minority individuals in the pool of applicants — from which the actual selection would then be made *without regard* to race, color, creed, or nationality. In such a context, it was meaningful to speak of "affirmative action" to promote "equal opportunity," as expressed in President Kennedy's Executive Order No. 10,925.[5] The special targeting of designated groups for informational or recruiting activity was perfectly compatible, in principle, with disregarding all group designations when the time came to choosing among competing individuals. None of this implied goals, preferences, or quotas as regards the final choices. Nor was there any implication of "compensation" to individuals or groups for past societal or institutional wrongs. All these things require additional assumptions and presuppositions.

"Affirmative action" as a general term therefore includes specific policies which may or may not center on numerical results. Even as a very general concept, however, it is a transitional policy. This presents no special problems for administrative or even legislative policy. For judicial and especially constitutional decisionmaking, however, there are serious difficulties. Are courts the appropriate institutions to determine how long social transitions should last, or the principles or indicia of its duration? Can a program be *transitionally* constitutional?

While the general principle of "affirmative action" was announced in a series of Executive Orders of the President, in the Kennedy and Johnson administrations, the specific content of the term evolved in the implementing activities of administrative agencies. Tendencies toward shifting the emphasis of "affirmative action" from equality of prospective opportunity toward statistical parity of retrospective results were already observed, at both state and federal levels, by the time that the Civil Rights Act of 1964 was under consideration in Congress. Senator Hubert Humphrey, in guiding this bill through the Senate, assured his colleagues that it "does not require an employer to achieve any kind of racial balance in his work force by giving preferential treatment to any individual or group."[6] He pointed out that subsection 703(j) under Title VII of the Civil Rights Act "is added to state this point expressly."[7] That subsection declared that nothing in Title VII required an employer "to grant preferential treatment to any individual or group on account of any imbalance which may exist" with respect to the number of employees in such groups "in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section or other area."[8]

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[5] Exec. Order No. 10,925, 26 Fed. Reg. 1977 (1961). "The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin."

Virtually all the issues involved in the later controversies over "affirmative action," in the specifically numerical sense, were raised in the legislative debates preceding passage of the Civil Rights Act. Under subsection 706(g) an employer was held liable only for his own "intentional" discrimination,[9] not for societal patterns reflected in his work force. According to Senator Humphrey, the "express requirement of intent is designed to make it wholly clear that inadvertent or accidental discriminations will not violate the title or result in the entry of court orders."[10] Vague claims of differential institutional policy impact — "institutional racism" — were not to be countenanced. For example, tests with differential impact on different groups were considered by Humphrey to be "legal unless used for the purpose of discrimination."[11] There was no burden of proof placed upon employers to "validate" such tests. In general, there was to be no burden of proof on employers; rather, the Equal Employment Opportunity Commission (EEOC) created by the Act "must prove by a preponderance" that an adverse decision was based on race (or, presumably, other forbidden categories), according to Senator Joseph Clark, another leading advocate of the Civil Rights Act.[12] Senator Clark also declared that the Civil Rights Act "will not require an employer to change existing seniority lists," even though such lists might have differential impact on blacks as the last hired and first fired.[13] Still another supporter, Senator Williams of Delaware, declared that an employer with an all-white work force could continue to hire "only the best qualified persons even if they were all white."[14]

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[6] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964 3005 (n.d.) [hereinafter LEGISLATIVE HISTORY].

[7] *Id.*

[8] *Id.* 1007-08.

[9] *Id.* 1014.

[10] *Id.* 3006.

[11] *Id.* 3160.

This legislative history is important, not only in itself, but also because it is wholly inconsistent with various judicial speculations and assertions about Congressional intent in both the ***Bakke*** and ***Weber*** cases. The EEOC and other federal agencies administering "affirmative action" programs likewise went counter to all these legislative directives and intentions, usually with the traditional appellate court "deference" to an administrative agency's "expertise" in interpreting its mandate. Central to the changed direction of policy was a shift from the concept of "equal opportunity" as a prospective decision-making principle to the retrospective concept of statistical parity of "representation" or other end results.

B. The Distinction Between Prospective Opportunity and Retrospective Results

The shift from the prospective concept of "equal opportunity" to the retrospective concept of parity of "representation" (or "correction" of "imbalance") occurred in stages. The first use of the term "affirmative action" in an Executive Order (No. 10,925) was by John F. Kennedy[15] in 1961, and the policy announced for federal contractors was hiring and treatment "without regard" to various ethnic considerations.[16] Later Executive orders added age and sex to ethnicity as proscribed categories. The key Executive Order (No. 11,246) by President Johnson in 1965 created the Office of Federal Contract Compliance in the U.S. Department of Labor, and authorized it to issue guidelines to federal contractors. In May 1968, this Office issued guidelines containing the phrase "goals and timetables" and "representation," but in a context which did not yet make it clear that employers were to have specific numbers and percentages set forth as measures of their hiring practices. The next set of guidelines, in 1970, spoke of "results-oriented procedures," suggesting a shift from the still prospective 1968 language of "goals and timetables for the prompt achievement of full and equal employment opportunity" to a retrospective "results" criterion. The guidelines issued in December 1971 made it clear that "goals and timetables" were meant to "increase materially the utilization of minorities and women," with "under-utilization" being spelled out as "having fewer minorities or women in a particular job classification than would reasonably be expected by their availability. . . ."[17] Employers were required to confess to "deficiencies" in the "utilization" of minorities and women whenever this statistical parity could not be found in all job classifications, as a first step toward correcting this situation. The burden of proof — and remedy — was on the employer. "Affirmative action" was now decisively transformed into a numerical concept, whether called "goals" or "quotas."[18]

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[12] *Id.* 3015.

[13] *Id.* 3013.

[14] *Quoted in* N. GLAZER, AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY 45 (1975).

[15] *Id.* 46.

[16] LEGISLATIVE HISTORY, *supra* note 6, at 4.

II. PRESUPPOSITIONS

To equate the retrospective fact of statistical underrepresentation with the prospective act of discrimination requires additional presuppositions about the nature of social processes. So too does the belief that the extent of discrimination can be measured or monitored through numerical representation.

Group discrimination — differential treatment of similar individuals who belong to different groups — can be inferred from differences in group "representation" only insofar as the relevant characteristics by which individuals are chosen do not differ substantially from one group to another. *This is not even approximately true*.

Median age differences of a decade or more are common among American ethnic groups. Blacks, Hispanics, and American Indians are at least a decade younger than Americans of Irish, Polish, or Japanese ancestry — and more than twenty years younger than Americans of Jewish ancestry.[19] (See Table 1).

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[17] N. GLAZER, *supra* note 14, at 46-49.

[18] Much semantic effort has gone into claiming that quotas are rigid requirements while "goals" under "affirmative action" are flexible. Historically, however, quotas have existed in sales, immigration, production, and other areas, sometimes referring to minima, sometimes to maxima, and with varying degrees of flexibility. The idea that "quota" implies rigidity is a recent redefinition. The objection to quotas is that they are quantitative rather than qualitative criteria, not that they are rigidly rather than flexibly quantitative.

[19] Age differences among members of the labor force are less, but still substantial. *See* ESSAYS AND DATA ON AMERICAN ETHNIC GROUPS 262, 280, 298, 316, 346, 365, 382, 400 (T. Sowell ed. 1978).

TABLE 1

Ethnicity	*Age*
Jewish	46
Polish	40
Irish	37
Italian	36
German	36
Japanese	32
NATIONAL AVERAGE	28
Chinese	27
Black	22
Indian	20
Puerto Rican	18
Mexican American	18

Source: U.S. Bureau of the Census[20]

These huge age differences reflect, in part, differences in the number of children per family, which is twice as large in some groups as in others.[21] Half of all Mexican Americans or Puerto Ricans in the United States are either infants, children or teenagers.[22] To compare any group's representation in adult jobs with their representation in a *population* that includes five-year-olds is to compare apples and oranges. The comparison is especially inappropriate in the high-level occupations on which special attention is focused. These jobs typically require years of experience and/or education, and are consequently filled by individuals in their forties or fifties. In these age brackets, the *demographic* "representation" is so different from one group to another as to make an even occupational representation virtually impossible. For example, more than 40 percent of Polish Americans are 40 years old or older, while less than 20 percent of American Indians, Mexican Americans or Puerto Ricans are that old. At the extremes, just over half of all Jewish Americans are 45 or older, while only 12 percent of Puerto Ricans are that old.[23] Age differences of the magnitudes found among American ethnic groups play havoc with all the gross statistical comparisons that are commonly used, for age has a major impact, throughout all groups, on such variables as income, occupation, unemployment, fertility, and crime rates.[24] Income differences between age brackets in the U.S. population are greater than income differences between blacks and whites.[25]

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[20] U.S. BUREAU OF THE CENSUS, U.S. CENSUS OF POPULATION 1970, SUBJECT REPORTS, PC(2), pt. 1B, at 2; PC(2), pt. 1G, at 2; PC(2) pt. 1G, at 2, 61. U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS ser. P-20, No. 213, at 6 (Nov. 1969); ser. P-20, No. 221, at 4 (Nov. 1969). "Russian American" age data are used here as a proxy for Jewish data, as is common in the literature, given that constitutional considerations limit the Census Bureau's inquiries into religious groups.

[21] *Cf.* ESSAYS AND DATA ON AMERICAN ETHNIC GROUPS, *supra* note 19, at 273-77, 291-95, 309-13, 327-31, 357-61, 369-72, 393-97, 411-15.

[22] A median age of 18 means that half of these groups are no older than that.

[23] *Cf.* U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS ser. P-20, No. 213, at 6 (Nov. 1969); ser. P-20, No. 221, at 4, with "Russian Americans" in the latter serving as a proxy for Jews.

Even where intergroup comparisons are limited to members of the adult labor force, age differences are still very substantial. The median age of all Puerto Rican income-earning heads of family was 36 years, according to 1970 Census data, while the corresponding age among Jews was 50 years.[26] Moreover, because the lowest income groups have only recently begun finishing high school or attending college on a large scale, their older members typically lack education requirements while their younger members necessarily lack the experience. For example, among blacks aged 55 to 64 years, more than 20 percent have less than five years of school,[27] and only 4 percent have completed college.[28] Among Puerto Ricans in the same age bracket, approximately *half* have less than five years of schooling,[29] and only 3 percent have completed college.[30] In short, the *combination* of experience (age) and education needed for high-level occupations accentuates intergroup disparities in qualifications and income, both of which tend to be greatest in the older age brackets. The Jewish family heads who are 14 years older then Puerto Rican family heads also average 6 more years of schooling.[31]

In a country of the size and regional diversity of the United States, geographical distribution affects incomes as dramatically as demographic distribution does. Income differences between California and Arkansas, or between Alaska and Mississippi, are greater than income differences between blacks and whites.[32] No ethnic group in the United States has an income that is as low as one-half the national average, but members of a given ethnic group in one location often earn less than half the income of members of the same ethnic group located elsewhere. Blacks in Mississippi earn less than half the income of blacks in New York state. Mexican Americans in the Laredo or Brownsville metropolitan areas in Texas earn less than half the income of Mexican Americans in the Detroit metropolitan area. Indians on reservations earn less than half the income of Indians located in Chicago, Detroit or New York City.[33] In short, the effects of geographical distribution are profound, and are confounded with ethnic differences, as such, in gross statistical comparisons among groups. Virtually no two American ethnic groups have the same geographical distribution pattern.[34] Blacks are located in the low-income South to a substantially greater extent than most other Americans. The economic consequences of this can be seen in the fact that while Mexican Americans and Puerto Ricans earn more than blacks nationally, blacks outside the South earn more than either of these Hispanic groups.[35] Their gross income differences are geographic rather than racial.

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[24] Sowell, *Ethnicity In a Changing America*, DAEDALUS 220-25 (1978).

[25] The average income of families headed by someone in the 45-54 year old bracket was 94 percent higher than the average income of families headed by someone under 25 in 1974, while the average white income the same year was 62 percent higher than the average black income. *See* U.S. BUREAU OF THE CENSUS, SOCIAL INDICATORS, 1976 454-55 (1977).

[26] ESSAYS AND DATA ON AMERICAN ETHNIC GROUPS, *supra* note 19, at 365, 389.

[27] U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS ser. P-20, No. 224, at 12 (Mar. 1971).

[28] Computed from tables in ESSAYS AND DATA ON AMERICAN ETHNIC GROUPS, *supra* note 19, at 278-80.

[29] U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS ser. P-20, No. 224, at 12 (Mar. 1971).

[30] Computed from tables in ESSAYS AND DATA ON AMERICAN ETHNIC GROUPS, *supra* note 19, at 387-89.

[31] *Id.* 365, 389.

[32] U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970 (1976).

Age and location are variables with little moral or ideological significance, and are not very amenable to governmental policy control. This may explain, but in no way justifies, their being almost totally disregarded in analyses of causes of intergroup differences in income or occupations. Moreover, age and location are among various neglected factors which invalidate the presumption that all intergroup differences are due either to current discrimination or to some behavior in the past or present by a personified "society." In some cases, we feel certain *from other evidence* that discrimination has existed or does exist. But both intellectually and legally, a serious problem arises when the real basis for belief is replaced by pseudoscientific numerical indices — *i.e.*, when issues are decided by gut feelings garnished with numbers. Many social processes and variables can and do generate the same numbers attributed to discrimination.

Many substantial economic and social differences among ethnic groups in the United States reflect historic differences that existed before they ever set foot on American soil—for example, the overrepresentation of Jews in the clothing industry,[36] Germans in the beer industry,[37] or the Irish in politics and the priesthood,[38] not to mention such general cultural differences as varying receptivity to formal education. In the New York City schools of 1911, German and Jewish children finished high school at a rate more than a hundred times greater than Irish or Italian children.[39] Since the Irish were the dominant group in both municipal politics and among school teachers, these results could hardly have been due to discrimination against the Irish by either Germans or Jews. Similarly, in turn-of-the-century Boston, the Irish not only had more political power than the Jews but higher incomes and more education among the adults – and still the Jewish children went on to college at a higher rate than the Irish children.[40]

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[33] U.S. BUREAU OF THE CENSUS, U.S. CENSUS OF POPULATION, 1970, SUBJECT REPORTS, PC(2), pt. 1B, at 149-50; PC(2), pt. 1C, at 170-71; PC(2), pt. 1F, at 158-63.

[34] Sowell, *supra* note 24, at 225-26.

[35] T. SOWELL, RACE AND ECONOMICS 152 (1975).

[36] Kuznets, *Immigration of Russian Jews to the United States: Background and Structure*, in IX PERSPECTIVES IN AMERICAN HISTORY 76, 79 (1975).

[37] K. CONZEN, IMMIGRANT MILWAUKEE, 1836-1860 103-05 (1976).

[38] N. GLAZER & D. MOYNIHAN, BEYOND THE MELTING POT 223-38 (2d ed. 1970).

The history of the Irish and the Jews in this era undermines the explanatory value of the usual socioeconomic indices, as well as those two favorite "causes" of social phenomena – "ability" and "discrimination." In addition to being better off than the Jews politically, economically, and educationally, the Irish also scored higher on mental tests administered to masses of soldiers in World War I.[41] Because the Irish had immigrated to the United States in large numbers before the Jews, American "society" had given them more material and educational advantages over the years. What American society could not give them were the Jewish attitudes and values – and these proved decisive, as the Jews rose past the Irish by all the usual economic, educational, and other indices. In short, the actions of "society" are often far from decisive in the outcome, much less all-determining.

The case of blacks is obviously quite different from the case of Jews, for all sorts of historical and other reasons that remain largely implicit. But in terms of the explicit argument and the explicit evidence cited in "affirmative action" cases – and applied to all sorts of ethnic, sex, and other groups – the history of the Jews, Orientals, and other ethnic groups is relevant and fatally undermines their presuppositions. To the extent that the explicit evidence is merely *pro forma* recitation, the implicit argument is not tested for either its general validity or its applicability to each of the diverse groups covered by "affirmative action."

A. *The Ethnic Vision and the "National Average"*

A common theme in "affirmative action" arguments is comparison of one group's statistics with "the national average" or with local or regional data. This approach makes all deviations from the average look unusual or even suspicious. The implicit suggestion is that all groups would be "average" in the relevant respects, but for intervening discrimination or other societal action. But comparing each group with the national average seriatim is a very different process from looking at all the groups simultaneously – which may reveal that the national average is itself just one point on a wide-ranging continuum, and that "deviations" on either side are quite common. In other words, the national average is nothing more than a statistical amalgamation of highly diverse group characteristics, and not a norm measuring what most people actually do or should do.

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[39] D. RAVITCH, THE GREAT SCHOOL WARS 178 (1974).

[40] S. THERNSTROM, THE OTHER BOSTONIANS 173 (1973).

[41] PSYCHOLOGICAL EXAMINING IN THE UNITED STATES ARMY, MEMOIRS OF THE NATIONAL ACADEMY OF SCIENCES ch. 6 (Yerkes ed. 1921). The relevant categories under "Nativity" are Ireland, on the one hand, and either Russia or Poland, on the

The median family incomes of various American ethnic groups illustrates the point:

TABLE 2

Ethnic Group	*Income as Percent of National Average*
Jewish	172 percent
Japanese	132 percent
Polish	115 percent
Chinese	112 percent
Italian	112 percent
German	107 percent
Anglo-Saxon	105 percent
Irish	102 percent
NATIONAL AVERAGE	100 percent
Filipino	99 percent
West Indian	94 percent
Mexican	76 percent
Puerto Rican	63 percent
Black	62 percent
Indian	60 percent

Source: U.S. Bureau of the Census and National Jewish Population Survey.[42]

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other, since most Russian-born Americans at that time were Jewish, as were at least half the Polish born.

[42] Data on the 1969 family incomes of Americans of Japanese, Chinese, Filipino, West Indian, Puerto Rican, Black, and American Indian backgrounds were compiled from the 1970 Census Public Use Sample, and published in ESSAYS AND DATA ON AMERICAN ETHNIC GROUPS, *supra* note 19, at 257-58. These family incomes were then taken as a percentage of the national average family income generated by applying the same computer program specifications to the whole Public Use Samples as were used to generate the individual ethnic data. Data on 1969 family incomes of Americans of Polish, Italian, Irish, German, and Mexican ancestry were not directly available from the 1970 Census, but their 1968 and 1970 incomes were available from the U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS ser. P-20, Nos.

The notion of a national average unreachable by ethnic minorities – or by non-white minorities – will not stand up, in the face of these data. Two of the top five incomes are by non-white groups. In addition, black West Indians have incomes not far from the national average, and considerably higher than the incomes of Puerto Ricans, most of whom are white.

The supposedly dominant Anglo-Saxons have incomes below various groups who arrived in American after them, and who faced varying degrees of discrimination on their way up. Anglo-Saxons may be envisioned as wealthy old families, but in fact they include poverty-stricken people scattered along hundreds of miles of the Appalachians, and numerous other places in American society. Even the supposed numerical dominance of the Anglo-Saxons is largely mythical. They are indeed the largest of the ethnically identifiable groups, but (1) half of all Americans cannot identify their ethnicity to Census surveyors,[43] presumably because of intermixtures, and (2) Anglo-Saxons are only about 14 percent of the population.[44] Despite widespread use of the majority-minority dichotomy, it is intellectually questionable to refer to 14 percent of the population as if they were a majority and to 13 percent (Germans) or 11 percent (blacks) as "minorities." Moreover, the inclusion of women as a disadvantaged group brings the total proportion of persons in the minority category up to about two-thirds of the total population.

Both the demographic and the economic data reveal the wholly arbitrary nature of the government's designations of various groups as "minorities" or "disadvantaged" groups – for the official list includes groups both above and below the national average, *e.g.*, Japanese and Chinese as well as Indians or Mexicans. The only consistency in the list is with an implicit vision of racist and sexist discrimination as the reason for group deviations from the national average. Where those deviations include incomes nearly a third *larger* than the national average (Japanese), the data must at least suggest other very powerful influences at work – factors which cannot then be arbitrarily excluded from explanations of why other groups fall below the mythical national norm.

213-21, 224, and 249, and an arithmetic average of the percentage that these two family incomes were of the national averages as reported in these respective publications was used as their percent of the national average family income. Data on the 1969 incomes of Jewish families are unavailable from the Census, because of constitutional limitations on government studies of religious groups. The data here were obtained from a private survey, the National Jewish Population Survey, compiled for the same year as the Census data.

[43] U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS ser. P-20, No. 221, at 1 (Nov. 1969); ser. P-20, No. 249, at 1 (Mar. 1972 and 1971).

[44] *Id.* ser. P-20, No. 249, at 19. Persons of "English, Scottish, and Welsh" ancestry are used here as a proxy for Anglo-Saxons.

Many cultural differences do not lend themselves to quantification, but some have numerical effects. For example, half of all Mexican American women are married in their teens, while only 10 percent of Japanese American women marry that young.[45] It requires little imagination to see how that must affect opportunities for college attendance and/or lucrative careers, quite aside from employer discrimination or the sins of "society."

B. *The Special Case of Blacks*

The unique history of blacks – both slavery and pervasive Jim Crow laws and practices – has been used as a justification for affirmative action programs, though as noted above, such programs are then applied to groups (including women) who add up to several times the size of the black population. But, putting aside this "entering wedge" approach to policymaking, how well do the presuppositions of affirmative action apply to the group which provides its strongest arguments? That is, how much of the still substantial black-white difference in incomes and occupations can be attributed to employer discrimination? Despite a voluminous literature on discrimination, this is a question seldom addressed and often settled by assumption. Thurow's *Poverty and Discrimination*, for example, simply *defines* discrimination as all intergroup differences in prospects,[46] without regard to the sources of those differing prospects.

Blacks and whites differ not only in skin color but in many cultural characteristics. Yet much of the literature automatically ascribes economic differences between the two groups to whites' discrimination against blacks – that is, to color rather than culture. However reasonable this may be as a plausible assumption – given the history of demonstrable racial discrimination – what is unreasonable is to treat this assumption or hypothesis as an empirical fact or as something transcending empirical facts.

One of the most obvious ways to test the effect of color against the effect of culture would be to compare the economic conditions of groups with the same color but with different cultures. Alternatively, the comparison could be made between groups with the same culture but of different colors. Seldom has either of these things been done.

Black West Indians living in the United States are a group physically indistinguishable from black Americans, but with a cultural background that is quite different.[47] If current employer racial discrimination is the primary determinant of below average black income, West Indians' incomes would be similarly affected. Yet, as seen in Table 2, West Indian incomes are 94 percent of the U.S. national average, while the incomes of blacks as a group are only 62 percent of the national average. That is, West Indians' incomes are 44 percent higher than the incomes of other blacks. Their "representation" in professional occupations is double that of blacks, and slightly *higher* than that of the U.S. population as a whole.[48]

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[45] Uhlenberg, *Demographic Correlates of Group Achievement: Contrasting Patterns of Mexican-Americans and Japanese-Americans*, in RACE, CREED, COLOR OR NATIONAL ORIGIN 91 (R. Yin ed. 1973).

[46] L. THUROW, POVERTY AND DISCRIMINATION 2 (1969).

[47] *See, e.g.*, Sowell, *Three Black Histories*, in ESSAYS AND DATA ON AMERICAN ETHNIC GROUPS, *supra* note 19, at 41-48.

The argument has sometimes been made that white employers distinguish West Indians from other blacks by accent, birthplace, or place of schooling and that this differentiation in their treatment explains the substantial intergroup economic differences between these two sets of blacks in the same economy. Again, the test is not plausibility but evidence. If accent, birthplace or place of schooling are responsible for West Indians' advantages in the market place, then those West Indians lacking such obvious clues for American employers would not be expected to have comparable advantages over other blacks. *Second-generation* West Indians – born in the United States of West Indian parents – are less likely to have an accent and would have no distinguishing place of birth or schooling. If employer discrimination explains the economic condition of blacks, and the different conditions of West Indians, then second-generation West Indians should not be expected to have as large an advantage over other blacks. If, on the other hand, West Indian advantages are cultural, then second-generation West Indians might be expected to continue to benefit from the values and behavior patterns of their parents, plus whatever additional benefits derive from their parents' socioeconomic success and their own greater familiarity with American society. In short, diametrically opposite predictions regarding second-generation West Indians derive from the theory of cultural differences and the theory of employer discrimination as explanations of black incomes below the national average.

The facts about the economic conditions of second-generation West Indians are rather dramatic in themselves, and decisive in their implications. Second-generation West Indians have even higher incomes than first generation West Indians, and higher incomes than the national average – or the incomes of Anglo-Saxons.[49] Second-generation West Indians also have higher proportions in the professions than other blacks, first generation West Indians, the national average, or Anglo-Saxons.[50] These data are from the 1970 Census, which is to say they are 1969 incomes – two years before the 1971 federal guidelines mandating quota hiring, and so cannot be explained as effects of affirmative action.

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[48] *Id.* 257-58.

[49] *Id.* 44; U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS ser. 20, No. 221, at 22 (Nov. 1969) ("English" as proxy for Anglo-Saxon ancestry); ser. 20, No. 249, at 34 (Mar. 1972 and 1971) (income of "English, Scottish, Welsh" as proxy for Anglo-Saxon ancestry).

These results are reinforced by the alternative comparisons of people with similar culture but different color. Richard Freeman's study of blacks and whites with the same reading (or non-reading) habits showed that by 1969 they were earning the same incomes, regardless of race.[51] Looked at another way, the still large racial income difference was cultural rather than racial, as such. Data for earlier periods did not show such a similar pattern. Blacks made less than whites in earlier years, even when cultural indicators were the same.[52] This is consistent with historical evidence of racial discrimination, while undermining the conclusion that all current differences can be automatically attributed to the same source.

There are many possible reasons for West Indians' advantages over other blacks.[53] The purpose here is not to praise, blame, grade, or otherwise morally rank groups. In some ultimate sense, we are all born into a world we never made, including the values around us. The more important point, from a causal standpoint or policy relevance, is the source of the racial statistical discrepancies so often cited. West Indian data are simply a means to the end of testing alternative theories of racial discrepancies. Like the comparison between the Irish and the Jews, this comparison among different black groups suggests that cultural traits reaching far back in history have continuing contemporary impact, invalidating any presumption of equal "representation," income, etc., in the absence of current discriminatory institutional policies.

C. *The Special Case of Women*

Although the situation of women is often lumped together with that of ethnic "minorities" for affirmative action purposes, it is in fact an entirely different social phenomenon. Two key facts are routinely ignored in gross statistical comparisons of male and female incomes, occupations, and other areas of concern over statistical parity or representation: (1) Historical trends in these regards do not accord with any theory of sex discrimination or women's organized political struggles for equality, but accord almost perfectly with demographic trends, and (2) most of the current income and occupational differences between males and females as gross categories turn out, on closer scrutiny, to be differences between married women and all other persons. Historically, women's position relative to that of men *declined* for more than two decades, across a broad front, from peaks reached in the 1930's or earlier. Women's shares of doctoral degrees — both Ph.D.'s and M.D.'s — declined, along with their representation on college and university faculties (including the faculties of women's colleges run by women administrators), as did their representation among people listed in *Who's Who*.[54] Women's income as a percentage of men's income declined over a twenty year period from 1949 to 1969.[55] If sex discrimination is the chief explanation of the male-female economic differences, it is hard to imagine why there would have been *increasing* sex discrimination during this particular period of apparent female economic retrogression. However, it is much easier to understand as a consequence of a parallel decline in the age of marriage for educated women and a rising number of children per woman.[56]

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[50] 50. Sowell, *Three Black Histories*, in ESSAYS AND DATA ON AMERICAN ETHNIC GROUPS, *supra* note 19, at 44, 257; U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS ser. 20, No. 221, at 23 (Nov. 1969).

[51] 51. R. FREEMAN, BLACK ELITE, ch. 4, especially 98-99, 107 (1976).

[52] 52. *Id.* 88, 110.

[53] 53. Sowell, *Three Black Histories*, in ESSAYS AND DATA ON AMERICAN ETHNIC GROUPS, *supra* note 19, at 43-48.

This mundane demographic explanation of socioeconomic trends also accords with recent upswings in women's occupational position as marriage and childbearing trends began to reverse in the 1960's.[57] The same explanation is even more dramatically apparent in contemporaneous comparisons. As of 1971, single women in their thirties who had worked continuously since leaving school earned slightly *more* than single men, even though women as a group earned less than half as much as men as a group.[58] In the academic world, single female faculty members who had received their Ph.D.'s in the 1930's had by the 1950's become full professors to a slightly *greater* extent than male Ph.D.'s of the same vintage, even though female academics as a group were far less successful than males by various indices.[59] A more recent study shows that female academics who never married earned more than male academics who never married, even before affirmative action "goals and timetables" became mandatory in 1971.[60] Many statistical comparisons sidestep the crucial effect of marriage on women's careers in various ways, including defining "single" women to include women who are widowed, divorced, or separated. Obviously, a woman who re-enters the labor force after many years as a housewife is unlikely to earn as much as a man who has been working continuously.

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[54] Parrish, *Professional Womanpower as a National Resource*, Q. REV. ECON. & BUS. 56-58 (Feb. 1961).

[55] Gwartney & Stroup, *Measurement of Employment Discrimination According to Sex*, 39 S. ECON. J. 583 (April 1973).

[56] Parrish, *supra* note 54, at 59; J. BERNARD, ACADEMIC WOMEN 39, 62, 74, 215 (1964).

[57] T. SOWELL, AFFIRMATIVE ACTION RECONSIDERED 41 (1975).

[58] *Id.* 28.

[59] Astin, *Career Profiles of Women Doctorates*, in ACADEMIC WOMEN ON THE MOVE 153 (A. Rossi & A. Calderwood eds. 1973); T. SOWELL, *supra* note 57, at 31, 33.

[60] T. SOWELL, *supra* note 57, at 32.

Although the situation of women is different from that of minorities, it is often treated the same in the sense that variables which do not lend themselves to ideological explanations or political crusades tend to be disregarded. Whatever one may think of the unequal distribution of domestic responsibilities found even among married couples who are both professionals,[61] it is not employer discrimination.

D. *Institutional Responsibility*

Affirmative action as a legal doctrine goes beyond assigning causation and blame to a personified "society." It attributes intergroup statistical variations found at a particular institution to actions of that particular institution. In legal theory, this breathtaking leap in logic is only a "rebuttable presumption," but in practice rebutting such a presumption is often either impossible statistically or prohibitively expensive — even if there has been no discrimination whatsoever by the accused employer.

The validity of statistical conclusions cannot be independent of sample size, and the relevant sample — the number of employees in a specific job category — is often too small for *any* demonstrable conclusion, even when the total number of employees in all job categories is large. Moreover, hiring and promotion statistics refer to even smaller numbers of people than those employed in the job category. The EEOC's doctrine of *differential* validation of job criteria for its designated minorities[62] reduces the relevant sample size still further, thereby increasing the number of employees for whom the theoretically rebuttable presumption for "representation" data becomes *de facto* "proof" of discrimination.

Even where the employer has both sufficient sample sizes in all job categories and sufficient members of government-designated minorities to meet sample size requirement for statistical analysis, he must then face the issue whether the costs of the process of vindication are more or less than the costs of quota hiring. The cost of simple test validation has been estimated at "between $40,000 and $50,000"[63] under statistically favorable conditions. Differential validation for each group would obviously cost more.

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[61] *Id.* 24.

[62] N. GLAZER, *supra* note 14, at 57-58.

[63] *Id.* 57.

Legal controversies tend to center on the validity of end-results reached by certain processes. But the cost of the process itself is not a negligible consideration. The ability to impose process costs is the ability to punish. The mere preparation of an affirmative action report can cost hundreds of thousands of dollars, *regardless* of the end-result of the process. Many crimes do not carry fines that high. An employer faced with the process costs of justifying numbers that do not fit the preconceptions of a government agency – before a tribunal from that very same agency – must also, realistically, be prepared to appeal an adverse decision, a further process cost.

The employer whose numbers do not fit the preconceptions of government agencies, and who does not prove himself innocent to those same agencies, must then fashion a "remedy." The agencies involved do not specify what he is to do. They approve or disapprove plans he submits. In this way, they avoid the legal onus of themselves prescribing quotas in violation of the Civil Rights Act, while adding to the process costs of the employer, who must guess at what size quotas will satisfy them – and continue to resubmit plans until he guesses right.

E. *The "Results" of Affirmative Action*

Despite the shift in the meaning of affirmative action, from prospective opportunity to retrospective results, the affirmative action program itself has little in the way of results to show for its own wide-ranging, costly, activity. Studies by different economists, using different data and methods, have reached a similar conclusion – that affirmative action has had little or no effect on black-white income ratios or occupational representation.[64] For example, "the rise in black-white wage ratios has occurred primarily in the more private sectors of the private economy, and not in those industries most susceptible to affirmative action pressure."[65] In the academic world – heavily dependent on federal money – the black-white pay differential was greater after affirmative action began in 1971 than it was before – and both before and afterwards, it was a gross difference in favor of whites that turned into a net difference in favor of blacks when job qualifications were held constant.[66]

This is not to claim that there has been no progress. With progress, as with "underrepresentation," the issue is not about the facts but the reasons for the facts. Progress, like numerical representation, is not independent of group qualifications. "Almost half the rise in the ratio of black-white male wages" from 1968 through 1975 was statistically explained by "converging" job qualifications.[67] The neglected variable of geographic location was also important. Relocation "accounted for approximately one third" of the rise of black-white wage ratios.[68] An earlier study had found migration to be "the principal reason for the rise in racial income ratios between 1940 and 1960."[69] In short, variables almost totally ignored in the presuppositions of affirmative action have had — and continue to have — major impact on both intergroup disparities and the lessening of disparities.

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[64] J. SMITH & F. WELCH, RACE DIFFERENCES IN EARNINGS: A SURVEY AND NEW EVIDENCE ix, 20-21, 24, 49 (1978) [hereinafter J. SMITH & F. WELCH]; Ashenfelter, *Comments*, in 2 FRONTIERS OF QUANTITATIVE SCONOMICS 558 (M.D. Intriligator & D.A. Kendrick eds. 1974); T. SOWELL, *supra* note 57, at 23.

[65] J. SMITH & F. WELCH, *supra* note 64, at 49.

[66] T. SOWELL, *supra* note 57, at 15-20.

The automatic attribution of whatever ethnic economic progress has occurred to affirmative action has been promoted by before-and-after comparisons in which "before" was long before the 1971 guidelines on goals and timetables, and before the whole equal opportunity phase that preceded affirmative action. This confounds the effects of two very different policies — equal opportunity with regard to race or ethnicity, and affirmative action with regard to those very same factors. There were dramatic improvements in the relative positions of low-income ethnic groups during the 1960's or equal opportunity era — more so than during the 1970's affirmative action policies. To attribute the total advancement of both phases to the latter is clearly invalid.

However little empirical support there is for the effectiveness of affirmative action, it would seem — theoretically — that quotas are a stronger measure that should have more effect than equal opportunity. In fact, however, there are theoretical as well as empirical reasons for doubting this.

The incentives provided by equal opportunity laws and policies are rather unequivocal. Discrimination against comparable individuals from different groups incurs liability under the law. Non-discrimination reduces or eliminates that liability, given that the burden of proof is on the employee to demonstrate employer policies that cannot be demonstrated, by hypothesis. In short, equal opportunity policies make the non-discriminatory alternative cheaper to the employer. Affirmative action, on the other hand, provides two opposing sets of incentives. An employer's immediate liabilities are lowered by hiring from the government-designated groups, but his longer run liabilities are raised insofar as employees from the government-designated groups can subject him to additional process costs whenever their pay, promotion, or discharge patterns do not coincide with those of others or with the preconceptions of government agencies. With the burden of proof on the employer — and often either impossible or prohibitively expensive — it is by no means clear whether he is better off in the long run to have acquired such potentially expensive employees as a means of reducing government hiring pressures. Depending on the specifics of his circumstances, those offsetting incentives may make hiring members of government-designated groups either advisable or inadvisable. The net effect is not nearly as clear-cut as under equal opportunity policies.

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[67] J. SMITH & F. WELCH, *supra* note 64, at vii.

[68] *Id.* 46.

[69] *Id.* 19.

A particularly striking example of this combination of incentives and disincentives to hire from designated groups is the academic world. Academic institutions in general, and highly-rated research universities in particular, typically hire and then discharge non-tenured faculty after a few years, with no allegation of incompetence or wrongdoing. It is essentially on-the-job screening and (in the case of research universities) gambling on the unknowable future research creativity of junior faculty and discarding the losing bets. In those research universities with the highest standards, most bets may be losing bets, meaning that it is impossible to accurately predict which particular individuals will take their places in the forefront of their professions, and all that is possible is to select a promising collection of young scholars emerging from graduate school.

Affirmative action in this academic context means that the virtually inevitable discharge of many blameless individuals subjects the institution to large legal process costs, *regardless* of the outcomes of those processes. In turn, this provides the employing institution with powerful incentives to avoid having to discharge members of the government-designated groups. Retaining them all as tenured faculty members may be either impossible (given the limited number of tenure positions) or prohibitively expensive (since a tenure appointment is a lifetime commitment to pay out perhaps a million dollars or more to the tenured individual). One obvious way to avoid having to discharge members of the government-designated groups is not to hire them in the first place, or to hire them for academic positions outside the usual up-or-out system in which junior faculty must be either promoted or fired. Still another way to avoid the discharge dilemma is to seek primarily those members of the government-designated groups who already have a track record (degrees, publications, etc.) minimizing the likelihood that they will need to be discharged.

The incentives created by affirmative action in colleges and universities tend therefore to (1) *lower* the demand for untested members of the government-designated groups relative to the demand for untested members of the remainder of the population, (2) *raise* the demand for demonstrably better qualified members of the designated groups relative to equally demonstrably better qualified members of the general population, and (3) *shift* members of the government-designated groups out of the faculty, where up-or-out policies prevail, into the college or university administration, where they do not.

Empirical evidence supports these theoretical conclusions. A post-affirmative action study of college and university faculty shows that (1) blacks without doctorates and with few or no publications earned *less* than whites of the same description,[70] while (2) blacks with the Ph.D. from top-rated schools and with several articles published earned *more* than whites of the same description,[71] and (3) black academics were in the administration rather than the faculty, in far higher proportions than their white colleagues.[72]

The perverse incentives created by affirmative action policies may be either more pronounced or merely more visible in the academic world. The point here is simply that there are contrary incentives to hire and not to hire from government-designated groups, and that the net result of these affirmative action pressures is not as unequivocal as the straightforward anti-discrimination thrust of equal opportunity laws and policies.

III. THE BAKKE CASE

Allan Bakke, a white applicant for admission to the medical school of the University of California at Davis, was rejected in both 1973 and 1974, even though individuals with far lower qualifications were accepted because they were members of government-designated ethnic groups. Bakke instituted a lawsuit, charging discrimination. The trial court held that he had been unlawfully discriminated against by racial criteria for admission, though it did not order his admission, because there were other white applicants who were also rejected and their qualifications might have led to their admission instead of Bakke's. The California Supreme Court, in a 6 to 1 decision, affirmed the unlawfulness of the exclusion of Bakke in favor of less qualified candidates for racial reasons, and ordered him admitted. The U.S. Supreme Court, in a 5 to 4 decision, affirmed the decision of the California Supreme Court.

Justice Powell's official opinion for the Supreme Court in the *Bakke* case brought the doctrine of compensatory preferences out into the full light of day and decisively rejected it as a legal principle, as well as casting doubt on it as a social theory. There are no inherent constitutional rights of *groups*, such as would be necessary for a general policy of group compensation for societal wrongs. "The guarantees of the fourteenth amendment extend to persons."[73] Where remedial and compensatory group benefits have been awarded in a particular case, it has been based on findings of group discrimination "not just by society at large, but by the respondent in that case."[74] According to Powell: "Every decision upholding the requirement of preferential hiring under the authority of Executive Order 11,246 has emphasized the existence of previous discrimination as a predicate for the imposition of a preferential remedy."[75] Similarly, where the authority was "constitutional or statutory," rather than an Executive order, the Supreme Court had "never approved preferential classifications in the absence of proved . . . violations."[76] There is no preexisting constitutional group right to remedial or compensatory action as "special wards entitled to a degree of protection greater than that accorded others."[77] The very concept of a "benign" quota or "benign" discrimination against the dominant majority in favor of groups suffering "stigma" was rejected. The equal protection clause of the fourteenth amendment "is not framed in terms of 'stigma'" — a word with "no clearly defined constitutional meaning."[78]

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[70] T. SOWELL, *supra* note 57, at 16, 18-20.

[71] *Id.*

[72] Freeman, *Discrimination in the Academic Marketplace*, in ESSAYS AND DATA ON AMERICAN ETHNIC GROUPS, *supra* note 19, at 175.

[73] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289 (1978).

In addition to being constitutionally unwarranted, compensatory preferences for historic societal wrongs were held to be beyond the range of judicial competence. The very concepts of "minority" and "majority" involve complications, for "the white 'majority' itself is composed of various minority groups, most of whom can lay claim to a history of prior discrimination at the hands of the State and private individuals."[79] To select which groups' deprivations exceeded some arbitrarily selected level of tolerence would be just the beginning of the difficulties, for the effect of judicial remedies would itself change the weights or rankings of the various groups with respect to remaining, uncompensated wrongs. The "variable sociological and political anaylsis" necessary for such ever-changing rankings "simply does not lie within the judicial competence."[80] The Powell opinion, in other words, rejected the idea that there are judicial remedies for all historic wrongs—an idea seldom explicitly avowed in this form, but without which the lengthy elaboration of historic wrongs, as in Justice Marshall's dissenting opinion,[81] would be pointless.

Whatever the merits of the official Supreme Court opinion written by Justice Powell, it was in fact the opinion of only one Justice. The four concurring Justices (Stevens, Burger, Stewart and Rehnquist) concurred with the judgment only "insofar as it affirms the judgment of the Supreme Court of California" which had invalidated the special admissions program at the Davis medical school and ordered Allan Bakke admitted. Lest there by any doubt, the concurring Justices "respectfully dissent" from Powell's opinion "to the extent that it purports to do anything else."[82] The basis for this very narrow concurrence was, among other things, that Powell's lone opinion was based primarily on constitutional grounds, while the concurring opinions limited themselves strictly to statutory grounds — specifically Title VI of the Civil Rights Act of 1964.[83] The traditional preference for statutory rather than constitutional resolution can hardly explain the extremes to which the concurring Justices went to avoid the constitution in this case. They (1) imputed to Congress an intention to create a private right to sue under Title VI,[84] despite its lack of any such authorizing language, in a statute whose *other* titles do contain such language,[85] and (2) base the need for this imaginative exegesis on the assertion that "Congress was not directly concerned with the legality of 'reverse discrimination' or 'affirmative action' programs" when writing the Civil Rights Act of 1964, being preoccupied with discrimination against minorities.[86] While the exegesis that produced the private right of action under Title VI is merely questionable, the legislative history which supposedly necessitated the exegesis is demonstrably false. As noted here in Section I, a wide variety of "reverse discrimination" issues were debated when the Civil Rights Act was under consideration, and some of this concern found its way into the explicit language of the Act, notably Section 703(j).[87] Indeed, Justice Rehnquist, after concurring in this bold assertion of Congressional neglect of "reverse discrimination" issues in the *Bakke* case, proceeded in the *Weber* case to elaborate at great length Congressional concern over this very issue.

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[74] *Id.* 301.

[75] *Id.* 301-02 n.40.

[76] *Id.* 302.

[77] *Id.* 295.

[78] *Id.* 294 n.34.

[79] *Id.* 295.

[80] *Id.* 297.

[81] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 387 (1978) (Marshall, J., dissenting).

Why the fictitious legislative history in *Bakke*? Its only use in the *Bakke* concurring opinion was to justify the need for exegesis creating a private right to sue, which in turn enabled the concurring Justices to avoid a judgment based on the Constitution. The traditional preference for statutory authority was here carried to the point of virtually avoiding the Constitution like the plague. In doing so, the Court preserved its options to pick and choose among future "affirmative action" programs it might like or not like, rather than make a constitutional ruling that could affirm or deny their legality permanently. The concurring Justices' assertion that this case "is not a class action" but only a "controversy . . . between two specific litigants"[88] reinforces this interpretation. Their approval of quotas in *Weber* after rejecting them in *Bakke* is further support of the conclusion that both the "liberals" and the "conservatives" on the Supreme Court have sought *ad hoc* judgments on particular affirmative action plans, rather than a principled ruling.

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[82] *Id.* 408, 421 (Stevens, J., concurring in part, dissenting in part).

[83] *Id.* 412-21.

[84] *Id.* 419.

[85] "A Congress careful enough to provide that existing private causes of action would be preserved (in Titles III and IV) would not leave for inference a vast new extension of private enforcement power. . . . Significantly, in at least three instances legislators who played a major role in the passage of Title VI explicitly stated that a private right of action under Title VI does not exist." *Id.* 385 (White, J., concurring).

[86] *Id.* 413 (Stevens, J., concurring in part, dissenting in part).

[87] See notes 6, 7 & accompanying text *supra*.

The four dissenting Justices (Brennan, White, Marshall and Blackmun) squarely faced the constitutional issues faced by Powell and avoided by the concurring Justices. The dissenters of course reached opposite conclusions from those of Powell. In the dissenting view neither Title VI nor the fourteenth amendment forbids "preferential treatment of racial minorities as a means of remedying past societal discrimination."[89] They did not go so far as to claim that either authority *required* preferential treatment, but argued that "voluntary use of racial preferences to assist minorities" is legal.[90] Congressional intent was discerned by the dissenting Justices, not from the many repudiations of compensatory preferences in the original consideration of the Civil Rights Act of 1964,[91] but from the later (1977) failure of a reiterating rider to a deadlocked H.E.W. appropriations bill to survive a conference committee concerned with resuming overdue funding.[92]

Having thus established — to their own satisfaction — that voluntary compensatory preferences were neither unconstitutional nor illegal under the Civil Rights Act, the dissenting Justices proceeded to argue that *mandatory* group preferences had been imposed by the Supreme Court itself in a long string of cases. Employers were forced to eliminate employment criteria which "have a disproportionate impact on racial minorities," even "in the absence of discriminatory intent,"[93] (despite the language and legislative history of Section 706[g][94]) and despite losses suffered by innocent third parties[95] analogous to Allan Bakke. The burden of proof had been put on employers to "validate" such criteria in general and to produce "differential validation" for affected minorities in particular.[96] Similarly, school boards have been forced to abandon "color blind" pupil assignment plans, in order to correct past discrimination, even though this too injured third parties.[97] The deliberate gerrymandering of a political district to enhance the voting effectiveness of a disadvantaged ethnic group had likewise been upheld despite its negative impact on others, including in this case another ethnic minority.[98]

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[88] 438 U.S. at 408 (Stevens, J., concurring in part, dissenting in part).

[89] *Id.* 328 (Brennan, J., concurring in part, dissenting in part).

[90] *Id.* 342 n.17.

[91] Legislative History, *supra* note 6, at 3005, 3015, 3092, 3129, 3131, 3134, 3160-61, 3187, 3189, 3246.

[92] 438 U.S. at 346-47 (Brennan, J., concurring in part, dissenting in part).

[93] *Id.* 353.

[94] "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent. . . ." Legislative History, *supra* note 6, at 1014.

Was the majority in *Bakke* saying that it was not prepared to go down that road any further — or any more times? Or was there some reason in legal principle rather than a policy judgment concerning degree?

Powell's opinion would have the issue turn on prior determinations of institutional discrimination[99] as in *Griggs* or the school cases where there was a finding of prior *de jure* segregation. But this apparent principle becomes somewhat less convincing — and indeed, less principled — in the light of the standards of evidence used to determine either employer "discrimination" or public school "segregation." These triggering findings have been based on inferences from numbers and percentages. The Davis medical school's relative newness, and the existence of affirmative action admissions programs there throughout its brief history, made such triggering numbers impossible to come by. If that is the only difference in this case, and if the Supreme Court continues to accept disproportionate numbers or percentages as presumptive evidence of discrimination, then *Bakke* may become a curiosity rather than a landmark.

IV. THE WEBER CASE

After criticism of their employment practices by the Office of Federal Contract Compliance (OFCC), the Kaiser Aluminum & Chemical Corporation established a training program in cooperation with the United Steelworkers union. At Kaiser's Gramercy, Louisiana, plant, where Brian Weber worked, at least 50 percent of the trainee positions were reserved for blacks, until their low proportions (2 percent) among Kaiser craft employees rose to approximate their proportions (39 percent) in the local labor force. Brian Weber, a white worker, was rejected when he applied for the Kaiser trainee program, even though black workers with less seniority were accepted. Weber

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[95] 438 U.S. at 346-49 (Brennan, J., concurring in part, dissenting in part).

[96] N. GLAZER, *supra* note 14, at 57-58.

[97] 438 U.S. at 356 (Brennan, J., concurring in part, dissenting in part).

[98] *Id.*

[99] *Id.* 300-05.

sued under the Civil Rights Act, claiming discrimination. He won in the federal district court, and again in the court of appeals, but the U.S. Supreme Court reversed their decisions, five to two. The four dissenters in *Bakke* were joined by Justice Stewart to uphold quotas.

The majority opinion, delivered by Justice Brennan, emphasized "the narrowness of our inquiry."[100] There was no constitutional issue, according to Brennan, because the Kaiser trainee plan "does not involve state action," which would be required to invoke the fourteenth amendment against unequal treatment by government. The Kaiser-Steelworkers plan "was adopted voluntarily," in Brennan's opinion,[101] completely ignoring the role of the Office of Federal Contract Compliance, which the court of appeals had noted in its opinion.[102]

The repeated emphasis on the "voluntary" nature of the Kaiser affirmative action plan eliminated the question of whether the Civil Rights Act *required* quotas, reducing the issue to whether it *permitted* quotas. But even after sidestepping the Constitution and the lack of any authorization of quotas in the Civil Rights Act, the majority still faced the formidable barrier of sections 703(a) and 703(d) of the Act. Section 703(a) declared it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ." Section 703(d) more specifically declared it unlawful to "discriminate against any individual" in "apprenticeship or other training."

Brennan's majority opinion simply rejected "a literal interpretation" of these words.[103] Instead, it sought the "spirit" of the Act, its "primary concern" with the economic problems of blacks. According to the Brennan exegesis on the legislative history, these words do not bar "temporary, voluntary, affirmative action measures undertaken to eliminate manifest racial imbalance in traditionally segregated job categories."[104] This performance received the sarcastic tribute of Justice Rehnquist that it was "a *tour de force* reminiscent not of jurists such as Hale, Holmes, and Hughes but of escape artists such as Houdini."[105] Rehnquist's dissent inundated the Supreme Court with the legislative history of the Act, and Congress' repeated and emphatic rejection of the whole approach of correcting imbalances or compensating for the past.[106] The spirit of the Act was as contrary to the decision as was the letter.

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[100] United Steelworkers of America v. Weber, 443 U.S. 193, 200 (1979).

[101] *Id.*

[102] 443 U.S. at 223 n.2 (Rehnquist, J., dissenting).

[103] 443 U.S. at 201.

[104] *Id.* 207 n.7.

[105] 443 U.S. at 222 (Rehnquist, J., dissenting).

[106] *Id.* 226-52.

V. SUMMARY AND IMPLICATIONS

The original meaning of affirmative action, as a general attempt to inform and recruit applicants from groups long excluded from employment and other opportunities, quickly gave way to its current meaning — choosing among applicants on the basis of numerical group results to be approximated, whether called "goals" or "quotas" or the "correction" of "imbalances." The prospective concept of opportunity was replaced by the retrospective concept of results. Indeed, the two concepts are often used interchangeably, though to do so implies that *nothing but* discrimination can explain large intergroup differences in representation, remuneration, promotion, etc. Supreme Court supporters of numerical affirmative action have explicitly stated this. To the majority in *Weber*, there could be "little doubt that any lack of skill has its roots in purposeful discrimination of the past"[107] and to the four Justices dissenting in the *Bakke* case, Allan Bakke "would have failed to qualify for admission" in a non-discriminatory world, being outperformed in such a hypothetical world, by sufficient numbers of minority applicants whose current failure to qualify in this world "was due principally to the effects of past discrimination."[108] These four Justices (Brennan, White, Marshall and Blackmun) see their task as "putting minority applicants in the position they would have been in if not for the evil of racial discrimination."[109] Behind this staggering notion is the simplifying presupposition that discrimination must be the decisive explanation of intergroup differences. But however morally important the evil of discrimination may be, that is no measure of its causal impact, much less a reason to ignore the causal significance of such non-moral variables as age, location and cultural values. Once the causal decisiveness of discrimination is treated as an hypothesis rather than an axiom, empirical evidence seriously undermines its presumed causal primacy. Among the highest income groups in the United States are non-WASP and non-white groups with a history of suffering severe discrimination, including the mass internment of Japanese Americans in World War II.

The uniqueness of the historic disabilities of blacks is often invoked by supporters of affirmative action, including Supreme Court Justices in the *Bakke* and *Weber* cases.[110] But that very uniqueness undermines both their causal and legal arguments. However much various data (income, education, etc.) for blacks differ from "the national average," such data are not unique. Neither the median family income, occupation level, years of schooling, I.Q., or unemployment rate of blacks is the worst among American ethnic groups. There are non-enslaved, non-Jim Crowed, non-black groups worse off in each of these respects.[111] This is hardly a reason for complacency, but the point is that the moral uniqueness of black history does not imply a causal uniqueness. Moreover, the economic performance of West Indian blacks in the United States suggests that color discrimination as an explanatory variable will not in fact bear the weight that is placed on it. But even if the factual evidence for the current uniqueness of blacks were far stronger than it is, that would hardly be an argument for a legal principle invoked on their behalf and then extended successively to other groups lacking that uniqueness and constituting — all together — a substantial majority of the American population.

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[107] 443 U.S. at 212 n.* (Blackmun, J., concurring).

[108] 438 U.S. 265, 365-66 (1978) (Brennan, White, Marshall & Blackmun, J.J., concurring in part, dissenting in part).

[109] *Id.* 374 n.58.

[110] *Id.* 369-72, 324-36. *See also* 443 U.S. at 201; 438 U.S. at 387-96 (Marshall, J., concurring in part, dissenting in part).

It is ironic for the historic discrimination against a racial minority to be invoked as the basis for current discrimination against the residual minority of persons not designated as special by the government agencies armed with the unchecked power to make or withhold such arbitrary designations.

Just how arbitrary (or ideological) these designations can be is shown by the fact that preferential decisions are authorized in favor of Chinese Americans over Irish Americans, for example, even though the former have higher incomes, more education, and a greater proportion of people in the professions. It is a further irony that the principle of preferential treatment is rejected by the very groups for whom it is most often invoked, blacks and women. According to the Gallup Poll, 64 percent of blacks and 80 percent of women reject preferential treatment in employment or college admission.[112] Indeed, the Gallup Poll could find no racial, regional, income, political, or other group in favor of this central principle of affirmative action.

The lack of popular support or statutory authorization for affirmative action programs, in which a few fervently believe, has had broader implications for the functioning of elective government and the integrity of courts. It raises somber questions about how far we have gone, and how fast we are going, from democracy toward a judicial *ad hoc*racy.

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[111] ESSAYS AND DATA ON AMERICAN ETHNIC GROUPS, *supra* note 19, 216, 223, 257-58, 283, 385.

[112] GALLUP OPINION INDEX, Rep. 143, 23 (June, 1977).

Thomas Sowell

"Affirmative Action" Reconsidered

Images and labels have taken the place of facts in the controversies surrounding so-called affirmative-action. Words like *quota, qualified,* and *underutilization* are flung about, and defined in strange and tortuous ways; and images are conjured up of either massive benefits conferred on blacks and females at the expense of white males, or cynical evasions of affirmative-action programs by employers whose discriminatory practices are ignored by inept or cowardly government agencies. For the academic world, there is the additional image of an "old-boy network," through which professors are hired by their cronies. But despite an abundance of horror stories, there has been pathetically little analysis establishing the general conditions in the academic world before or after affirmative action.

To make these intricate and emotionally charged issues manageable, it is necessary to (1) distinguish the basic concepts and legal rationale of affirmative action from the many specific laws, regulations, and practices that have developed under that label; (2) measure in some general terms the mag-

Source: The Public Interest (*Winter 1976*). *Reprinted by permission of the publisher, with footnotes omitted. A longer, more detailed version of this article appeared as a pamphlet published by the American Enterprise Institute for Public Policy Research, Washington, D.C.*

nitude and severity of the problem that was intended to be solved or ameliorated by affirmative-action programs; (3) consider the actual results achieved and general trends set in motion by such programs; and finally (4) weigh the implications of affirmative-action policies both for those directly affected and for the general society.

UNDOING THE PAST

The general principle behind affirmative action is that a court order to cease and desist from some discriminatory practice may not be sufficient to undo the harm already done, or even to prevent additional harm as the result of a pattern of events set in motion by the prior illegal activity. This general principle goes back much further than the civil-rights legislation of the 1960s, and extends well beyond questions involving ethnic minorities or women. In 1935, the Wagner Act prescribed affirmative action as well as cease-and-desist remedies against employers whose anti-union activities had violated the law. Thus, in the landmark Jones and Laughlin Steel case, which established the constitutionality of the Act, the National Labor Relations Board ordered the company not only to stop discriminating against those of its employees who were union members, but also to post notices to that effect in conspicuous places and to reinstate unlawfully discharged workers, with back pay. Had the company merely been ordered to cease and desist from economic (and physical) retaliation against union members, the *future* effect of its *past* intimidation would have continued to inhibit the free-choice elections guaranteed by the National Labor Relations Act.

Racial discrimination is another obvious area where merely to cease and desist is not enough. If a firm has engaged in racial discrimination for years, and has an all-white work force as a result, then simply to stop explicit discrimination will mean little as long as the firm continues to hire by word-of-mouth referrals of its current employees' friends and relatives. (Many firms hire in just this way, regardless of their racial policies.) Clearly, the area of racial discrimination is one in which positive or affirmative steps of *some kind* seem reasonable—which is not to say that the particular policies actually followed make sense.

Many different policies have gone under the general label of affirmative action, and many different organizations—courts, executive agencies, and even private organizations—have got involved in formulating or interpreting the meaning of that term. The conflicting tendencies and pressures of these various institutions have shifted the meaning of affirmative action and produced inconsistent concepts at the same time. There is no way to determine *the* meaning of affirmative action. All that can be done is to examine the particulars—the concepts, intentions, and actual effects.

In a society where people come from a wide variety of backgrounds and where some backgrounds have been severely limited by past discrimination, the very definition of equality of opportunity is elusive. For example, a seniority system in a company which previously refused to hire minority individuals means that present and future discrimination occurs because of past discrimination. A Court of Appeals decision struck down such a system on the grounds of its *current* discriminatory effect. In another case, the Supreme Court struck down a mental test for voters in a community with a long history of providing segregated and inferior education for Negroes. Again, the rationale was that the case involved *present* discrimination, considering the past behavior; but this case touches the crucial question of what to do when the effects of past discrimination are incorporated in the current capabilities of individuals. Is equal opportunity itself discriminatory under such circumstances? If so, is anything more than equality of treatment justifiable under the Fourteenth Amendment and corollary statutes and court rulings? As important as the question of whether a legal basis exists for any compensatory or preferential treatment is the question of who should bear the inevitable costs of giving some citizens more than equal treatment. A question may also be raised as to whether such treatment really serves the long-run interests of the supposed beneficiaries.

The legislative history of the Civil Rights Act of 1964 shows that many of these concerns and dilemmas were present from the outset. Senator Hubert Humphrey, in helping to steer this legislation through Congress, attempted to meet criticism by pointing out that the Act "does not require an employer to achieve any kind of racial balance in his work force by giving any kind of preferential treatment to any individual or group." He said that there must be "an intention to discriminate" before an employer can be considered in violation of the law, and that the "express requirement of intent" was meant to prevent "inadvertent or accidental" conditions from leading to "court orders." Senator Joseph Clark, another supporter, made it clear that the burden of proof was to be on the Equal Employment Opportunity Commission (EEOC) to "prove by a preponderance" that a "discharge or other personnel action was because of race." Clark added flatly: "Quotas are themselves discriminatory."

Congress also faced the difficult question of what to do about groups whose historic disadvantages left them in a difficult position to compete on tests with members of the general population. Senator Tower of Texas cited, as an example of what he was opposed to, a case in Illinois where a state agency had forced a company to abandon an ability test which was considered "unfair to 'culturally deprived and disadvantaged groups.'" Senator Case replied that "no members of the Senate" disagreed with Tower concerning such examples, and Senator Humphrey affirmed that such tests "are legal unless used for the purpose of discrimination." Humphrey rejected Tower's proposed explicit amendment on this point because he considered it redundant: "These tests are legal. They do not need to be legalized a second time." Senator Case characterized the actions of the Illinois state agency as an "abuse," and said that the Civil Rights Act did not embody "anything like" the principle involved in the Illinois case. Humphrey brushed aside the Illinois case as "the tentative action of one man," which he was sure the Illinois commission as a whole would "never" accept.

THE SHIFT IN THE BURDEN OF PROOF

Despite the clear congressional intent, expressed by both supporters and opponents of the Civil Rights Act of 1964, the actual administration of that law has led precisely in the direction which its sponsors considered impossible. The burden of proof has been put on those employers whose proportional representation of employees by race or sex is not satisfactory to federal agencies administering that law. The chairman of EEOC has demanded that employer witnesses at public hearings cite "the action taken to hire more minority people." The position of EEOC is that "any discussion of equal-employment-opportunity programs is meaningful only when it includes consideration of their results—or lack of results—in terms of actual numbers of jobs for minorities and women. . . . " Numbers and percentages are repeatedly invoked to show "discrimination" without any reference to individual cases or individual qualifications—with percentages below EEOC's expectations characterized as "exclusions" or "underutilization." The notion of qualified applicants has been expanded to mean "qualified people to train"—that is, people lacking the requirements of the job, whom the employer would have to pay to train. Contrary to the congressional debates, the burden of proof has been put on the employer to show the validity of tests used, and the notion of "tests" has been expanded to include job criteria in general, whether embodied in a test or not. As for employer intentions, a poster prepared by EEOC includes among ten true-or-false questions the statement: "An employer only disobeys the Equal Employment Opportunity laws when it is acting intentionally or with ill motive"—and the answer to that question is *false*. Despite Senator Humphrey's assurances about "express requirement of intent," legal action can be taken on the basis of "inadvertent or accidental" conditions.

EEOC is only one of many federal agencies administering the Civil Rights Act in general or the "affirmative action" programs in particular. There are overlapping jurisdictions of the Labor Department, the Department of Health, Education, and Welfare (HEW), the Justice Department, the EEOC, and the federal courts. There are also regional offices of all these agencies, which vary significantly in their respective practices. Moreover, when one federal agency approves—or requires—a given practice, following such an approved course of action in no way protects an employer from being sued, on the grounds of following that very same course of action, by another federal agency or by private individuals. Indeed, federal agencies have sued one another under this Act.

Parallel to this development of the interpretation of the Civil Rights Act, and more significant for higher education, has been the elaboration of an Executive Order requiring "affirmative action" by federal contractors. This order is enforced by different federal agencies under the general supervision of the Labor Department. For higher education, the regulating agency is HEW.

The courts have not gone so far as the administrative agencies have in forcing numerical "goals and timetables" on employers. Such numerical specifications have typically been invoked by the court only where there has been demonstrable discrimination—not simply "wrong" racial proportions—by the particular employer in question: They are a "starting point in the process of shaping a remedy" for "past discriminatory hiring practices" by the employer to whom the court order applies. In the landmark *Griggs vs. Duke Power Company* case, the Supreme Court included the company's past racial discrimination as a reason that the company could not use tests which eliminated more black job applicants than white job applicants and had no demonstrated relationship to actual job performance. In general, the courts have rejected the notion that "any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. . . . "

Legal remedies under the Civil Rights Act and related executive orders range from cease-and-desist orders, through individual reinstatement or group preferential hiring, to the cutting off of all federal contracts to the offending employer. The latter is a virtual sentence of death to any leading research university, whether public or private, for they are all dependent upon federal money to maintain their competitive standing, and will sustain a massive loss of top faculty without it.

DISCRIMINATION IN ACADEMIA

There is little real question that if one goes back a number of years one finds a pervasive pattern of discrimination against minorities in academic employment. This applies not only to blacks and other minorities regarded as disadvantaged, but also to Jews, who were effectively excluded from many leading university faculties before World War II. The situation with respect to women is somewhat more complicated and will be deferred for the moment. However, the question that is relevant to affirmative-action programs for both minorities and women is what the situation was at the onset of such programs and how the situation has changed since.

While colleges and universities were subject to the general provisions of the Civil Rights Act of 1964 and to subsequent executive orders authorizing cancellation of federal contracts for noncompliance, the *numerical-proportions* approach dates from the Labor Department's 1968 regulations as applied to academic institutions by HEW. More detailed requirements—including a written affirmative-action program by each institution—were added in 1971. The Revised Order No. 4 contains the crucial requirement that to be "acceptable" an institution's "affirmative action program must include an analysis of areas where the contractor is deficient in the utilization of minority groups and women" and must establish "goals and timetables" for increasing such "utilization" so as to remedy these "deficiencies."

For purposes of establishing a chronology, 1971 may be taken as the beginning of the application of numerical "goals and timetables" to the academic world. The question thus becomes: What were the conditions in academic employment, pay, and promotions as of that date? With respect to minorities in general, and blacks in particular as the largest minority, *virtually nothing* was known about these crucial matters at that point. Assumptions and impressions abounded, but the first national statistical study of black academic salaries was not published until the spring of 1974 by Professor Kent G. Mommsen of the University of Utah. *In short, affirmative-action programs were going full blast for years before anyone knew the dimensions of the problem to be solved.*

Nevertheless, it is relatively easy to find out what the situation is in academic employment, for the academic profession is unique in the mountains of statistical data that exist giving detailed information on crucial career factors for individuals. It is a relatively straightforward process to match individuals of similar characteristics—as regards degrees, research publications, experience, and so forth—and to determine what pay and promotions differences there are by race or sex. Moreover, each of the major academic fields has long-established ratings of its own departments across the country, so that the crucial *qualitative* dimension of an individual's training or of the employing department can be gauged much more easily than in most other occupations. The American Council on Education (ACE) has made massive surveys covering all these factors, with samples of more than 50,000 academics each, in 1968-69 and in 1972-73—perfect for a "before" and "after" look at the effects of employment "goals and timetables," which were established in 1971 for colleges and universities. In addition, the National Science Foundation (NSF) and the National Academy of Sciences (NAS) have similarly massive samples of data on holders of doctoral degrees, going back for more than a decade. In short, it is easy to get the facts about academics—for those who want the facts, instead of the overheated rhetoric and indignant posturing that have become standard procedure in the controversy concerning affirmative action in academia.

THE SITUATION "BEFORE"

What was the situation in academia that the employment goals and timetables of 1971 were designed to correct? Blacks as a group earned less than whites as a group, and women as a group earned less than men as a group—and both minorities and women were a smaller percentage of the academic profession than of the general population. Thus far, everyone can agree on the facts. But when seeking *reasons* for these facts, different observers split into warring camps. But there are innumerable facts on file to permit matching individuals on the crucial variables of an academic career, in order to determine how much of the gross racial or sex differentials in employment, pay, and promotion are due to different career characteristics and how much to employer discrimination against equally qualified individuals.

A mere glance at academic career characteristics shows vast differences between blacks or women and the rest of the profession. Blacks or female academics have a Ph.D. less than half as often as the rest of the profession, publish less than half as many articles per person, and specialize in the lowest-paying fields—notably education, the social sciences, and the humanities, with very few being trained in the natural sciences, medicine, or law, or other highly paid specialties. Even if no employer had a speck of prejudice, black and female academics would still have lower pay and promotion prospects. But in the real world, where prejudice obviously exists, how much concrete difference remains when the career characteristics are the same?

Academic salaries in 1969-70 for black academics with a Ph.D. in the natural and social sciences averaged exactly $62 a year below that of all doctorates in these fields. This was before "goals and timetables" were applied to colleges and universities, and makes *no* allowance for the different distribution of black academics by field. On a field-by-field basis, black academics earned *more* than doctorates as a whole. Earlier data for doctorates in education and the humanities showed whites earning more in the former and blacks earning more in the latter.

Table I. *Race Differences Before Affirmative Action (1969-70 Mean Academic Year Salaries of Doctorates)*

Field	All Doctorates	Black Doctorates	Black Differential
Biological Sciences	$16,000	$16,044	+$ 44
Physical Sciences	$16,466	$16,558	+$ 92
Social Sciences	$15,440	$18,043	+$2,603
Total	$16,500	$16,438	-$ 62

Source: Kent G. Mommsen, "Black Doctorates in American Higher Education," *Journal of the Social and Behavioral Sciences*, Spring 1974, p. 106.

This does not prove the purity of the academic soul. The situation that existed just before affirmative action was the result of more than a decade of civil-rights legislation, demonstrations, and changes in American public opinion. Affirmative action, however, must be judged against the background of the situation that actually existed when numerical goals and timetables were applied to colleges and universities in 1971, not against the background of virtually total exclusion of blacks from leading academic institutions a generation earlier. Some proponents of affirmative action persistently make comparisons with that earlier era, as if all the antidiscrimination forces of the 1960s had never existed.

The issue of equal representation is a little more complicated than the issue of equal pay, and the case of women is somewhat different from that of minorities—but the end results are equally clear-cut. If representation in academic employment is measured against the qualified supply, everything depends upon how *qualified* is defined. Taking the standard academic requirement of a Ph.D. for a long-term career as a tenured professor (though non-Ph.D.'s fill many nontenured positions), both blacks and women are *over*represented among academics. Women hold about 10 percent of all Ph.D.'s, but are more than 20 percent of the academics. Blacks hold less than 1 percent of the Ph.D.'s, but are more than 2 percent of the academics. These figures are, of course, nowhere near the population proportions for either group, nor are they any reason for complacency, but they do suggest that the *cause* of underrepresentation is not necessarily employer discrimination. (The complex social processes behind the figures reach back well before the date when the statistics were collected, and extend well beyond the institution at which they were collected.)

Although minorities and women are often lumped together, it is very questionable to lump even minorities together. Orientals have very different patterns from blacks, and women are quite different from either. The crucial variable for academic women's careers is marriage. Single academic women with a Ph.D. achieve the rank of full professor more often than do other academics with similar years of experience—though married female Ph.D.'s achieve that rank far less frequently. This was true *before* affirmative action. Moreover, the average 1968-69 academic-year salary of full-time female academics who were never married was slightly *higher* than that of males who were never married (Table II). Indeed a number of measures and indicators show that the basic difference in pay and promotion was between married women and all other persons. The gross "male" versus "female" comparisons are lopsided largely because married women (and especially married women with children) drag down the averages of other women.

It is not difficult to understand why married female academics fall so far behind others. Innumerable surveys show that (1) married academic women put more time than married academic men into the home and family; (2) the geographical location of academic couples is usually determined by the husband's career prospects, with little concern for how this affects the wife's career; and (3) women interrupt their careers more often than men, usually

Table II. *Sex Differentials Before Affirmative Action (1968-69 Mean Academic-Year Salary, All Academic)*

	Male Academics	Female Academics	Female/Male Salary Percentage
Never married	$11,070	$11,523	104%
Presently married	$13,562	$10,264	76%
Divorced, widowed, etc.	$15,065	$13,176	88%

Source: American Council on Education.

for childbearing or other reasons related to the needs of others. Surveys of academics show that men and women both overwhelmingly agreed that marriage advances a man's career and retards a woman's. Income statistics confirm these beliefs: While academic women who never married have an edge over their male counterparts, married academic men have a huge advantage over married female academics. The situation averages out to a "male" advantage over "females," but this average conceals more than it reveals. What it conceals is that (1) people who are independent do about the same in the academic world, regardless of sex; (2) people with help (married men) do much better; and (3) those who are doing the helping (married women) do worst of all in their own careers. Such a situation may not be just —but it does not result, however, from employer discrimination.

There are some further indications that the location of the problem is the home rather than the workplace: low marriage rates and high divorce rates among academic women. Academic women are married less frequently than academic men and divorced several times as often. This tendency reflects more than the general problem for women of combining a career with marriage. Nonacademic female Ph.D.'s have higher marriage rates than academic female Ph.D.'s, as do women in other professions. The academic profession is unique not only in the Darconian "publish or perish" rule, which demands great amounts of time for research, but also in the geographical isolation of most top research universities. The demands of continuous research are an obvious strain on whoever assumes the primary responsibility for maintaining domestic life—the wife, in most cases. The geographical isolation is a less obvious but very potent force, as well. An academic woman whose husband teaches at Cornell will not have an equally prestigious institution available as a potential employer within a radius of two hundred miles (for UCLA the comparable figure would be four hundred miles). So her career faces a major setback, barring the happy coincidence that the same institution has an opening for her at the same time that it has one for him—unless her husband considers her career equally important in deciding where to locate, which may be an even more unlikely circumstance. If she resigns herself to working at a less prestigious institution nearby, she may be accepting not only a lower salary but also a lesser prospect of developing her own abilities in the environment that such growth requires. While Cornell or UCLA may be unusually isolated, it is rare to have several top-rated research universities within commuting distance of one another. The result is that a married academic woman, equally qualified with her husband, is going to be underutilized unless the couple agree to alternate, or somehow share, the inherent disadvantages of their professional situation—or unless a coincidence rescues them from some hard choices.

THE SITUATION "AFTER"

What drastic changes have been wrought by affirmative action in the academic world to result in the great outpourings of words and emotions? Practically none, as far as the pay, employment, or promotions of women and minorities are concerned. The ACE data show that blacks were 2.1 percent of academics in 1968-69 and 2.9 percent in 1972-73, while women were 19.1 percent in 1968-69 and 20.0 percent in 1972-73. These are hardly revolutionary changes. Later data from studies also show very little change.

Neither are there dramatic changes in the salaries of minorities or women relative to other members of the academic profession. A tabulation of ACE data shows a black/white salary differential of $640 per year for academic year 1972-73 in favor of whites ($16,677 versus $16,037); but blacks usually earn slightly more than whites on a field-by-field basis, with degrees and publications held constant. This is very similar to the statistical results before affirmative action. For women, NAS data show that full-time, continuously employed female doctorates in the natural sciences and the social sciences earn identical percentages of the incomes of male doctorates in these fields in 1970 and in 1973.

What is a drastic change is that the *process* of academic hiring has become a bureaucratic nightmare, regardless of who ends up being hired. A university's affirmative-action report to the government typically weighs several pounds—and may still be rejected for not being detailed enough! The University of Michigan spent $350,000 for compiling statistics alone. HEW prescribes elaborate and arbitrary formulas for determining the available supply of qualified applicants—formulas which defy economics, statistical theory, or logic. Moreover, the long-standing practice of having a professor's qualifications judged by other specialists in his field is increasingly being overturned by academic administrators who now either take the decision out of the hands of academic departments or put the departments under heavy pressure to act in a way that will preserve the institution's access to federal money. This need not involve hiring a minority or female faculty member—and usually does not, as the statistics indicate—but does involve a legalistic and bureaucratic manner of recruiting, screening, and evaluating candidates in order to generate enough paperwork to show "good faith efforts" to meet numerous goals and timetables for minority and female employment. These charades take the place of meeting quotas which no one seriously expects to be met. For example, if American colleges and universities were to hire every black Ph.D. in the United States, active or retired (or indeed, living or dead)—a 100 percent drain from industry, government, and other institutions—the result would still be less than three black faculty members per institution. Given the hard facts of the situation, it is not surprising that colleges and universities do not fulfill their employment goals, but instead go through a costly and demoralizing process called "good-faith efforts"—a process equally embittering to supporters and opponents of affirmative action. This produces few jobs and much anguish.

An additional source of bitterness is the current academic retrenchment in hiring, brought on by financial conditions. This retrenchment means that many aspiring academics would necessarily have had their career hopes disappointed, regardless of affirmative action. Now, when a hundred white male applicants are rejected, they can all blame it on one or two minority or female academics who were hired—even though over 90 percent of the white males could not have been hired anyway, and there are probably ten or twenty other white males hired for the one or two "affirmative action" professors. But administrators can, of course, *tell* rejected applicants that they lost out because of affirmative action, whether it is true or not, because that may be easier than telling them the real reasons. Again, the situation has high potential for [creating] bitterness for both the supporters and the opponents of affirmative action.

QUALIFICATIONS

Among the many crudities of the affirmative-action program is the notion of "qualified" applicants. Given the enormous range of standards among the thousands of American colleges and universities, virtually anyone who has been to graduate school is "qualified" to teach somewhere, while only a small fraction of the Ph.D.'s are qualified to teach at the top institutions. In the real world, the question of qualifications is the question whether an individual's career characteristics—degrees, publications, and so forth—match those sought by the employing institution. If a university does not hire someone, that does not mean either that the candidate is "unqualified" to be in the profession or that the university is being unreasonable or discriminatory. But, obvious as this is, the government defines "underutilization" as the existence of a lower representation of a given group among employees than the representation of that same group in the "available" supply of "qualified" people. Moreover, the meaning of *qualified* has been stretched to mean "qualified to be trained," and the "available" supply includes women who no longer work (usually because of their husbands' prosperity).

The government's crude concept of a pool of "qualified" individuals overlooks the basic fact that academic departments in general do not hire faculty in general. Departments hire specialists in different areas of their respective fields. An economics department will seldom be in the market for "an economist" or even a "qualified" economist. They will be looking for an international-trade theorist familiar with econometrics, or a labor economist knowledgeable about manpower-training programs. Statistics on the racial or sex composition of the economics profession are irrelevant. Women, for example, are distributed very differently among the specialties in economics than are their male counterparts. What matters is the pool of qualitatively comparable people in the specialty, which may be only a half-dozen for any given department at a given time. Schools at the top of the prestige rankings are unlikely to have even this many candidates usually available to move at a given time—although hundreds lacking the qualifications may submit resumes if the position is advertised. Moreover, it will be virtually impossible to draw up in advance a list of vacancies to be filled in the years ahead—as the government would like—for that means predicting which members of a department are likely to leave.

THE "OLD-BOY NETWORK"

Universities have long relied on the expertise of their respective departments in gauging job qualifications, rather than have administrators pretend to be experts on every field from art to zoology. The department, in turn, often has had to canvass the opinions of trusted colleagues at other institutions to develop a balanced assessment of candidates or to suggest likely prospects. Since no one department is in touch with the thousands of other kindred departments in the country, each is limited in its information network to a relative handful of similar departments for candidates about whom it can get the kind of detailed and reliable information it wants. This situation has led to charges of an "old-boy network," through which jobs are given to cronies, and in particular to the charge that minorities and women, as outsiders, are institutionally disadvantaged by the very existence of the network. As in so much of the affirmative-action controversy, however, in this charge there is a premium on rhetoric, preconceptions, and insinuations, and a virtual moratorium on facts.

Two considerations must be separated: (1) the necessity and value of the informal communications network as a recruiting channel in general, and (2) the extent to which minorities and women are outside this network. The first is a large subject in itself. Long before affirmative action, there were numerous attempts to replace the informal networks with a more rational system of academic hiring—with *rational* being used here in the usual sense of something plausible to those unfamiliar with the intricacies of the situation. It is significant that all these attempts at rational hiring systems failed miserably, in terms of the reported dissatisfaction of both employers and employees and their observable unwillingness to continue investing time in alternative systems. The more relevant question for affirmative action is whether minority and female academics are outside the recruiting channels, which are used especially frequently by top-rated academic institutions, and which are especially important at the beginning of an individual's academic career—before there has been time to establish a scholarly reputation independent of this informal network. The fact is that women receive their Ph.D.'s at the top universities—*within* the "old-boy network"—a higher percentage of the time than men. A comprehensive survey by Professor Mommsen found the same to be true of blacks, with more than half of all black Ph.D.'s coming from just ten universities (mostly top-ranked institutions), compared to 37 percent of all white Ph.D.'s being products of the ten most frequent Ph.D.-granting institutions. The ACE sample, with different definitions, indicates that a higher percentage of white academics than of black academics received their Ph.D.'s from top-ranked institutions (29 percent versus 22 percent). In any case, the hard facts show nothing like the exclusion of women and blacks from the "old-boy network" suggested by the prevailing rhetoric. It is significant that the purveyors of such rhetoric have found it unnecessary to supply any supporting evidence.

THE PROBLEMS OF MINORITIES

With all the caveats about "qualifications," it is still useful to get a general view of the career characteristics of minorities and women. The ACE data permit the inclusion of Orientals, so that *minority* need not be synonymous with *black* as it so often is, because of relatively more abundant statistics on the black population compared with Mexican-American, Puerto Ricans, American Indians, and other ethnic minorities.

The data in Table III show both the salary edge of white academics over blacks, and also the *reason* for that edge—a different distribution among various qualification brackets, rather than an edge within those brackets themselves. Blacks, in fact, have the salary edge over whites within three out of the four brackets. These statistics also undermine the belief that "incompetent" blacks are generally earning "exorbitant" academic salaries because of affirmative action. Actually it is the most-qualified blacks who have the greatest edge over their white counterparts, while the least-qualified blacks do not earn as much as the least qualified whites. This is even more apparent when these statistics are further broken down according to publication

Table III. *Mean Academic-Year Salary (1972-73) of Full-Time Faculty*

	White Academics	Black Academics	Oriental Academics
"Distinguished" or "strong" Ph. D.	$17,991 (11%)	$20,399 (4%)	$18,235 (16%)
Lower-ranked Ph.D.	$17,414 (14%)	$19,014 (6%)	$17,035 (27%)
Unranked doctorate	$18,179 (12%)	$20,499 (8%)	$16,724 (17%)
Less than doctorate	$15,981 (62%)	$15,195 (82%)	$12,272 (41%)
All faculty	$16,677 (100%)	$16,037 (100%)	$15,419 (100%)

Source: American Council on Education.

records: Black academics who have published five or more scholarly articles average about $3,000 per year more than white academics who have published five or more scholarly articles, while black faculty who have published nothing earn slightly less than white faculty who have published nothing. Insofar as this is attributable to affirmative-action pressures, it suggests that that program has had its greatest financial impact on those blacks who needed it least.

The situation for Orientals is very different. Oriental faculty earn slightly less than black or white faculty, but are better qualified than either—whether measured by the percentage holding a Ph.D., the proportion of Ph.D.'s from top-rated departments, or the number of publications per person. More than 40 percent of all Oriental faculty had published five or more scholarly articles, compared with 31 percent for whites and 12 percent for blacks.

The case of Oriental faculty illustrates the pitfalls in trying to determine the level of discrimination from the amount of gross differentials. There are minor salary differentials among all three racial groups, but these small differentials represent substantial underpayment of Oriental faculty relative to others with the same qualifications in the same fields. Orientals are in the high-paying natural sciences to a greater extent than either blacks or whites, so that they would tend to have the highest salaries overall, if everyone were paid the same within each field. But Orientals are almost invariably the lowest paid, by two or three thousand dollars per year in every field for any given level of degree and any given number of articles published. For example, Orientals in the natural sciences with five or more articles published averaged $17,852 in salary in 1972-73, compared to $19,469 for whites and $20,640 for blacks with these same qualifications. In the humanities, Orientals with five or more articles earned nearly $2,000 a year less than blacks and nearly $4,000 a year less than whites with the same publication records. In the social sciences the Orientals with the most publications earned $4,000 per year less than whites with the same publication records. In the social sciences the Orientals with the most publications earned $4,000 per year less than whites and $8,000 less than blacks in the same category. In all three fields, Orientals had Ph.D.'s more often than blacks or whites, and had these Ph.D.'s from higher-ranked departments than the other two groups. In short, just as substantial pay differentials overall do not prove discrimination —because groups fall in different qualifications categories—so an absence of large gross differentials between groups does not prove an absence of discrimination, if one group has large unrewarded qualifications differentials.

The complications of marital status make it impossible to directly compare women with men in the same way. However, a further breakdown of the data already cited in Table II shows that "never married" women with publications earned slightly more ($293 annually) than "never-married" men in top-rated institutions, and slightly less ($114 annually) in other institutions; and "never married" women without publications in unranked institutions earned a hefty 45 percent more than "never married" men in the same category. This lends support to the belief that many able women end up in non-research institutions because they prefer teaching, and are therefore superior to the men who more often end up in such places simply beause they could not do better. It also indicates that when women do better than men, they get paid more than men.

The preference of women for teaching over research is not only significant in itself, it also highlights the crucial element of individual *choice*, which is routinely ignored in syllogistic arguments that go directly from statistical "under-representation" to "exclusion" or "discrimination." Blacks, too, exercise individual preference and choice. The Mommsen study found that black faculty were unwilling to move from their present positions—mostly in black colleges—for less than a $6,000-per-year raise. They are hardly standing with their noses pressed against the windows of universities from which they are "excluded."

THE NEGATIVE EFFECTS

If the affirmative-action program was merely inane, futile, and costly, it might deserve no more attention than other government programs of the same description. But it has side effects which are negative in the short run and perhaps poisonous in the long run. While doing little or nothing to advance the position of minorities and females, it creates the impression that the hard-won *achievements* of these groups are *conferred* benefits. Especially in the case of blacks, this means *perpetuating* racism instead of allowing it to die a natural death or to fall before the march of millions of people advancing on all economic fronts in the wake of equal-opportunity laws and changing public opinion. During the 1960s—*before* affirmative action—black incomes in the United States rose at a higher rate than white incomes. So, too did the proportion of blacks in college and in skilled and professional occupations—and along with this came a faster decline in the proportion of black families below the poverty line or living in substandard housing. When people ask why blacks cannot pull themselves up the way other oppressed minorities have in the past, many white liberals and black spokesmen fall right into the trap and rush in to offer sociological explanations. But there is nothing to explain. The fact is that blacks have pulled themselves up—from further down, against stronger opposition—and show every indication of continuing to advance.

While this advance is the product of generations of struggle, it accelerated at an unprecedented pace in the 1960s, once the worst forms of discrimination had been outlawed and stigmatized. Black income as a percentage of white income reached its peak in 1970—the year *before* numerical goals and timetables. That percentage has gone down since. What affirmative action has done is to destroy the legitimacy of what had already been achieved, by making all black achievements look like questionable accomplishments, or even outright gifts. Here and there, this program has undoubtedly caused some individuals to be hired who would otherwise not have been hired—but even that is a doubtful gain in the larger context of attaining self-respect and the respect of others.

The case of women is different in many factual respects, but the principle is the same. Unfortunately, there is much fictitious "history" used to apply the "minority" concept to women. The fact is that women were a higher proportion of college faculty, Ph.D.'s, M.D.'s, people in *Who's Who,* and so forth, generations ago than they are today—and female incomes in the nation as a whole were a higher percentage of male incomes then than they are now. While many factors may have influenced their relative decline over the decades, that long decline parallels a rise in marriage rates among educated women and a rising birth rate among women in general—the population explosion—and the recent upturn for women has followed a reversal in these trends that had tied them to domesticity. In the case of women, as in the case of minorities, this all happened *before* affirmative action and its numerical goals and timetables. Their achievements were also made to look like the government's gift.

Who were the gainers from affirmative-action quotas? Politically, the Nixon administration, which introduced the program, gained by splitting the ethnic coalition that had elected liberal Democrats for decades. Blacks and Jews, for example, were immediately at each other's throats, after having worked together for years on civil-rights legislation and other sociopolitical goals. Whether the architects of Watergate had any such Machiavellian design in mind is a question on which each can speculate for himself. Certainly, the clearest continuing beneficiaries are the bureaucrats who acquired power, appropriations, and publicity from their activities, and who have stretched the law far beyond any congressional intent. Nothing in the Civil Rights Acts or the executive orders authorizes quotas by any name, and both the congressional debates and the specific language of the law forbid them. But the boldness of the various agencies who interpret and administer affirmative action, and the reluctance of courts to overrule administrative agencies, has permitted the growth of an administrative empire serving itself in the name of serving the disadvantaged.

The semantic evasions and political zigzags which have marked the evolution of affirmative-action programs are symptomatic of the confused thinking that exists in this area. Central to this confusion is a failure to understand the tragic situation of disadvantaged groups—tragic both in the sense of involving unhappy circumstances and in the classical sense of involving a genuine conflict of rights, not merely a conflict between the "good guys" and the "bad guys."

Senator HATCH. Thank you, Professor Sowell.

Senator HATCH. Our third witness this morning will be Prof. Thomas Nagel, who for many years was with Princeton University's School of Philosophy.

He now teaches at the School of Philosophy of New York University.

He has also taught at the University of California at Berkley and Rockefeller University and has lectured at Oxford University in England.

He is the associate editor of "Philosophy and Public Affairs" and has written extensively on the public affair that we are, of course, exploring today—affirmative action programs.

Professor Nagel, we are really happy to have you here with us today.

Please proceed.

STATEMENT OF THOMAS NAGEL, PROFESSOR OF PHILOSOPHY, NEW YORK UNIVERSITY, NEW YORK, N.Y.

Dr. NAGEL. Thank you, Mr. Chairman.

Just to complicate the terminology, I am going to use the term "strong affirmative action" for preferential programs, to distinguish it from what I call "weak affirmative action"—by which I mean simply, efforts to insure equality of opportunity.

I think the distinction is important and should not be blurred. It is not possible to defend strong affirmative action by the arguments that justify weak affirmative action.

Strong affirmative action is what is controversial and what I shall try to defend, especially for blacks.

I also believe that a defender of the practice must acknowledge that there are serious arguments against it, and that it is defensible only because the arguments for it have great weight.

My view is that while strong affirmative action is intrinsically undesirable and should be undertaken only with reluctance, it is a legitimate and perhaps indispensable method of pursuing a goal so important to the national welfare that it can be justified as a temporary, though not short-term, policy for both public and private institutions.

In this respect, it is like other policies that impose burdens on some for the public good.

I want to proceed by stating the objections to strong affirmative action, trying to assess their weight, and then explaining why I think the arguments for it are sufficient to overcome them.

The first objection is that it is inefficient. This needs little discussion. It is obvious that if you appoint a less-qualified person to a position over other candidates who are more qualified, there will be a loss in competence and a loss in the effectiveness with which the job is done or with which the educational program is undertaken. I will not say any more about that.

Second, it is unfair. It is unfair, I want to acknowledge, if some are passed over for admission or advancement or appointment because of membership in a group they were born into, where this has nothing to do with their individual qualifications for the position. Certainly a lot of strong affirmative action has that character.

I think it is important to examine the character of the unfairness here to see how strong an objection that is. It does not mean that strong affirmative action is morally repugnant in the manner of racial or sexual discrimination. It is nothing like those practices. Like them, it employs race and sex as criteria of selection. But it does so for entirely different reasons.

Racial and sexual discrimination are based on contempt, or even loathing for the excluded group—the feeling that certain contacts with them are degrading to members of the dominant group; that they are fit only for subordinate positions or menial work. Strong affirmative action involves none of this. It is simply a means of increasing the social and economic strength of formerly victimized groups and does not stigmatize others. There is an element of individual unfairness here, but it is more like the unfairness of conscription in wartime or property condemnation under the right of eminent domain. Those who benefit or lose out because of their race or sex cannot be said to deserve their good or bad fortune.

This is a fairly common type of unfairness in any large-scale social or private institution. It is not severe enough, I think, to exclude strong affirmative action out of hand as an instrument of policy, provided the result it achieves is sufficiently important. Someone who would otherwise gain a position, purely on the merits, does not suffer a grave moral injustice if he is passed over for strong reasons that can be publicly defended. Race and sex in themselves are bad reasons, but their use as criteria for the purpose of attacking severe racial and sexual inequalities has to be assessed only in the light of all the arguments for and against the policy.

The third objection to strong affirmative action, and I think this is a particularly serious one, is that it damages the self-esteem of those whom it is intended to benefit. It damages the esteem in which they are held by others.

While strong affirmative action is in effect, and generally known to be so, no one in an affirmative action category who gets a desirable job or is admitted to a selective university can be sure that he or she has not benefited from the policy.

Even those who would have made it anyway fall under suspicion from themselves and others. It comes to be widely felt that success does not mean the same thing for women and minorities.

These objections are serious. Taken together, they imply, in my view, that strong affirmative action should be undertaken only to achieve a social goal of the first importance and only as part of a crash program that will end.

While this condition is not met by all programs of affirmative action now in effect, it is met by those which address the most deep-seated, stubborn, and radically unhealthy divisions in the society—divisions whose removal is a condition of basic justice and social cohesion.

The situation of black people in our country is unique in this respect. For almost a century after the abolition of slavery, we had a rigid racial caste system of the ugliest kind. It only began to break up 25 years ago.

In the South it was enforced by law, and in the North in a somewhat less severe form by social convention. Whites were thought to be defiled by social or residential proximity to blacks. Intermarriage was taboo. Blacks were denied the same level of public goods, education, and legal protection as whites. They were restricted to the most menial occupations and were barred from any positions of authority over whites.

The visceral feelings of black inferiority and untouchability that this system expressed were deeply ingrained in the members of both races. They continue, not surprisingly, to have their effect. Blacks still form, to a considerable extent, a hereditary social and economic community, characterized by a widespread poverty, unemployment, and social alienation.

I am not making a compensation argument here. I am saying that because of the history leading up to the present condition of blacks, it presents the Nation with a problem that requires special action.

When the society finally got around to moving against the caste system, it might have done no more than to enforce straight equality of opportunity—perhaps with the help of weak affirmative action—and then wait a few hundred years while things gradually got better.

Fortunately, it decided instead to accelerate the process by both public and private institutional action, because there was wide recognition of the intractable character of the problem posed by this insular minority and its place in the Nation's history and collective consciousness.

This has not been going on very long, but the results are already impressive, especially in speeding the advancement of blacks into the middle class.

Affirmative action has not done much to improve the position of poor and unskilled blacks. That is the most serious part of the problem, and it requires a more direct economic attack.

Increased access to higher education and upper level jobs is an essential part of what must be achieved to break the structure of drastic separation that was left largely undisturbed by the legal abolition of the caste system.

Changes of this kind require a generation or two. My guess is that strong affirmative action for blacks will continue to be justified into the early decades of the next century, but that by then it will have accomplished what it can and will no longer be worth the costs.

One point deserves special emphasis. The goal to be pursued is the reduction of a great social injustice, not proportional representation of the races in all institutions and professions.

Proportional racial representation is of no value in itself. It is not a legitimate social goal, and it should certainly not be the aim of strong affirmative action whose drawbacks make it worth adopting only against a serious and intractable social evil, such as hereditary stratification, especially racial.

I will not read the rest of my remarks but just make this comment.

I think that the argument is considerably less strong for other racial groups and for women than it is for blacks. Accordingly, I suspect that justification for strong affirmative action is likely to run out fairly quickly for those groups.

Senator HATCH. Thank you, Dr. Nagel.

Your entire prepared statement will be made a part of the hearing record at this point.

[The prepared statement of Dr. Nagel follows:]

PREPARED STATEMENT OF PROF. THOMAS NAGEL, DEPARTMENT OF PHILOSOPHY, NEW YORK UNIVERSITY

The term "affirmative action" has changed in meaning since it was first introduced. Originally it referred only to special efforts to insure equal opportunity for members of groups that had been subject to discrimination. These efforts included public advertisement of positions to be filled, active recruitment of qualified applicants from the formerly excluded groups, and special training programs to help them meet the standards for admission or appointment. There was also close attention to procedures of appointment, and sometimes to the results, with a view to detecting continued discrimination, conscious or unconscious.

More recently the term has come to refer also to some degree of definite preference for members of these groups in determining access to positions from which they were formerly excluded. Such preference might be allowed to influence decisions only between candidates who are otherwise equally qualified, but usually it involves the selection of women or minority members over other candidates who are better qualified for the position.

Let me call the first sort of policy "weak affirmative action" and the second "strong affirmative action". It is important to distinguish them, because the distinction is sometimes blurred in practice. It is strong affirmative action—the policy of preference—that arouses controversy. Most people would agree that weak or precautionary affirmative action is a good thing, and worth its cost in time and energy. But this does not imply that strong affirmative action is also justified.

I shall claim that in the present state of things it is justified, most clearly with respect to blacks. But I also believe that a defender of the practice must acknowledge that there are serious arguments against it, and that it is defensible only because the arguments for it have great weight. Moral opinion in this country is sharply divided over the issue because significant values are involved on both sides. My own view is that while strong affirmative action is intrinsically undesirable, it is a legitimate and perhaps indispensable method of pursuing a goal so important to the national welfare that it can be justified as a temporary, though not short-term, policy for both public and private institutions. In this respect it is like other policies that impose burdens on some for the public good.

I shall begin with the arguments against. There are three objections to strong affirmative action: that it is inefficient; that it is unfair; and that it damages self-esteem.

The degree of inefficiency depends on how strong a role racial or sexual preference plays in the process of selection. Among candidates meeting the basic qualifications for a position, those better qualified will on the average perform better, whether they are doctors, policemen, teachers, or electricians. There may be some cases, as in preferential college admissions, where the immediate usefulness of making educational resources available to an individual is thought to be greater because of the use to which the education will be put or because of the internal effects on the institution itself. But by and large, policies of strong affirmative action must reckon with the costs of some lowering in performance level: the stronger the preference, the larger the cost to be justified. Since both the costs and the value of the results will vary from case to case, this suggests that no one policy of affirmative action is likely to be correct in all cases, and that the cost in performance level should be taken into account in the design of a legitimate policy.

The charge of unfairness arouses the deepest disagreements. To be passed over because of membership in a group one was born into, where this has nothing to do with one's individual qualifications for a position, can arouse strong feelings of resentment. It is a departure from the ideal—one of the values finally recognized in our society—that people should be judged so far as possible on the basis of individual characteristics rather than involuntary group membership.

This does not mean that strong affirmative action is morally repugnant in the manner of racial or sexual discrimination. It is nothing like those practices, for though like them it employs race and sex as criteria of selection, it does so for entirely different reasons. Racial and sexual discrimination are based on contempt or even loathing for the excluded group, a feeling that certain contacts with them are degrading to members of the dominant group, that they are fit only for subordinate positions or menial work. Strong affirmative action involves none of this: it is simply a means of increasing the social and economic strength of formerly victimized groups, and does not stigmatize others.

There is an element of individual unfairness here, but it is more like the unfairness of conscription in wartime, or of property condemnation under the right of eminent domain. Those who benefit or lose out because of their race or sex cannot be said to deserve their good or bad fortune.

It might be said on the other side that the beneficiaries of affirmative action deserve it as compensation for past discrimination, and that compensation is rightly exacted from the group that has benefited from discrimination in the past. But this is a bad argument, because as the practice usually works, no effort is made to give preference to those who have suffered most from discrimination, or to prefer them especially to those who have benefited most from it, or been guilty of it. Only candidates who in other qualifications fall on one or other side of the margin of decision will directly benefit or lose from the policy, and these are not necessarily, or even probably, the ones who especially deserve it. Women or blacks who don't have the qualifications even to be considered are likely to have been handicapped more by the effects of discrimination than those who receive preference. And the marginal white male candidate who is turned down can evoke our sympathy if he asks, "Why me?" (A policy of explicitly compensatory preference, which took into account each individual's background of poverty and discrimination, would escape some of these objections, and it has its defenders, but it is not the policy I want to defend. Whatever its merits, it will not serve the same purpose as direct affirmative action.)

The unfairness of strong affirmative action though real, does not bear comparison with the unfairness of racial or sexual discrimination, and is not severe enough to exclude it as an instrument of policy, provided the result it achieves is sufficiently important. Someone who would gain a position purely on the merits does not suffer a grave moral injustice if he is passed over for strong reasons that can be publicly defended. Race and sex in themselves are bad reasons, but their use as criteria for the purpose of attacking severe racial and sexual inequalities can be assessed only in light of all the arguments for and against the policy.

The third objection concerns self-esteem, and is particularly serious. While strong affirmative action is in effect, and generally known to be so, no one in an affirmative action category who gets a desirable job or is admitted to a selective university can be sure that he or she has not benefited from the policy. Even those who would have made it anyway fall under suspicion, from themselves and from others: it comes to be widely felt that success does not mean the same thing for women and minorities. This painful damage to esteem cannot be avoided. It should make any defender of strong affirmative action want the practice to end as soon as it has achieved its basic purpose.

I have examined these three objections and tried to assess their weight, in order to decide how strong a countervailing reason is needed to justify such a policy. In my view, taken together they imply that strong affirmative action involving significant preference should be undertaken only if it will substantially further a social goal of the first importance. While this condition is not met by all programs of affirmative action now in effect, it is met by those which address the most deep-seated, stubborn, and radically unhealthy divisions in the society, divisions whose removal is a condition of basic justice and social cohesion.

The situation of black people in our country is unique in this respect. For almost a century after the abolition of slavery we had a rigid racial caste system of the ugliest kind, and it only began to break up twenty-five years ago. In the South it was enforced by law, and in the North, in a somewhat less severe form, by social convention. Whites were thought to be defiled by social or residential proximity to blacks, intermarriage was taboo, blacks were denied the same level of public goods—education and legal protection—as whites, were restricted to the most menial occupations, and were barred from any positions of authority over whites. The visceral feelings of black inferiority and untouchability that this system expressed were deeply ingrained in the members of both races, and they continue, not surprisingly, to have their effect. Blacks still form, to a considerable extent, a hereditary social and economic community characterized by wide-spread poverty, unemployment, and social alienation.

When this society finally got around to moving against the caste system, it might have done no more than to enforce straight equality of opportunity, perhaps with the help of weak affirmative action, and then wait a few hundred years while things gradually got better. Fortunately it decided instead to accelerate the process by both public and private institutional action, because there was wide recognition of the intractable character of the problem posed by this insular minority and its place in the nation's history and collective consciousness. This has not been going on very long, but the results are already impressive, especially in speeding the advancement of blacks into the middle class. Affirmative action has not done much to improve the position of poor and unskilled blacks. That is the most serious part of the problem, and it requires a more direct economic attack. But increased access to higher education and upper-level jobs is an essential part of what must be achieved to break the structure of drastic separation that was left largely undisturbed by the legal abolition of the caste system.

Changes of this kind require a generation or two. My guess is that strong affirmative action for blacks will continue to be justified into the early decades of the next century, but that by then it will have accomplished what it can, and will no longer be worth the costs. One point deserves special emphasis. The goal to be pursued is the reduction of a great social injustice, not proportional representation of the races in all institutions and professions. Proportional racial representation is of no value in itself. It is not a legitimate social goal, and it should certainly not be the aim of strong affirmative action, whose drawbacks make it worth adopting only against a serious and intractable social evil.

This implies that the justification for strong affirmative action is much weaker in the case of other racial and ethnic groups, and in the case of women. At least, the practice will be justified in a narrower range of circumstances and for a shorter span of time than it is for blacks. No other group has been treated quite like this, and no other group is in a comparable status. Hispanic-Americans occupy an intermediate position, but it seems to me frankly absurd to include persons of oriental descent as beneficiaries of affirmative action, strong or weak. They are not a severly deprived and excluded minorty, and their eligibility serves only to swell the numbers that can be included on affirmative action reports. It also suggests that there is a drift in the policy toward adopting the goal of racial proportional representation for its own sake. This is a foolish mistake, and should be resisted. The only legitimate goal of the policy is to reduce egregious racial stratification.

With respect to women, I believe that except over the short term, and in professions or institutions from which their absence is particularly marked, strong affirmative action is not warranted and weak affirmative action is enough. This is based simply on the expectation that the social and economic situation of women will improve quite rapidly under conditions of full equality of opportunity. Recent progress provides some evidence for this. Women do not form a separate hereditary community, characteristically poor and uneducated, and their position is not likely to be self-perpetuating in the same way as that of an outcast race. The process requires less artificial acceleration, and any need for strong affirmative action for women can be expected to end sooner than it ends for blacks.

I said at the outset that there was a tendency to blur the distinction between weak and strong affirmative action. This occurs especially in the use of numerical quotas, a topic on which I want to comment briefly.

A quota may be a method of either weak or strong affirmative action, depending on the circumstances. It amounts to weak affirmative action—a safeguard against discrimination—if, and only if, there is independent evidence that average qualifications for the positions being filled are no lower in the group to which a minimum quota is being assigned, than in the applicant group as a whole. This can be presumed true of unskilled jobs that most people can do, but it becomes less likely, and harder to establish, the greater the skill and education required for the position. At these levels, a quota proportional to population, or even to representation of the group in the applicant pool, is almost certain to amount to strong affirmative action. Moreover it is strong affirmative action of a particularly crude and indiscriminate kind, because it permits no variation in the degree of preference on the basis of costs in efficiency, depending on the qualification gap. For this reason I should defend quotas only where they serve the purpose of weak affirmative action. On the whole, strong affirmative action is better implemented by including group preference as one factor in appointment or admission decisions, and letting the results depend on its interaction with other factors.

I have tried to show that the arguments against strong affirmative action are clearly outweighed at present by the need for exceptional measures to remove the stubborn residues of racial caste. But advocates of the policy should acknowledge the reasons against it, which will insure its termination when it is no longer necessary. Affirmative action is not an end in itself, but a means of dealing with a social situation that should be intolerable to us all.

From Mortal Questions
by Thomas Nagel
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7

The Policy of Preference

It is currently easier, or widely thought to be easier, to get certain jobs or to gain admission to certain educational institutions if one is black or a woman than if one is a white man. Whether or not this is true, many think it should be true, and many others think it should not. The issue is this: If a black person or a woman is admitted to a law school or medical school, or appointed to an academic or administrative post, in preference to a white man who is in other respects better qualified,[1] and if this is done in pursuit of a preferential policy or to fill a quota, is it unjust? Can the white man complain that he has been unjustly treated? It is important to investigate the justice of such practices, because if they are unjust, it is much more difficult to defend them on grounds of social utility. I shall argue that although preferential policies are not required by justice, they are not seriously unjust either – because the system from which they depart is already unjust for reasons having nothing to do with racial or sexual discrimination.

[1] By saying that the white man is 'in other respects better qualified' I mean that if, e.g., a black candidate with similar qualifications had been available for the position, he would have been selected in preference to the black candidate who was in fact selected; or, if the choice had been between two white male candidates of corresponding qualifications, this one would have been selected. Ditto for two white or two black women. (I realize that it may not always be easy to determine similarity of qualifications, and that in some cases similarity of credentials may give evidence of a difference in qualifications – because, e.g., one person had to overcome more severe obstacles to acquire those credentials.)

I

In the United States we have reached the present situation by the following steps. First, and not very long ago, it came to be widely accepted that deliberate barriers against the admission to desirable positions of blacks and women should be abolished. Their abolition is by no means complete, and certain educational institutions, for example, may be able to maintain limiting quotas on the admission of women for some time. But deliberate discrimination is widely condemned.

Secondly, it was recognized that even without explicit barriers there could be discrimination, either consciously or unconsciously motivated, and this gave support to self-conscious efforts at impartiality, careful consideration of candidates belonging to the class discriminated against, and attention to the proportions of blacks and women in desirable positions, as evidence that otherwise undetectable bias might be influencing the selections. (Another, related consideration was that criteria which were good predictors of performance for one group might turn out to be poor predictors of performance for another group, so that the continued employment of those criteria might introduce a concealed inequity.)

The third step came with the realization that a social system may continue to deny different races or sexes equal opportunity or equal access to desirable positions even after the discriminatory barriers to those positions have been lifted. Socially caused inequality in the capacity to use available opportunities or to compete for available positions may persist, because the society systematically provides to one group more than to another certain educational, social, or economic advantages. Such advantages improve one's competitive position in seeking access to jobs or places in professional schools. Where there has recently been widespread deliberate discrimination in many areas, it is not surprising if the formerly excluded group experiences relative difficulty in gaining access to newly opened positions, and it is plausible to explain the difficulty at least partly in terms of disadvantages produced by past discrimination. This leads to the adoption of compensatory measures, in the form of special training programs, or financial support, or day-care centers, or apprenticeships, or tutoring. Such measures are designed to qualify those whose reduced qualifications are due to racial or sexual discrimination, either because they have been its direct victims, or because they are deprived as a result of membership in a group or community many of whose other members have been discriminated against. The second of these types of influence covers a great deal, and the importance of the social contribution is not always easy to establish. Nevertheless its effects typically include the loss of such goods as self-esteem, self-confidence, motivation, and ambition – all of which contribute to competitive success and none of which is easily restored by special training programs. Even if social injustice has produced such effects, it may be difficult for society to eradicate them.

This type of justification for compensatory programs raises another question. If it depends on the claim that the disadvantages being compensated for are the product of social injustice, then it becomes important how great the contribution of social injustice actually is, and to what extent the situation is due to social causes not involving injustice, or to causes that are not social, but biological. If one believes that society's responsibility for compensatory measures extends only to those disadvantages caused by social injustice, one will assign political importance to the degree, if any, to which racial differences in average I.Q. are genetically influenced, or the innate contribution, if any, to the statistical differences in emotional or intellectual characteristics between men and women. Also, if one believes that among socially produced inequalities, there is a crucial distinction between those that were produced unjustly and those that are merely the incidental results of just social arrangements, then it will be very important to decide exactly where that line falls: whether, for example, certain intentions must be referred to in arguing that a disadvantage has been unjustly imposed and therefore merits compensation. But let me put those issues aside for the moment.

The fourth stage comes when it is acknowledged that some unjustly caused disadvantages that create difficulties of access to positions formally open to all cannot be overcome by special programs of preparatory or remedial training. One is then faced with two alternatives. One can permit the effects of social injustice to confer a disadvantage in access to desirable positions filled simply on the basis of qualifications relevant to performance. Or one can institute a system of preferential selection that will facilitate access for those whose qualifications are lower at least partly because of unjust discrimination in other situations and at other times (and possibly against other persons). This is a difficult choice, and ideally it would be far better to use a more direct method of rectification, than to balance inequality in one part of the social system by introducing a reverse inequality at a different point. If the society as a whole contains serious injustices with complex effects, there is no way for a single institution within that society to adjust its criteria for competitive admission or employment so that the effects of injustice are nullified as far as that institution is concerned. That gives appeal to the position that places should be filled solely by criteria relevant to performance, and if this tends to amplify or extend the effects of inequitable treatment elsewhere, the remedy must be found in a more direct attack on those differences in qualification, rather than in the introduction of irrelevant criteria of appointment or admission which will sacrifice efficiency, productivity, or effectiveness of the institution in its specific tasks.

At this fourth stage we therefore find a broad division of opinion. Some believe that nothing further can legitimately be done in the short run, once the *remediable* unjust inequalities of opportunity between individuals have been dealt with: the irremediable ones are unjust, but further steps to counterbalance them by reverse discrimination would also be unjust, because they must employ irrelevant criteria. On the other hand, some find it unacceptable in such circumstances to stay with the criteria usually related to successful performance, and believe that differential admission or hiring standards for worse-off groups are justified because they compensate in some approximate way for the inequalities of opportunity produced by past injustice.

But at this point there is also a temptation to resolve the dilemma and strengthen the argument for preferential standards by proceeding to a fifth stage. One may reflect that if the criteria relevant to the prediction of performance are not inviolable it may not matter whether one violates them to compensate for disadvantages caused by injustice or disadvantages caused in other ways. One does not have to settle the question of the degree to which racial or sexual discrepancies are socially produced, because the differentials in reward ordinarily correlated with differences in qualifications are not the result of natural justice. They simply arise in a competitive system when employers try to fill positions and perform tasks efficiently. Certain abilities may be relevant to filling a job from the point of view of efficiency, but they are not relevant from the point of view of justice, because they provide no indication that one deserves the rewards that go with the job. The qualities, experience, and attainments that make success in a certain position likely do not in themselves merit the rewards that happen to attach to occupancy of that position in a competitive economy.

Consequently it might be concluded that if women or black people are less qualified, for *whatever* reason, in the respects that lead to success in the professions that our society rewards most highly, then it would be just to compensate for this disadvantage, within the limits permitted by efficiency, by having suitably different standards for these groups, and thus bringing their access to desirable positions more into line with that of others. Preferential treatment would not, on this view, have to be tailored to deal only with the effects of past injustice.

But it is clear that this is not a stable position. For if we abandon the condition that to qualify for compensation an inequity must be socially caused, then there is no reason to restrict the compensatory measures to well-defined racial or sexual groups. Compensatory selection procedures would have to be applied on an individual basis, within as well as between such groups – each person, regardless of race, sex, or qualifications, being granted equal access to the desirable positions, within limits set by efficiency. This might require randomization of law and medical school admissions, for example, from among all the candidates above some minimum standard enabling them to do the work. If we were to act on the principle that different abilities do not merit different rewards, it would result in much more equality than is demanded by proponents of preferential treatment.

There is no likelihood that such a radical course will be adopted in the United States, but the fact that it seems to follow naturally from a certain view about how to deal with racial or sexual injustice reveals something important. When we try to deal with the inequality in advantages that results from a disparity in qualifications (however produced) between races or sexes, we are up against a feature of the system which at every turn exacts costs and presents obstacles in response to attempts to reduce the inequalities. We must face the possibility that the primary injustice with which we have to contend lies in this feature itself, and that some of the worst aspects of what we now perceive as racial or sexual injustice are merely conspicuous manifestations of the great social injustice of differential reward.

II

If differences in the capacities that any society rewards are visibly correlated, for whatever reason, with other traits such as race or religion or social origin, then a system of liberal equality of opportunity will give the appearance of supporting racial or religious or class injustice. Where there is no such correlation, there can be the appearance of justice through equal opportunity. But there is injustice in both cases, and it lies in the schedule of rewards.

The liberal idea of equal treatment demands that people receive equal opportunities if they are equally qualified by talent or education to use those opportunities. In requiring the relativization of equal treatment to characteristics in which people are very unequal, it guarantees that the social order will reflect and probably magnify the initial distinctions produced by nature and the past. Liberalism has therefore come under increasing attack in recent years, on the ground that the familiar principle of equal treatment, with its meritocratic conception of relevant differences, seems too weak to combat the inequalities dispensed by nature and the ordinary workings of the social system.

This criticism of the view that people deserve the rewards that accrue to them as a result of their natural talents is not based on the idea that apart from social institutions no one can be said to deserve anything.[2] For if no one deserves anything, then no

[2] Rawls appears to regard this as the basis of his own view. He believes it makes sense to speak of positive desert only in the context of distributions by a just system, and not as a pre-institutional conception that can be used to measure the justice of the system. John Rawls, *A Theory of Justice* (Cambridge, Mass: Harvard University Press, 1971), pp. 310–13.

inequalities are contrary to desert, and desert provides no argument for equality. But for many benefits and disadvantages, certain characteristics of the recipient *are* relevant to what he deserves. If people are equal in the relevant respects, that by itself constitutes a reason to distribute the benefit to them equally.[3]

The relevant features will vary with the benefit or disadvantage, and so will the weight of the resulting considerations of desert. Desert may sometimes, in fact, be a rather unimportant consideration in determining what ought to be done. But I do wish to claim, with reference to a central case, that differential abilities are not usually among the characteristics that determine whether people *deserve* economic and social benefits (though of course they determine whether people *get* such benefits). In fact, nearly all characteristics are irrelevant to what people deserve in this dimension, and most people therefore deserve to be treated equally.[4] Perhaps voluntary differences in effort or moral differences in conduct have some bearing on economic and social desert. But they are features in which most people do not differ enough to justify very wide differences in reward.[5] I shall not try to defend these claims here, or the legitimacy of the notion of desert itself. If these things make no sense, neither does the rest of the argument.

A decision that people are equally or unequally deserving in some respect is not the end of the story. First of all, desert can be overridden, for example by liberty or even by efficiency. In some cases the presumption of equality is rather weak, and not much is required to depart from it. This will be so if the interest in question is minor or temporally circumscribed, and does not represent an important value in the subject's life.

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[3] Essentially this view is put forward by Bernard Williams in 'The Idea of Equality', in *Philosophy, Politics, and Society* (second series), ed. P. Laslett and W. G. Runciman (Oxford: Blackwell, 1964), pp. 110–131.

[4] This is distinct from a case in which nothing is relevant because there *is* no desert in the matter. In that case the fact that people differed in no relevant characteristics would not create a presumption that they be treated equally. It would leave the determination of their treatment entirely to other considerations.

[5] It is *not* my view that we cannot be said to deserve the *results* of anything which we do not deserve. It is true that a person does not deserve his intelligence, and I have maintained that he does not deserve the rewards that superior intelligence can provide. But neither does he deserve his bad moral character or his above-average willingness to work, yet he probably does deserve the punishments or rewards that flow from those qualities. For an illuminating discussion of these matters, see Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), ch. 7.

Second, it may be that although an inequality is contrary to desert, no one can benefit from its removal: all that can be done is to worsen the position of those who benefit undeservedly from its presence. Even if one believes that desert is a very important factor in determining just distributions, one need not object to inequalities that are to no one's disadvantage. In other words, it is possible to accept something like Rawls' Difference Principle from the standpoint of an egalitarian view of desert.[6] (I say it is possible. It may not be required. Some may reject the Difference Principle because they regard equality of treatment as a more stringent requirement.)

Third (and most significantly for the present discussion), a determination of relative desert in the distribution of a particular advantage does not even settle the question of *desert* in every case, for there may be other advantages and disadvantages whose distribution is tied to that of the first, and the traits relevant to the determination of desert are not necessarily the same from one advantage to another.

This bears on the case under consideration. I have said that people with different talents do not thereby deserve different economic and social rewards. They may, however, deserve different opportunities to exercise and develop those talents.[7] Whenever the distribution of two different types of benefit is connected in this way, through social or economic mechanisms or through natural human reactions, it may be impossible to avoid a distribution contrary to the conditions of desert in respect of at least one of the benefits. There will be a dilemma in which injustice cannot be entirely avoided. It may then be necessary to assign justice in the distribution of one advantage priority over justice in the distribution of another that automatically goes with it.

In the case under discussion, there appears to be a conflict between justice in the distribution of educational and professional opportunities and justice in the distribution of economic

[6] Rawls, *Theory of Justice*, pp. 75–80.

[7] Either because differences of ability are relevant to degree of desert in these respects or because people are equally deserving of opportunities proportional to their talents. More likely the latter.

and social rewards. There is a presumption, based on something more than efficiency, in favor of giving equal opportunities to those equally likely to succeed. But if the presumption in favor of economic equality is considerably stronger, the justification for departing from it must be stronger too. So when 'educational' justice and economic justice come into conflict, it will sometimes be necessary to sacrifice the former to the latter.

III

In thinking about racial and sexual discrimination, the view that economic justice has priority may tempt some to favor admission quotas proportional to the representation of a given group in the population. Whatever explains the small number of women or blacks in the professions, it has the result that they have less of the financial and social benefits that accrue to members of the professions, and what accounts for those differences cannot justify them. So justice may seem to require that more women and blacks be admitted to the professions.

The trouble with this solution is that it does not locate the injustice accurately, but merely tries to correct the racially or sexually skewed economic distribution which is one of its more conspicuous symptoms. We are enabled to perceive the situation as unjust when we see it through its racial manifestations, because race is a subject by now associated in our minds with injustice. But little is gained by merely transferring the same system of differential rewards, suitably adjusted to achieve comparable proportions, to the class of blacks or the class of women. If it is unjust to reward people differentially for what certain qualities enable them to do, it is equally unjust whether the distinction is made between a white man and a black man or between two black men, or two white women, or two black women. There is no way of attacking the unjust reward schedules of a meritocratic system (if indeed they are unjust) by attacking their racial or sexual manifestations directly.

In most societies reward is a function of demand, and many of the human traits most in demand result largely from *gifts* or *talents*. The greatest injustice in our society, I believe, is neither racial nor sexual but intellectual. I do not mean that it is unjust that some people are more intelligent than others. Nor do I mean that society rewards people differentially simply on the basis of their intelligence: usually it does not. But it provides on the average much larger rewards for tasks that require superior intelligence than for those that do not. This is how things work out in a technologically advanced society with a market economy. It does not reflect a social judgment that smart people *deserve* the opportunity to make more money than dumb people. They may deserve richer educational opportunity, but they do not therefore deserve the material wealth that goes with it. The same could be said about society's differential reward of beauty, athletic ability, musicality, etc. But intelligence and its development by education provide a particularly significant and pervasive example.

A general reform of the current schedule of rewards, even if they are unjust, is beyond the power of individual educational or business institutions, working through their admissions or appointments policies. A competitive economy is bound to reward those with superior training and abilities: the refusal to do so will put any business enterprise in a poor competitive position. And those who succeeed in medical school or law school will tend to earn more than those who do not – whatever criteria of admission the schools adopt. It is not the procedures of appointment or admission, based on criteria that predict success, that are unjust, but rather what happens as a result of success.

No completely just solution is available. If different factors determine what is deserved in the distribution of different benefits and disadvantages, and if the distribution of several distinct advantages is sometimes connected even though the relevant factors are not, then inevitably there will be injustice in some respect, and it may be impossible to substitute a principle of distribution that avoids it.

Justice may require that we try to reduce the automatic connections between material advantages, cultural opportunity, and institutional authority. But such changes can be brought about, if at all, only by large alterations in the social system, the system of taxation, and the salary structure. They will not be achieved by modifying the admissions or hiring policies of colleges and universities, or even banks, law firms, and businesses.

Compensatory measures in admission or appointment can be defended on grounds of justice only to the extent that they compensate for specific disadvantages that have themselves been unjustly caused, by factors distinct from the general meritocratic character of the system of distribution. Such contributions are difficult to verify or estimate; they probably vary among individuals in the oppressed group. And even where a justification for preferential treatment exists, it may not be strong enough to create an obligation, since it is doubtful that one element of a pluralistic society is obliged to adopt discriminatory measures to counteract injustice due to another element, or even to the society as a whole.

IV

These considerations suggest that an argument on grounds of justice for the imposition of racial or sexual quotas would be difficult to construct without rather precise assumptions about the source of unequal qualifications between members of different groups. The more speculative the assumptions, the weaker the argument.

But the issue is different if we return to the question posed at the beginning of this essay. The question was not whether preferential treatment is *required* by justice, but whether it is *compatible* with justice. To that question we can give a different answer. If the reflections about differential reward to which we have been led are correct, then preferential treatment need not be seriously unjust, and it may be warranted not by justice but by considerations of social utility. I say not *seriously* unjust, to acknowledge that a departure from the standards relevant to distribution of intellectual opportunities *per se* is itself a kind of injustice. But its seriousness is lessened because the factors relevant to the distribution of intellectual opportunity are irrelevant to the distribution of the material benefits that go with it.

Where the allocation of one benefit on relevant grounds carries with it the allocation of other, more significant benefits to which those grounds are irrelevant, the departure from those grounds need not be a serious offense against justice. This may be so for two reasons. First, the presumption of equal treatment of relevantly equal persons in respect of the first benefit may not be very strong to begin with. Second, the fairness of abiding by that presumption may be overshadowed by the unfairness of the other distribution correlated with it. Consequently, it may be acceptable to depart from the 'relevant' grounds for undramatic reasons of social utility, or to serve legitimate institutional aims, which would not justify more flagrant and undiluted examples of unfairness. Naturally a deviation from the usual method will appear unjust to those who are accustomed to regarding ability to succeed as the correct criterion, but this appearance may be an illusion. That depends on how much injustice is involved in the usual method, and whether the reasons for departing from it are good enough, even though they do not correct the injustice.

The problem, of course, is to say what a good reason is. I do not want to produce an argument that will justify ordinary racial or sexual discrimination designed to preserve internal harmony in a business, for instance. Even someone who thought that the system of differential economic rewards for different abilities was unjust would presumably regard it as an *additional* injustice if standard racial, religious, or sexual discrimination were a factor in the assignment of individuals to highly rewarded positions.

I can offer only a partial account of what makes systematic racial or sexual discrimination so exceptionally unjust. It has no social advantages, and it attaches a sense of reduced worth to a feature with which people are born.[8] A psychological consequence of the systematic attachment of social disadvantages to an inborn feature is that both the possessors of the feature and others begin to regard it as an essential and important characteristic, one that reduces the esteem in which its possessor can be held.[9] Concomitantly, those without the characteristic gain free esteem by comparison, and the arrangement thus sacrifices the most basic personal interests of some for the interests of others, with those sacrificed being on the bottom. (Because similar things can be said about the social and economic disadvantages attaching to low intelligence, that, too, is a major injustice.)

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[8] For a detailed and penetrating treatment of this and a number of other matters discussed here, see Owen M. Fiss, 'A Theory of Fair Employment Laws', *University of Chicago Law Review*, xxxviii (Winter, 1971), 235–314.

[9] This effect would not be produced by an idiosyncratic discriminatory practice limited to a few eccentrics. If some people decided they would have nothing to do with anyone left-handed, everyone else, including the left-handed, would regard it as a silly objection to an inessential feature. But if everyone shunned the left-handed, left-handedness would become a strong component of their self-image, and those discriminated against would feel they were being despised for their essence. What people regard as their essence is not independent of what they get admired and despised for.

Reverse discrimination need not have these consequences, and it can have social advantages. Suppose, for example, that a substantial increase in the number of black doctors is desirable because the health needs of the black community are unlikely to be met otherwise. And suppose that, at the present average level of premedical qualifications among black applicants, it would require a huge expansion of total medical school enrollment to supply the desirable absolute number of black doctors without adopting differential admission standards. Such an expansion may be unacceptable either because of its cost or because it would produce a total supply of doctors, black and white, much greater than the society requires. This is a strong argument for preferential admissions, not on grounds of justice but on grounds of social utility. (In addition, there is the salutary effect on the aspirations and expectations of other blacks, from the visibility of exemplars in formerly inaccessible positions.)

The argument in the other direction, from the point of view of qualified white applicants who are turned away, is not nearly as strong as the argument against standard racial discrimination. The self-esteem of whites as a group is not endangered by such a practice, since the situation arises only because of their general social dominance, and the aim of the practice is only to benefit blacks, not to exclude whites. Moreover, although the interests of some are being sacrificed to the interests of others, it is the better placed who are being sacrificed and the worst placed who are being helped.[10] The policy is designed to favor a group whose social position is exceptionally depressed, with destructive consequences both for the self-esteem of members of the group and for the health and cohesion of the society.[11]

So, if a preferential admission or appointment policy is adopted to mitigate a grave social evil, and it favors a group in a particularly unfortunate social position, and if for these reasons it diverges from a meritocratic system that is not itself required by justice, then the preferential practice is probably not unjust.[12]

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[10] This is a preferable direction of sacrifice if one accepts Rawls' egalitarian assumptions about distributive justice. Rawls' *Theory of Justice*, pp. 100–3.

[11] It is therefore not, as some have feared, the first step toward an imposition of minimal or maximal quotas for all racial, religious, and ethnic subgroups of the society.

It is not without costs, however. Not only does it inevitably produce resentment in the better qualified who are passed over because of the policy, but it also allows those who would in any case have failed to gain a desired position on the basis of their qualifications to feel that they may have lost out to someone less qualified because of the preferential policy. Similarly, such a practice cannot do much for the self-esteem of those who know they have benefited from it, and it may threaten the self-esteem of those in the favored group who would in fact have gained their positions even in the absence of the discriminatory policy, but who cannot be sure that they are not among its beneficiaries. This has led some institutions to lie about their policies, or to hide them behind clouds of obscurantist rhetoric about the discriminatory character of standard admissions criteria. Such concealment is possible and even justified up to a point, but the costs cannot be entirely evaded, and preferential policies will be tolerable only so long as they contribute to the eradication of great social evils.

V

When racial and sexual injustice have been reduced, we shall still be left with the great injustice of the smart and the dumb, who are so differently rewarded for comparable effort. This would be an injustice even if the system of differential economic and social rewards had no systematic sexual or racial reflection. And if the social esteem and economic advantages attaching to different occupations and educational achievements were much more uniform, there would be little cause for concern about racial, ethnic, or sexual patterns in education or work. At present we have no way of divorcing professional status from social esteem and economic reward, at least not without a gigantic increase in total social control, on the Chinese model. Perhaps someone will discover a way to reduce the socially produced inequalities

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[12] Adam Morton has suggested an interesting alternative, which I shall not try to develop: namely, that the practice is justified not by social utility, but because it will contribute to a more just situation in the future. The practice considered in itself may be unjust, but it is warranted by its greater contribution to justice over the long term, through eradication of a self-perpetuating pattern.

(especially the economic ones) between the intelligent and the unintelligent, the talented and the untalented, or even the beautiful and the ugly, without limiting the availability of opportunities, products and services, and without resort to increased coercion or decreased liberty in the choice of work or style of life. But in the absence of such a utopian solution, the familiar task of balancing liberty against equality will remain with us.

Senator HATCH. Our last witness today will be John Bunzel who, as with Professor Sowell, is a senior fellow at the Hoover Institution at Stanford University.

He has taught political science at Stanford, Michigan State University, and San Francisco State College.

For 8 years, until 1978, he was president of San Jose State University in California.

President Bunzel is the author of numerous books on American public policy issues, as well as a large number of articles and essays on affirmative action.

An article by President Bunzel appears recently in the New Republic on the subject of school busing. This article was the subject of animated discussion in this subcommittee several weeks ago.

We are very happy to have you here, and we look forward to your testimony.

STATEMENT OF JOHN H. BUNZEL, SENIOR FELLOW, HOOVER INSTITUTION, STANFORD UNIVERSITY

Dr. BUNZEL. Thank you, Mr. Chairman.

That is a very generous introduction.

I first became interested in the issue of affirmative action in my last life, as you pointed out, as a university administrator in the early 1970's.

I soon discovered that how I thought about affirmative action was almost as important as what I thought.

I have always been uncomfortable when I have been surrounded by simplifiers, because for better or worse, I suppose, I am a complexifier.

Senator HATCH. That is not unusual in the academic community I understand.

[Laughter.]

Dr. BUNZEL. No, but not always are complexifiers easily understood either in the academic world.

I used to be told, for example, that affirmative action—and I still hear this argument—is an attempt merely to make up for our past sins as a racist society.

Then would follow the rather familiar idiom that echoed Stokely Carmichael: If you are not actively with us, you are against us.

I go back to an earlier statement that I believe you, Mr. Chairman, made at the opening of this session. It depends a great deal on which affirmative action you are talking about.

I appreciate Professor Nagel's comments this morning, because he certainly is trying to discuss in his terms strong versus weak affirmative action. While I have differences with him, I thoroughly understand and appreciate the emphasis that he brings to this discussion.

Whether one is for or against affirmative action, that kind of approach simply is insufficient.

When applied to the academic world, I found that the moral absolutism of this simplistic characterization simply denied legitimacy to complicated and inevitably vexing questions.

I still think that it does.

One of the very wise observers of the human scene, Prof. Paul Freund, who has just recently retired from the Harvard Law School, used to warn against the doctrinaire in his beliefs—the fanatic who holds to absolutes, whether that absolute is liberty and nothing else, equality and nothing else, or truth and nothing else.

He liked to quote Lord Acton's statement that an absolute principle is as absurd as absolute power.

Professor Freund's rule is simple and clear. When you perceive a truth, look for the balancing truth.

I think the rule applies in this whole area of affirmative action and equal protection.

The issue of affirmative action, at least so far as I am concerned, is not righteousness or moral virtue but is one of competing and legitimate values and, may I add, their relationship to many practical problems.

I want to say that my approach to affirmative action is based on a conflictual model. I see it frequently presenting a collision of rights and a conflict of principles.

The important question, of course, is how to balance one's obligations.

I have also found that many of the assertions and assumptions about affirmative action, frequently addressed in the language of right principle, need to be tempered by opposing and equally compelling considerations.

Thus, many people claim that the problems of minority groups in this country are the consequence of widespread discrimination. Their solution is more energetic and single-minded enforcement of Federal affirmative action regulations, which require equal representation of certain minority groups in Federal and other employment, as beneficiaries of Government programs.

However, many of the problems of minority groups are no longer the results simply of present discrimination. Today discrimination against blacks or Hispanic Americans in employment is diminished and is not of much real consequence in the area of access and equal opportunity in education.

Yet if these problems are treated as if they are simply problems of discrimination, the result may turn out to be the imposition of quota remedies, which in turn will bring about a decline in efficiency of services and in the morale of employees and, most seriously, a damaging effect on the motivation and self-respect and capacity of minority group members.

These are points which Prof. Nathan Glazer, among others, has made very often and with considerable eloquence.

Another proposition frequently heard is that as a society, we need to remedy past educational, economic, and cultural injustices to the disadvantaged and minorities. It is an imperative priority.

However, higher education must not adopt unjust or undemocratic means to achieve these laudable goals.

Many affirmative actionists say that our colleges and universities should move at once to bring about a statistically acceptable representation of women and minorities on their faculties.

Some even go so far, as I remember in my days as an administrator, to say that the way to bring this about is simply to put them there.

The cause of low representation of, say, blacks and Hispanic Americans, among college and university faculties, is not simply the result of discrimination and is not the result of invariable discrimination. An important reason is limited supply.

We are told statistics do not lie. Blacks, Hispanic Americans, and other minority groups are not heavily represented on university faculties.

However, the same statistics by themselves do not tell us why.

The idea that one can legitimately and always infer discrimination from a discrepancy between the ratio of minority members employed to the total number employed and the ratio of the minority members to the total population is simply, in my judgment, inappropriate for institutions of higher education.

What needs to be done, Mr. Chairman, to deal with this situation is to get black and Hispanic youngsters to take math and science courses, rather than social sciences and ethnic studies.

Less than 3 percent of doctoral degrees in this country go to blacks. Sixty percent of those are in education.

One reason Asian American minorities have forged ahead in recent decades in getting good jobs and higher incomes is because they have concentrated in the sciences, mathematics, engineering, and architecture, even when they faced severe discrimination.

We are reminded and told that Government enforcement agencies have a right to determine whether or not contractors with the Government, including universities, are in compliance with Federal affirmative action regulations.

However, a college or university must not compromise the right to make its own academic decisions regarding hiring, tenure, and promotion, based on professional judgments about intellectual capacity, scholarship, and teaching ability.

Nor is it enough for some affirmative actionists to talk in terms of universities not having to select unqualified persons over qualified ones. That is not the real question.

The real question is whether affirmative action compliance investigators are willing to assure a university that having canvassed widely and having nondiscriminatory applicant pools to consider, it is completely protected in choosing the best-qualified person.

Are these compliance officials prepared to give the kind of public assurance of what would make it impossible in advance for a university or Government agency to predict what the categoric group composition of the total of such new appointments might turn out to be.

I realize that the issues I have raised here do have a rather specialized focus. The truth is that they touch on questions of public policy that are of growing interest to the American people. In my judgment, they are among those that should be addressed by Congress.

You mentioned earlier that this committee is to be concerned with philosophical and constitutional questions.

In my own thinking, every time I wrestle with the many complex problems of affirmative action, I realize that I am dealing, among other things, with the very complex and complicated problems of defining what equality really means.

I think a good deal of what will be said before this committee comes down to a definition of equality and how one views it. These are terribly important and legitimate concerns.

For myself, I think it only fair to say that I put emphasis on equal opportunity as the key to the idea of political equality. This, I believe, is in the liberal tradition and has its roots in the thinking of John Locke and John Stuart Mill.

I depart from the so-called radical equalitarian who generally favors a far-reaching social welfare theory of Government, because he wants everybody in society to have equal quantities of the things that men and women covet.

I prefer, and these are my own biases, a political system which requires that Government protect other values. I think of individual liberty and freedom, even-handedness, and so on, and a political system that takes into consideration an individual's achievement or performance as a relevant criterion for determining his or her proper allocation of benefits and burdens.

In other words, I hold for a more balanced and limited, rather than a persistently interventionist role for Government.

I do not think I need to tell you, Mr. Chairman, that equality is something of a loose cannon today. It has many meanings, almost like beauty in the eye of the beholder.

I stress again the notion that the equal distribution of society's goods is not presently an accepted principle. There are many reasons, and this is only one.

This is because this Nation continues to honor and value its long tradition of personal initiative and achievement.

The belief that the Government has an absolute or positive duty and obligation to what has been called the principle of distribution, according to a formula of numerical equality, has not yet been elevated to a constitutional proposition.

I think one of the crucial questions of the 1980's is what role the courts will play in the continuing redefinition of equality in this country.

In recent years, it seems to me, that judges have led the way in giving the standard of equal protection its content.

As I have suggested elsewhere and in many different forums, and as I believe, Mr. Chairman, you are suggesting here, it is time for the legislature to assume its responsibilities and to take the lead.

If equality is to be redefined or expanded or if the Government is to assume new responsibilities in providing more of everyone's needs, according to some need standard, I think the direction of that development should take place through the political and legislative process.

This does not usurp the constitutional responsibilities of the court. However, I think the courts will then be better able to confine themselves to protecting the legislatively sanctioned commitment to equalitarian norms approved by the people's elected representatives.

That was the beauty of the Civil Rights Act, and that is what helped to forge something of a consensus at that time.

In short, I think the political process, Mr. Chairman, should have the chance to address such problems as preferential treatment and many of the other complex principles and programs of affirmative action.

Thank you.

Senator HATCH. Thank you so much.

At this point, we will insert in the hearing record your entire prepared statement.

[The prepared statement of Dr. Bunzel follows:]

PREPARED STATEMENT OF JOHN H. BUNZEL

I wish to express my appreciation to this Committee for the invitation to appear here today to join in these discussions about affirmative action. I come before you as an educator, a former president of a state university in California (San Jose State), a researcher concerned with the politics and problems of higher education, and as a citizen who has spent all of his adult life in association with those who are deeply committed to the struggle against prejudice and discrimination and to the advancement of civil rights for all Americans, especially the poor and the powerless.

Thus the matters to which you are devoting your attention in these hearings are of importance to me both personally and professionally.

I first became interested in the issue of affirmative action in my last life - as a university administrator in the early 1970s. I soon discovered that how I thought about affirmative action was as important as what I thought. I was always uncomfortable when surrounded by simplifiers because, for better or worse, I am a complexifier. I would be told, for example, that affirmative action is merely an attempt to make up for our past sins as a racist society - and then would follow the familiar idiom that echoed Stokeley Carmichael's: if you are not actively with us, you are against us.

The problem was that, when applied to the academic world, the moral absolutism of this simplistic characterization denied legitimacy to complicated and inevitably vexing questions. It still does.

A very wise observer of the human scene, Professor Paul A. Freund of the Harvard Law School (now retired), has warned against the doctrinaire in his beliefs, the fanatic who holds to absolutes, whether that absolute is liberty and nothing else, equality and nothing else, or truth and nothing else. He likes to quote Lord Acton's statement that "an absolute principle is as absurd as absolute power." Professor Freund's rule is simple and clear: "When you perceive a truth, look for the balancing truth."

I think the rule applies here. The issue of affirmative action is not

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John H. Bunzel, former president of San Jose State University in California, is a Senior Research Fellow at the Hoover Institution at Stanford.

righteousness or moral virtue, but one of competing and legitimate values and their relationship to many practical problems.

My approach to affirmative action is based on a conflictual model. I see it frequently presenting a collision of rights and a conflict of principles. The important question is how one balances one's obligations.

I have also found that many of the assertions and assumptions about affirmative action, dressed in the language of "right principle", need to be tempered by opposing and equally compelling considerations. Thus:

1. Many people claim that the problems of minority groups in this country are the consequence of widespread discrimination. Their solution is more energetic and single-minded enforcement of federal affirmative action regulations, which require equal representation of certain minority groups in federal and other employment as beneficiaries of government programs.

BUT: Many of the problems of minority groups are no longer the result of present discrimination. Today discrimination against blacks or Hispanic Americans in employment is considerably diminished and is not of much consequence in the area of educational opportunity. Yet if these problems are treated as if they are problems of discrimination, the result can only be the imposition of quotas, which in turn will bring about a decline in efficiency of services and in the morale of employees and, most seriously, a damaging effect on the motivation, self-respect and capacity of minority-group members. (See Nathan Glazer, Federal Civil Rights Enforcement Effort, "A Breakdown in Civil Rights Enforcement?", The Public Interest, Spring 1971, pp. 106-115.)

2. As a society we need to remedy past educational, economic and cultural injustices to the disadvantaged and minorities. It is an imperative priority.

BUT: Higher Education must not adopt unjust or undemocratic means to achieve these laudable goals.

3. Many affirmative actionists say our colleges and universities should move at once to bring about a statistically acceptable representation of women and minorities on their faculties. Some even go so far as to say that the way to bring this about is simply to put them there.

BUT: The cause of low representation of, say, blacks and Hispanic Americans among college and university faculties is not the result of invariable discrimination. The reason is limited supply.

4. Statistics do not lie. Blacks, Hispanic Americans, and other minority groups are not heavily represented on university faculties.

BUT: These same statistics, by themselves, do not tell us why. The idea that one can legitimately infer discrimination from a discrepancy between the ratio of minority members employed to the total number employed and the ratio of the minority members to the total population is simply inappropriate for institutions of higher education. What needs to be done to deal with this situation is to get black and Hispanic youngsters to take math and science courses rather than social sciences and ethnic studies. Less than 3 percent of the doctoral degrees in this country go to blacks; 60 percent of those are in education. One reason Asian-American minorities have forged ahead in recent decades in getting good jobs and higher income is because they have concentrated in the sciences, mathematics, engineering and architecture even when they faced severe discrimination.

5. Government enforcement agencies have a right to determine whether or not contractors with the government, including universities, are in compliance with federal affirmative action regulations.

BUT: A college or university must not compromise the right to make its own academic decisions regarding hiring, tenure and promotion based on professional judgments about intellectual capacity, scholarship and teaching ability. Nor is it enough to talk in terms of universities not having to select "unqualified persons over qualified ones." The real question is whether affirmative action compliance investigators are willing to assure a university that, having canvassed widely and having a nondiscriminatory applicant pool to consider, it is completely protected in choosing the best qualified person. Are these compliance officials prepared to give the kind of public assurance that would make it impossible in advance for a university (or a government agency) to predict what the categoric group composition of the total of such new appointments might turn out to be?

I realize that the issues I have raised here have a specialized focus. But the truth is that they touch on questions of public policy that are of growing interest to the American people and, in my judgment, should be addressed by Congress. I would suggest that among the questions that call for analysis and debate, and then are acted on through direct involvement of the political process, three deserve legislative attention:

- What did Congress intend the governing principle of the Civil Rights Act to be - to provide rights and opportunities for individuals regardless of their race or color or background, or to attach entitlements and penalties to individuals based on the significance of their group membership? Stated another way, should individual rights give way to group rights in the demand for equal rights?

- Did Congress intend equality of opportunity to mean statistical parity among groups, or did the anti-discrimination standards in Title VI intend to prohibit racially preferential treatment and quotas?

- Does Congress believe that equality of condition and result rather than of access and opportunity should be the defining principle of a "new egalitarianism"?

I think I can safely say that I am not alone in having a difficult time discovering what Congressional intent was in passing the 1964 Civil Rights Act (although I thought I knew). If it meant to assert then that no American may be discriminated against on grounds of color, sex or national origin, it should reassert that principle today. It is time for a sharper and clearer statement by the popularly elected branch of our government as to whether or not it believes as a matter of fundamental policy that race or ethnicity, once abolished by the Supreme Court as a permissible basis for governmental classification (the Brown case of 1954), should now be a legitimate and desirable ground for awarding jobs, social benefits or opportunities.

AMERICAN CHRONICLE

Affirmative Action, Negative Results

By John H. Bunzel

IN THE OFFICE of a Stanford University administrator there is a photograph of the Presidents of Harvard, Yale, Stanford and Princeton. But only Princeton's President Bowen has a happy face. Underneath is the written question, "*Why is this man smiling?*" The answer: he is the only one whose university does not have a Medical School.

It is a story President Bowen often tells to alumni groups and other audiences when he is asked to describe what Princeton is doing to protect its independence in the face of Government intrusion into the university's affairs, the growth of Federal rules and regulations, and the mounting burden of unnecessary red tape and paperwork. How to respond to the constant threat of new "government initiatives" is a question presidents, administrators, and faculty members across the US are grappling with on a daily basis.

Perhaps the single most controversial undertaking of the Federal government in American higher education has been the move to increase the hiring of minority and women faculty on the approximately 3,000 colleges and universities in the USA. If the institutions fail to take "*affirmative action*" in recruiting more women, Blacks, and other minorities for faculty positions, they face the possibility of a cut-off of Federal research (and other) grants. Put very simply, the enforcement of this powerful requirement has increased the national government's role and has dramatically changed hiring and employment procedures on the campuses. It is a striking illustration of both the burgeoning cost of compliance and the growing autonomy of the executive branch of government as its Washington agencies have engaged in an excessive blanketing of rules and regulations.

In a moment of frustration over the heavy hand of the Federal bureaucracy, I once said that Affirmative Action was an example of the government's enduring ability to give a good idea a bad name. It was an immoderate statement . . . not only because I do not subscribe to that school of thought which reflexively looks upon the government as the embodiment of "regulatory evil" but because I supported the efforts (at all levels of government) to play a vigorous role in the struggle against discrimination and inequality long before Affirmative Action became a "code-word" in the 1970s. Along with most of my academic colleagues, I strongly believe we should recruit more women and minorities as faculty members on an equal opportunity and non-discriminatory basis. Highly qualified women in particular have not been accorded fair-and-equal treatment by the academic world, and it is time we admitted it. But I am opposed to the use of any form of quota system (or its functional equivalent) that would distinguish race or sex as a preferred or predominant criterion for hiring.

IN THE LAST TEN YEARS American educators have been reminded again that institutional freedom can be threatened by a well-intentioned and beneficent government. As Congressman John O'Hara remarked (when he was chairman of the House Subcommittee on Post-secondary Education),

> "Surely we have learned that however laudable the goal, we cannot trust in the limitless goodwill of government—that agencies that are charged with carrying out the law have an almost irresistible tendency to go beyond the law, and that we have to maintain constant vigilance to see that they stay within it. . . ."

Anyone looking for an example of how such university values as self-governance, academic excellence, individual judgment, and local decision-making have been entangled in the web of the Federal regulatory process could do no better than focus on the impact of Affirmative Action rule-making and enforcement in the academic community.

FROM ITS INCEPTION in the early 1970s, Affirmative Action has been regarded by its

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strongest advocates as a democratic principle wrapped in a moral command that authorises the Federal government, in advancing its conceptions of sound and necessary policy, to take enforcement action against colleges and universities (if they are Federal contractors) that have not taken positive steps to cure employment discrimination by hiring more women and minorities. But like "due process" and "equal protection", the substantive reach of the Government's powers and strategies to achieve its goals cannot be determined by reading the words of the wrapping alone. In relying on *Executive Order 11246* (as amended) and a variety of other anti-discrimination statutes, the Government has assumed the role of interpreter as well as overseer of the rules and regulations. Furthermore, through its formidable presence it has not only sought to shape the thinking about social and racial justice in the country but has played a decisive role in its determination to make the American system of higher education fit its own egalitarian model.

It is important not to minimise the depth and range of the difficult problems and actual conditions which surround the guidelines for higher education established by the US Department of Health, Education, and Welfare (HEW). The truth is that the debate over Affirmative Action has increasingly echoed Stokely Carmichael's familiar and facile distinction: "If you are not actively with us, you are actively against us. . . ." When applied to higher education, this simplistic moral absolute denies legitimacy to complicated and inevitably vexing questions.

> *"No institution is required to hire women or minorities on the basis of sexual or racial preference. To do so would be clearly illegal. Affirmative Action is not aimed at creating preference but at ending the preference for white males which has always existed in academia. What the executive order and Title VII do require is the obligation of fair recruiting and hiring. . . . Broadly speaking, affirmative action consists of efforts aimed to end discrimination and to remedy the effects of past discrimination."*

THIS STATEMENT by Bernice Sandler, one of the most vigorous and respected opponents of *discrimination, represents a number of beliefs which* are in keeping with the unobjectionable policy of the Civil Rights Act of 1964 that all contractors with the government will take "affirmative action" to eliminate employment discrimination against a person *because of* race, colour, religion, sex or national origin.[1] Further, Executive Order 11246 (the source of the contract compliance programme) also forbids "discrimination-because-of . . .", commands equal treatment "without-regard-to . . .", and requires positive measures to eliminate the one and accomplish the other.

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[1] Title VI of the Civil Rights Act (Sect. 601) states that "no person in the United States shall, *on the ground of* race, colour or national origin, be . . . subjected to discrimination under any program or activity receiving Federal assistance."

Title VII (Sect. 703a) states that "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . *because of* such individual's race, colour, religion, sex or national origin; or to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's race, colour, religion, sex or national origin."

WHAT Reinhold Niebuhr once called "the irony of American history" is still bitterly at work on the US scene, and in the familiar paradoxical pattern. The American founding fathers were prudent, pessimistic men, fearful of governmental powers, and the US Constitution which they fashioned remains the legal basis for the most powerful centralised bureaucracy the liberal world has ever known. The innovative American ideal was "free and equal rights for all" but for a century and more an enslaved Negro minority was ignored. Ironies proliferated. In order to control intoxicating spirits and abolish alcoholism the Volstead "noble experiment" in Prohibition, constitutionally enacted, produced a vast consumption in rotten illegal "booze" and a violent underworld of gangsterism to distribute it.

THE DECADE-OLD ATTEMPT *to legislate "racial equality" is now emerging as the latest "irony in American history." The negative consequences of so-called Affirmative Action are coming home to roost. Once the vicious hallmark of a narrow exclusivism, the "Quota System" has been reinstated in US life. Once the invidious and humiliating "nosiness" of petty inquisitors, the "Racial Profile" (just how dark is your skin, how long your nose, how swarthy your complexion, and how mixed your grandfather's genes?) is coming to be standard bureaucratic procedure. It is more than ironic, it is well-nigh suicidal. At a point in Western technological society, when brilliance and excellence and the innovative genius of exceptional individuals may help rescue a crisis-ridden civilisation, America is unfortunately opting for mediocrity, downward levelling, and an enforced depreciation of standards of talent and merit.*

As always in the ironic turns of American history, the disastrous road is paved with the best of intentions. Blacks should finally get their due place in the sun, women should at long last get a crack at all the good jobs so long automatically denied them. And so they should. But of all the roads to "ethnic" progress, the militant fiat of impassioned bureaucrats is surely the worst. They always want total results, instantaneously and across the board. They are ready

But the Department of Labour's Revised Order No. 4 charted a different course which underscored the schizophrenia running through the whole posture of affirmative action:

> "An acceptable Affirmative Action program must include . . . goals and timetables to which the contractor's good faith efforts must be directed to correct deficiencies and thus to increase materially the utilisation of minorities and women, at all levels and in all segments of the work force where deficiencies exist."

In the hands of some of HEW's advocates of an aggressive Affirmative Action programme, the concept of race and ethnicity has frequently been introduced into academic deliberations in ways that *go beyond* simply taking a person's background into account as a supplementary factor in making admissions or appointment decisions on the basis of individual achievement. Race has too often become the dominant (and sometimes exclusive) consideration that not only enables colleges to meet their "goals" and "timetables" but to subordinate merit criteria to the higher principle that preference be given to women and certain minority groups.

Thus "affirmative action" is governed by two sets of criteria with quite different genealogies. One draws on the tradition that the equal protection clause of the Constitution commands the elimination of racial barriers, with the academic variation that "race" (as the biologists and anthropologists demonstrated long ago) does not adequately describe individuals and, therefore, does not allow discriminatory preferences for any group, minority and majority. The other asserts that the Constitution's equal protection clause permits "race" to become a factor in employment when identification by race is intended to help those for whose protection the Fourteenth Amendment was enacted. The former accords equal rights to all persons regardless of race and does not command that members of any groups be given preference in hiring because they were formerly the subject of discrimination or because they are members of a minority group. The latter claims that racial identification is necessary, given the compelling interest of the state in overcoming past discrimination. It is also a strategy that seems to assume that preferential treatment based on race is a rational means of implementing that interest.

THE CRUCIAL QUESTION has been how to interpret and then apply Washington's Federal regulations which prohibit discrimination on grounds of race or sex but also require affirmative and corrective action on behalf of certain minority groups and women. Apart from the tangle of overlapping jurisdictions (and the fact that different enforcement agencies of the government have had conflicting views about what procedures to follow in their investigations of employment patterns and personnel practices in higher education), there has been no clear agreement either on or off the campus as to what constitutes "discrimination." College and university officials have repeatedly been told that the prohibition against discrimination means that men and women should receive "equal treatment." But what kind of treatment is "equal" remains a matter of dispute.

What is not in dispute is that the meaning of discrimination has been expanded. For example, at one time discrimination turned on whether or not an employer took racial considerations into account in making employment decisions—"intentional discrimination on the basis of race."

to pay any civic price. They look no further forward than immediate ideological gratification. The hard clauses of a ministerial command, like the loud chanting of the slogans of yesteryear, are taken to have magical qualities.

THE PARADOX *grows and hurts: to affirm is also to deny. In the name of spreading an ethnic or co-sexist or otherwise egalitarian democracy, important values of a democratic ethic are undermined. In the name of greater advantages for all, all become disadvantaged by a kind of high-minded cheating which leads to lower national achievement and to a low cynicism about pseudo-merit and manipulated rewards.*

The dilemmas of "Affirmative Action" as they confront American university leaders are sometimes grotesque. If one Dean doesn't appoint more women (and/or Blacks, and/or Porto Ricans) to the biology and chemistry departments—there are some, but not "enough" (and his appointments committee just couldn't find others with proper qualifications to teach and do original research)—then Washington would cut off the Federal funds which keep his University Medical school functioning. If yet another White American is appointed to a distinguished chair of philosophy (or mathematics, or physics), then the obviously prejudiced culprits will soon feel the full fury of the regulatory commissioners. What price intellectual excellence, or educational competence, or for that matter academic independence and integrity? The dilemmas are cruel, and the compromises often demeaning—all, ironically, in the name of "changing society for the better", not slowly, not consistently, but *NOW*.

JOHN BUNZEL, *as the President of a California university (San Jose), has been through it all. He is one of America's leading political scientists, author of an authoritative work on* Anti-Politics in America *(1967), and now a Senior Research Fellow at the Hoover Institution at Stanford.*

M.J.L.

Now "discrimination" can take place even if the employer does not intend to discriminate in this way. The new test is whether an employer's hiring procedure has a discriminatory or "adverse impact" on certain (but not all) minority groups—Blacks, for example, or Hispanics, but not Polish-Americans or citizens whose ancestors came from Eastern Europe. In other words, if the effect is disproportionately to disadvantage Blacks as against Whites, the burden to prove good behaviour shifts to the campus to show that it is *not guilty* of discriminating on grounds of race—reversing the ordinary requirements of legal procedure.

But, as Professor Jan Vetter (of Berkeley) has asked, "disproportionate with respect to what?" It makes a difference if the answer is with respect to the fraction of Blacks in the labour force, or with respect to the relative "merit" (i.e., job performance) of Blacks and Whites in the labour force.

> "These two answers might come to the same thing if it were the case that capacity for job performance were equally distributed among Blacks and Whites for all jobs. This is, however, not the case."[2]

The cause of both grief and mischief for heads of academic departments as well as for deans and other administrators who are responsible for faculty appointments is the increasing tendency of the government's compliance agencies to regard *numbers* as ends in themselves. But educators across the country have long believed that the important goal for a self-respecting college or university is and should be "equality of opportunity for every individual and the appointment of the best qualified person in every instance." It has been my own contention that the commitment to Affirmative Action reveals a basic flaw when government officials who investigate hiring and promotional practices rely heavily on a "numbers" definition of discrimination. The implication is that the real though unstated aim of Federal policy is not to promote *equal opportunity* but to bring about a dramatic equalisation of conditions for certain groups through preferential hiring and proportional representation—what the Carnegie Commission has called "*an equality of forced results.*" This "charade of numbers" in the quest for statistical parity also implies that more weight should be given to prohibiting discrimination against what have come to be called "federally protected minorities", even though the Executive Order and Title VII of the Civil Rights Act make it clear that what is prohibited is discrimination against anyone on grounds of race or sex.

> *"Affirmative Action policy requires an employer to develop "a set of specific and result-oriented procedures. . . . An acceptable Affirmative Action program must include an analysis of areas within which the contractor is deficient in the utilisation of minority groups and women, and further, goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies and, thus, to increase materially the utilisation of minorities and women."*
>
> US DEPARTMENT OF LABOR (Revised Order No. 4, Section 60-2.10), *Higher Education Guidelines*, p.C-2.
>
> *"Whenever the percentage of such persons /women and representatives of each minority group/ in that job group is less than the percentage available within the applicable labor area, the affirmative action program must specifically state that underutilisation exists in that group. Where underutilisation exists, and that increase in the number of persons in a job group necessary to eliminate underutilisation is .5 persons or greater, each /affirmative action/ program must contain goals which satisfy the following requirements. . . ."*
>
> FEDERAL REGISTER *(25 August 1975), p. 37066.*

THE CENTRAL CONCEPT of "under-utilisation" as it has been used in Affirmative Action—the mandate that employers must overcome their "under-utilisation" of persons in certain preferred groups—is another illustration of the shift in understanding of discrimination and discriminatory practices in higher education (and elsewhere) and of what should be done about it. *Non-discrimination* and *equal treatment* without regard to race, sex or national origin are felt to lack sufficiently vigorous thrust because a policy that merely treats all individuals equally will impede progress toward the more important goal of the "truly committed" Affirmative Actionists—namely, the immediate hiring of more women and minorities. Under the Executive Order a college or university (or any employer) must take Affirmative Action to insure equal treatment "*without-regard-to....*" But the elimination of the "without-regard-to" from the concept of discrimination as well as the compliance agencies' focus of concern and point of attack on "under-utilisation" have raised serious doubts. Is the real goal of Affirmative Action an "equality of actual opportunities" for all individuals so that the best possible person can be fairly found for every opening?

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[2] Professor Vetter points out that "a lower percentage of Blacks than Whites possess what society insists upon as a necessary minimum of training for the practice of medicine. The cumulative impact of the black experience in the US has the consequence that relative capacity across the entire range of jobs in the economy (in the sense of "present" as opposed to "innate" capacity) is not proportionately distributed between the two racial groups. It makes a difference whether discrimination against Blacks is defined as employing a lower proportion of Blacks in particular jobs than their proportion of the labour force, or as employing less able Whites than available Blacks. The former definition may serve as a measure of discrimination in society, but it is unlikely to furnish a test of unlawful discrimination unless modified to include a standard of minimum qualification. At least three considerations combine in favour of the latter definition. It serves an interest in efficiency. It gives effect to the view that the person who will perform a job best deserves the job. It rejects race as a criterion of selection." Jan Vetter, "Affirmative Action In Faculty Employment Under Executive Order 11246" (prepared for the Administrative Conference of the United States, dated 14 September 1974), pp. 65–66.

What I have found especially troubling is that as a matter of policy and practice "*treating equally*" has been subordinated to "*hiring more.*" The necessary and connecting link between one (means) and the other (ends)—particularly when the investigative agencies are bent on discovering so-called "real discrimination"—is "under-utilisation", which has come to mean under-representation. As San Jose State University's Dean of the Faculty has said:

> "Under the guise of enforcing an executive order and through a sophistical manipulation of the concepts of 'discrimination' and 'equal opportunity', the affirmative action policy has transformed a legitimate order to ensure equal treatment into a wilful command to hire more members of the preferred groups. Affirmative action is simply and overall a preferential policy of proportional employment."[3]

In Washington's enforcement of the Executive Order, statistical under-utilisation is not a question of evidence in a demonstration of unlawful discrimination. It is, rather, the deceptively subtle reasoning which gives the compliance agencies the authority to encourage employers everywhere to engage in preferential hiring on the basis of race or sex. This has come about because non-discriminatory compliance is measured quantitatively and more or less rigidly by a "result-oriented" under-utilisation analysis for higher education, the basic concepts of which have been transplanted from industrial sector employment. Predictably, under-utilisation will ultimately have reference not only to an employer's labour market but also to the general population. This extension is almost inevitable because (*1*) it is natural to think of representation in terms of population; (*2*) the labour market will itself be seen as "under-utilised" if the preferred groups are not represented therein in some arithmetic proportion; and (*3*) the demand to remedy past injustice will apply to the market no less than to the factory.

It must be noted that there is nothing in the Civil Rights Act or Executive Order 11246 which suggests that statistical under-utilisation of certain groups in a university's faculty or staff (or in any labour force) is a *prima facie* sign of discrimination.

> *"There has been much controversy in this area concerning the distinction between a quota hiring remedy, and a less rigid approach involving affirmative action toward a goal. That distinction is ultimately illusory. As the time to achieve the required goal approaches, members of the discriminated group must be hired in preference to a majority group person as often as required to meet the goal. A quota system, then, is simply a recognition of the reality encountered in reaching the desired goal."*
>
> QUOTED BY ONE FEDERAL COURT (EVEN WHILE PERMITTING RATIO HIRING), IN BRIDGEPORT GUARDIANS, INC. V. BRIDGEPORT CIVIL SERVICE COMMISSION, 41 U.S.L. WEEK 2427, 2428 (D. CONN., 1/29/73).

> *"The use of minimum racial, ethnic, religious and sexual quotas as a technique for correcting a serious discrimination in employment is a justifiable means of offsetting past wrongs by temporarily recruiting people from a group which has been discriminated against ... the alleged discrimination experienced by the individual white applicant under a system of compensatory treatment is not the same as the discrimination previously suffered by blacks.* **The white applicant is not being barred from employment because of his race; rather his**

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[3] Robert F. Sasseen, "Affirmative Action and the Principle of Equality", *Studies in Philosophy and Education*, Spring 1976, p. 283.

But *proportional employment* has never been understood to mean "equal treatment." The only way it can be connected is through "a particular and erroneous understanding of the principle of equality." The requirement to "overcome underutilisation" can be validly connected to the command to treat equally "only if equal treatment means no underutilisation. Affirmative Action can be justified in the name of equality only if equality naturally involves proportional employment and requires the distribution of jobs in arithmetic proportion among the groups composing society...." Without this premise there is no valid connection between the Affirmative Action requirement to overcome employment under-representation and the legitimate command of the Executive Order for employers to take positive measures to ensure equal treatment.

"Simply stated", Sasseen writes, "hiring proportionately can be considered equal treatment only if underutilisation necessarily means unequal treatment. Similarly, underutilisation is necessarily a sign of unequal treatment only if proportional employment is naturally the result of treating equally." The point is that only such an understanding of equality can supply the "necessary link" between the means of "hiring more" and the end of "treating equally."

claim to a particular job is being deferred while a remedy is applied" (*emphasis added*).[4]

MEMORANDUM OF THE "EQUALITY COMMISSION" OF THE AMERICAN CIVIL LIBERTIES UNION (29 NOVEMBER 1972).

IT IS IMPORTANT to point out that if the basic goal of Affirmative Action is to assure as faithfully as possible that members of both sexes and of all races and ethnic groups are accorded genuinely equal employment opportunities in higher education, then a numerical analysis of the circumstances of different groups can be helpful. For example, I know that colleges and universities would be able to strengthen their recruitment efforts and procedures if, through detailed analysis, they were able to compare more precisely "the proportions of women and members of minority groups among those recently hired with their proportions in the various pools from which faculty candidates are drawn and appointments made." Thus numerical analysis can serve a useful purpose in "Affirmative Action" if the purpose is not simply a particular numerical result but instead the fairest and most vigorous efforts to "reach out" for women and minorities (because this is the best guarantee of equal access and opportunity on a non-discriminatory basis) and the ultimate appointment of the best-qualified person (because this is the only way to guarantee that the university's continuing quest for excellence will not be compromised).

Higher education's problem with "goals" and "timetables" (as they are customarily understood by the compliance agencies) is that they are *not* clearly and unequivocally tied to the selection of the best-qualified individual regardless of race or sex. The setting of "goals" has tipped the balance away from providing equal opportunity for every individual to implying that unless a particular "numerical goal" has been achieved there has been "under-utilisation" which, in turn, means unequal treatment and discrimination. But this preoccupation with numbers and statistical parity suggests that the primary objective of a university in its hiring procedures should be to use "goal-setting" as a way of favouring applicants on the basis of race or sex, when "the aggregate numbers for groups of people", as Princeton's President William Bowen has stated, "should be seen as expected by-products of affirmative action efforts, not as the goals themselves." Apart from the importance of overcoming any notion that women or individuals from minority groups have been hired because of a need to reach a certain numerical goal, President Bowen states that

> "the crudity of the projections of composition of faculty groups by sex, race, and ethnic background, the probabilistic nature of such data, the small numbers often involved, and the appreciable differences among departments within the same institution and across institutions in the definitions of particular personnel needs—all warn strongly against putting much weight on any simple numerical analysis in seeking to determine whether good faith efforts have been made."

In short, the manipulation of dubious figures and statistical data—the "numbers game"—cannot make genuine equality of opportunity "more of a reality than it had been" and can never be a substitute for "improving the lot of real people."[5]

It is necessary to remember that "goals" and "timetables" are consequent upon the concept of "under-utilisation" and the requirement to eliminate it. One can argue at great length whether "goals" are really quotas (or merely "soft" or "benign" quotas). HEW has said that a university's attainment of specific numerical goals, according to the timetables in its affirmative action programme, will

Percentage Merit

Washington D.C.

THE TIME *is approaching to again pick federal judges strictly on individual merit, and to stop giving special consideration to Blacks, Hispanics and women, outgoing Attorney General Griffin Bell said yesterday.*

Mr. Bell, who has drawn fire from some interest groups for not recommending more women and minorities, said that when President Carter finishes filling the new judgeships created by Congress, the judiciary will break down this way: 7.5% will be Black, 3% Hispanic and 6.5% women.

The outgoing attorney general said that those percentages contrasted with "virtually nothing" in the way of representation for those groups when the Carter administration took office. "Related to the percentage of each in the lawyer population, this is substantial representation. . . ."

"I would suggest that the time is approaching when the Affirmative Action can be terminated and the selection process returned to the normal method of selecting the best person available without regard to race, creed or sex."

Of the total lawyer population, 2.6% is Black and 9.4% is women, according to the Department of Justice. No figure on Hispanics was available.

LOS ANGELES TIMES

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[4] Very simply, the American Civil Liberties Union is telling a white applicant, "*You can wait*"—and, presumably, would be willing to explain to him why waiting (10 years? 20 years? longer?) is *not* "serious discrimination." Perhaps the ACLU could convince him that the debate over the setting of employment quotas by race and sex is merely a semantic quibble. But he will probably feel that what has happened to him contradicts some fundamental principles of justice and equality in American society.

[5] William G. Bowen, *Testimony Before Department of Labor*, 30 September 1975.

not be the single test of compliance or non-compliance. None the less, they are perceived as a clear commitment by various groups on campus, which then hold the university accountable. HEW insists it is *not* advocating rigid or inflexible quotas that must be met. But the problem with applying numerical goals in a flexible manner is that there is no way of predicting how it will work in practice. Furthermore, the implication in the word "goal" that the number is something to be aimed at is precisely what gives a goal the character of a quota and allows it to be used as an instrument of administration and enforcement.

> *"While it may give minorities a little edge in some instances, and you may run into the danger of what we now commonly call reverse discrimination, I think the educational system needs this. Society needs this as much as the people we are trying to help... a society working toward affirmative action and inclusiveness is going to be a stronger and more relevant society than one that accepts the limited concepts of objectivity.... I would admit that it is perhaps an individual injustice. But it might be necessary in order to overcome an historic group injustice or series of group injustices."*
>
> ANDREW YOUNG (then a Congressman from Georgia), *The Atlanta Journal and Constitution*, 22 September 1974.

MANY WASHINGTON OFFICIALS of HEW's Office of Civil Rights deny that Federal policy encourages reverse discrimination. They point to specific language in Affirmative Action programmes requiring universities to recruit, hire, train, and promote persons in all job classifications without regard to race, colour, religion, sex or national origin. While they charge there has been conspicuous discrimination against women and minorities in higher education, they insist that Blacks should not be hired because they are Blacks or women because they are women. They also maintain that reverse discrimination with rigid quotas is not justified as a way of compensating for past discrimination. The principal requirement for a campus is "a good faith effort" to meet its flexible goals and timetables—in short, Affirmative Action in recruitment in order to provide equal opportunity for all.

I am speaking here about the principles of Affirmative Action as reflected in Executive Order 11246 and as they have been publicly pronounced and defended by those who believe that reverse discrimination is not consistent with a commitment to equal opportunity and social justice. These sound principles have the full support of the nation's institutions of higher learning. But the complicating truth is that the most zealous Affirmative Actionists, including Washington government investigators who are responsible for implementing Affirmative Action programmes on the campus, have too often violated their own principles in their quest for immediate results.

The violation of principle occurs in at least two ways. First, when many civil rights advocates and enforcement officials conclude that "getting the right proportions" of women and minorities is the *only* result-oriented method of showing that discrimination has really been ended. Secondly, when they agree that *priority emphasis* on race or sex or minority-group status is permissible in order to get the "right numbers" into jobs and schools as quickly as possible and as a short-term measure for meeting what has been called "a crisis of thundering urgency." What has happened, for example, is that a policy of preferential treatment has permitted race itself to become the determining factor in many admissions policies (before the US Supreme Court ruled in the *Bakke* Case that race could be only *one* factor)—thereby systematically excluding certain persons from equal consideration even when they were more promising than some minority applicants who were admitted to law or medical school on racial grounds. No matter how strenuously the defenders of "reverse discrimination" may claim that such a policy is not intended to disadvantage innocent individuals, the fact remains that it does not allow *everyone* a fair and equal chance "to play the game and compete within the rules." Thus, Affirmative Action programmes of anti-discrimination perceived by the higher education community as a commitment to *equal access and opportunity* have been regarded by policy activists in the government as something quite different—a "special treatment" policy of hiring and promotion that considers race and sex in choosing among "equal" applicants and employees, on the implicit assumption that equality of opportunity must be redefined not as "equal rights for all" but as group proportional equality.

DURING THE TIME I served as a university president, a number of charges of racial or sexual discrimination were filed against the institution. They ended up either in a campus grievance hearing or court (or both), or with the Office for Civil Rights, the Equal Employment Opportunity Commission, or the California Fair Employment Practices Committee. However, not once in eight years was the University found guilty of any form of "discrimination." I know that the same can be said of most US colleges and universities, especially when it comes to purposive or systematic discrimination.

This is neither an argument for complacency nor an attempt to suggest that the process of liberating

America's women and minorities has been completed. Clearly that is not the case. But there is something very wrong with the method of investigating all complaints of discrimination (including those which are of a frivolous or deceitful nature) when the investigative agencies of the government come on to the campus with the starting assumption that discrimination has actually taken place. It has turned out that the Washington investigators operate pretty much as advocates of the person or group bringing the complaint rather than as a neutral arbitrator, essentially because under the law that is the role the agency must play. Thus the university is always cast in the role of a defendant seemingly trying to conceal wrongful behaviour.

The investigative agencies and the universities are both dissatisfied with the whole complaint procedure, though for different reasons. The only real enforcement power an agency has is to cut off Federal funds, which is like trying to kill a gnat with a bowling ball. Therefore, an agency's true power lies in its ability *to harass*, which is a weapon it can and does use effectively irrespective of the merits of an individual complaint. As the University of California has learned, the agency must take advantages of the opportunity provided by a complaint to use that power. In fact, Berkeley's requests that the harassing stop are regarded by the agencies as a move to "strip them of the most useful means at their disposal to carry out their responsibilities." From the perspective of a college or university, the amount of time and *money*[6] spent in responding to demands for information and data is simply another example of how legitimate Affirmative Action progress is sacrificed to the agencies' insatiable appetite for forms and files—for "*racial profiles*" (of all applicants in the past two, four or maybe even ten years), copies of position announcements and job descriptions, written and unwritten procedures, "name, title, sex, ethnicity, and role of each member of the selection committee", telephone notes, special computer runs, and "any additional information that would assist us", all to be submitted "in no more than thirty (30) days from the date of this letter."[7]

In an Appropriations Committee hearing, Congresswoman Edith Green (author of Title IX of the Higher Education Act of 1972) once questioned the Director of the Office of Civil Rights about its enforcement policy:

> "Suppose in an institution of higher education there were a vacancy; ten people applied; two were obviously far more qualified than the other eight—these two happened to be WASPMs—White Anglo-Saxon Protestant Males. Would they then require the institution to hire one of the other eight who happened to be a woman or a member of a minority group?"
>
> He replied, "It depends on whether or not all ten were qualified."
>
> My reply was, "For the sake of argument, let's say all ten are qualified, but two were far more qualified and those two happened to be white males." His reply was, "Yes, if all are qualified—then they would have to hire a woman or a member of a minority group."
>
> I do not believe that this policy represents the Congressional intent.[8]

Congresswoman Green tried to write a provision into Title IX requiring that the text of the proposed regulations be specifically reviewed and approved by Congress. She was aware that even with their own enormous staff bureaucracies the members of the House and Senate were unable to keep up with the other bureaucracies, which (many of her colleagues believe) "make more laws" than Congress does. It was a good idea then, and it deserves serious attention now. I would further contend that the need for Congressional review and oversight of the Federal regulatory process is especially important in light of the critical and unresolved issue of whether "equality" in our society as well as in higher education is one of *process* or *outcome*, of *opportunity* or *result*. The question for the US Congress to consider is this: if Race or Ethnicity is to be legitimated as a proper or desirable ground for "public policy assignments of burdens and benefits", and if rights and special preferences are to be given to *certain* groups (but *not* to others), are the bureaucrats in HEW or elsewhere to decide which rules and regulations will be used to institutionalise the "new legitimacy" *without* the legislative process being engaged?

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[6] The total financial costs of Affirmative Action programmes throughout the country are high. A few years ago the Congressional Research Service collected what data there were and found that for the Federal Government alone in the fiscal year 1976 the figure was $329,296,367. The estimated costs to higher education for the academic year 1974–75 were more than $75,000,000—which Senator Buckley of New York called "literally astronomical."

There are also indirect costs of regulation that colleges and universities find especially burdensome. One is the unreimbursed diversion of faculty time from teaching and research to a wide variety of committee works and administrative duties (e.g. screening and drafting replies to large numbers of applicants) demanded by the complex procedures of Affirmative Action. Harvard's President Derek C. Bok estimated that "80,000 hours of faculty time" were consumed with Federal regulations in 1974–75. Another indirect cost is the excessive amount of time administrators must give to legal and bureaucratic problems at the expense of their educational responsibilities. A rule-of-thumb estimate is that these indirect costs may be two to three times the direct costs—all of which poses difficult problems for institutions with tight or declining budgets.

[7] Albert H. Bowker and Patrick M. Morgan, *The Impact of Federal Regulations on the University of California, Berkeley* (unpublished study, Berkeley, 19 September 1977), p. 406.

[8] Congresswoman Edith Green's remarks were part of an address given at the University of Michigan in Ann Arbor on 19 May 1974.

WHEN THE CIVIL RIGHTS ACT of 1964 was passed, Congress reflected the general normative consensus that Americans wanted not only to eliminate discrimination but to make employment opportunity independent of race, colour, religion, sex or national origins. The law intended to "bring Americans together", not to separate them into categories. It was a sentiment expressed by individuals and groups from every walk of life who participated in the legislative process that gave political sanction *not* to racially preferential treatment, or special privileges for some, or the concept of statistical parity among groups, but to the *elimination of discrimination* against anyone.

That policy has now undergone many changes, not by the legislative process responding to a great reversal of public opinion in the succeeding years—as verified by every poll, there has been no such reversal—but by the Courts and the Enforcement agencies of the Federal government many of whose decisions and actions, if taken one by one as legislative proposals, would not be passed by Congress. Therefore, it would appear to be time for Congress to restate its motives and purposes in passing the Civil Rights Act and to reaffirm the major principles to which the law is eloquent testimony. This would not only provide guidance to the US Courts but let the "policy activists" in Federal bureaucracy know that their regulatory efforts to change the meaning of equal opportunity and access from "fair and non-discriminatory competition" to the "achievement of numerical and racial goals" have exceeded Congressional intent and are contrary to wider public interests and political opinion.

WHAT, THEN, should Federal law and policy require of US colleges and universities in the area of equal educational opportunity?

(*1*) Higher education should be expected to exhibit and foster an attitude of working toward the national policy of equal opportunity at all levels without regard to an individual's race, religion, colour, sex or national background.

(*2*) Higher education should be expected to oppose all practices that give persons an advantage, or impose upon them any disadvantage, because of anything extraneous to their own merit, i.e., their skill, ability, achievement and promise. At the very least, any preference or disadvantage based on race or sex should be sustainable only upon a showing, by clear and convincing proof, that it is essential to an overriding public purpose and can be attained in no other way.

(*3*) Higher education should concentrate its efforts on its essential mission—education. It should not be asked to compromise those efforts by favouring experiments or policies which jeopardise them. US Government regulations or guidelines which affirm the principle of non-discrimination and equal opportunity make a fundamental error by establishing as the major goal an immediate increase in the number of women and minorities on the faculty and staff and in the student body. There should be no misunderstanding of this point. Colleges and universities must continue to seek a more cosmopolitan membership. But instead of being set as the primary, if not exclusive, goal, it should be viewed as an expected and desirable by-product of proper policy. An Affirmative Action programme should clearly state that an academic institution serves society best *by providing quality education to all eligible students on the basis of equal access and equal treatment*. That is its primary function. It is also the primary way it can contribute to the mitigation of inequalities in the country and should be emphasised in any policy statement on "equal opportunity." If the educational mission were regarded as paramount, many of the ambiguities and contradictions of Affirmative Action would be avoided.

(*4*) Higher education needs to do more to reach effectively people who have been denied the benefits of higher education, or who have had special barriers placed in their way. Any erosion in the quality of academic programmes *cheats* them, and is inconsistent with broadening the opportunity for quality education.

(*5*) Congress can help secure these objectives by well-conceived programmes of financial support. The most promising hope lies in a combination of longer-term efforts that range from introducing minority high-school students at the earliest age possible to the opportunities available to them in medicine, law, teaching, etc., to motivating those with potential as college undergraduates to pursue careers at the professional level so that the ranks of the truly qualified will be legitimately expanded. There should be guidance and assistance for people *before* they become incapacitated students. We need to rescue good minds at the US high-school level before they become dulled and ill-equipped to go on to college. The Federal government, state legislatures, and private foundations, as well as business and industry, should make available the necessary resources as further confirmation that as a society America must be more than passive if increased employment opportunities for women and minorities in higher education are to be achieved in fact as well as in legal theory.

[From the Stanford Magazine, Fall/Winter 1980]

Prepared, Not Preferred

PREFERENTIAL TREATMENT IS NOT WHAT MOST AMERICANS MEAN BY EQUALITY, NOR, AS THEY KEEP SAYING, IS IT WHAT AFFIRMATIVE ACTION SHOULD BE ALL ABOUT.

BY JOHN H. BUNZEL

ONE DOES NOT have to believe that "the voice of the people is the voice of God" to know that in a representative democracy public opinion is and should be an important force in politics. It may not be the irreducible minimum of democratic politics—after all, there is no agreement about how to define public opinion, or what it is capable of doing, or if it should "rule" (and if so, why?). But public opinion is nonetheless continuously involved in the institutional and procedural arrangements of government and has always been relevant to the purposes of public policy.

But not since the worst days of the Great Depression have Americans become so jaded and cynical about the government's ability to accomplish what they want done. Instead of a federal government run "for the people," which, as political science professor Everett Ladd of the University of Connecticut has observed, was the feeling in the 1950s and early 1960s, Americans now see the government moving further and further away from them and into the hands of impersonal and distant bureaucrats who are unresponsive to citizen interests and demands. According to election-year surveys by the Center for Political Studies of the University of Michigan, the number of Americans who say they do not trust the federal government to do what is right has more than doubled in the last ten years, from 30 percent to 63 percent. Furthermore, this dissatisfaction is not simply an expression of right-wing attitudes. Disenchantment with the performance of government has also risen dramatically among liberals, moderates, and conservatives.

Frustrated and angry, many Americans (those who have not withdrawn from politics altogether) are turning to "do-it-yourself" government—to direct democracy through increased use of the ballot for recalls, initiatives, referenda, and constitutional amendments on issues ranging from cutting taxes and government spending to gun control, abortion, pornography, and homosexual rights. In the 1978 general election, there were 350 proposals on the ballots in thirty-seven states, plus an untold number of propositions in individual cities and counties. Of the statewide propositions, forty were initiatives put on the ballot by citizen petition, the highest number in an off-year election in thirty years. Meanwhile, an organization called Initiative America has announced that forty-two House members and seven senators will sponsor a constitutional amendment that would permit citizens, after collecting 2.5 million signatures in ten states, to require a federal election on a proposal that would become law if it won majority approval.

One need not underestimate the rising demand for more responsive and accountable politicians and public officials to perceive the potential for mischief in trying to run a government by popular vote on ballot propositions. One reason James Madison preferred a representative government to a pure democracy was because a representative government protected individual liberties and rights from abuse by unrestrained majorities. Furthermore, in the give-and-take process of politics, legislators must consider an issue in the light of such things as the intensity of voter feeling, as well as the voters' numerical support. That is what the art of compromise and accommodation is all about. But referenda and other populist innovations make compromise very difficult, among other reasons because complicated issues are put on the ballot for a yes or no vote in unchangeable and often overly simple language. In short, a greater reliance on referendum voting and citizen initiatives will not avoid the problems to which state legislatures and Congress are vulnerable.

Let there be no mistake, however, about the "people's revolt" or the growing exasperation with Congress (and other legislative bodies) for their indifference to what the public thinks about issues affecting the entire society. Consider, for example, the federal government's affirmative action program of preferential hiring for minorities, and the whole subject of whether classifications by race violate rights to equal opportunity when they are made the sole basis for social rewards. For the past ten years the polls have revealed that many current policies do not have wide popular support and would be opposed by strong majorities in a national referendum.

In a November 1978 survey entitled "A Study of Attitudes Toward Racial and Religious Minorities and Toward Women," Louis Harris claimed that the majority of whites in America favor affirmative action programs for blacks in industry and educational institutions. Based on questions put to a cross section of 1,673 whites and a separate survey of 732 blacks, he reported that both whites and blacks expressed "overwhelming support" for affirmative action if (as the *New York Times* headlined on February 19, 1979) "quotas are not rigid." Whites, he said, have adapted to the implications of the Supreme Court's ruling in the *Bakke* case that quotas are impermissible in college and university admissions by making a "sharp distinction between affirmative action and quotas," and are now "strongly in favor of affirmative action." Blacks, who may be disappointed with the elimination of quotas, "still want to see affirmative action programs without quotas pursued."

According to Harris, his most important finding was that blacks and whites are in "remarkable agreement about affirmative action." In light of "this startling fact," he believes there could be significant and large-scale gains in the areas of jobs and education if the country's institutions "would press forward with a widening of affirmative action." Furthermore, he says that assertions about most whites "bristling with resentment about affirmative action for blacks" or blacks "moving to improve their lot" prove to be "largely a fairy tale, a state of mind on the part of some in the media and in the establishment and, most of all, in the heads of some who have posed as social science analysts without any real evidence to go on."

Louis Harris is one of the most respected public opinion analysts in the country. However, in this section of his study he failed to prove the public's more complicated attitudes about affirmative action, not because he did not ask some of the right questions (he did), but because he stopped short of asking several of the critical ones. Thus Harris found that large majorities of blacks and whites favor both setting up special programs for women and minorities so they can be given "every chance to have equal opportunities in employment and education," and providing "special training and advice" so they can perform better on the job. This is not surprising inasmuch as the American people have consistently supported special aid programs that enable disadvantaged minorities to increase their skills and opportunities and thereby "catch up to the standards of competition set by the larger society." Stated simply, Americans approve of *compensatory action* to help make up for past discrimination based on race, sex, poverty, or other grounds.

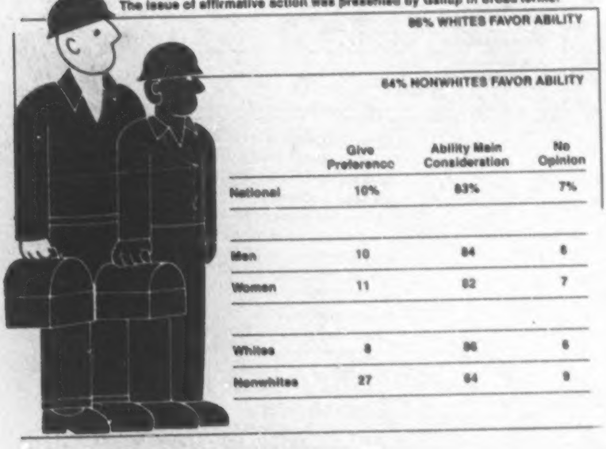
What Americans do not support is *preferential treatment*—not just quotas, which are opposed by most Americans, but any form of absolute preference. As Seymour Martin Lipset, a senior fellow at the Hoover Institution, and William Schneider, a political consultant to the *Los Angeles Times*, have pointed out, Americans will accept the argument that race and sex are handicaps that deserve compensation, in the same way that the majority of Americans approved of the New Deal as a justifiable intervention in the free market. They will go along with special compensation when it is directed at making resources roughly equal and the initial basis of competition once again fair. They draw the line, however, at doing away with fair and nondiscriminatory competition by predetermining the results. Thus, say Lipset and Schneider, the stiff and determined line of public resistance "is not between nondiscrimination and compensatory action but between compensatory action and preferential treatment."

This is a crucial distinction that Harris did not explicitly develop. It is almost as if he believed the whole idea of preferential treatment (a term he never used) for certain categories of people was beside the point, even though 76 percent of the whites and 49 percent of the blacks in his study agreed that "minorities and women have to learn that they are entitled to no special consideration and must make it strictly on merit." The fact is that racially preferential treatment has always been strongly opposed by the public and has played a significant part in the way Americans think about affirmative action. Harris is right when he says that most whites have regarded affirmative action as a code synonym for quotas. But he is wrong in thinking that with quotas removed from the equation, whites are now unqualifiedly in favor of affirmative action, or believe, in his own words, that affirmative action "can take on a major share of the push to achieve racial and religious equality." Most Americans share the traditional liberal-left commitment to equality of opportunity for all individuals, but not if it means racially preferential treatment for certain groups. That is not their idea of equality and, as they keep saying, it is not what affirmative action should be all about.

But who is listening? Not the Congress—or if it is, it has not been listening very closely—and certainly not the federal regulators and rule makers who have been increasingly involved in formulating public policy. Americans have consistently expressed strong views on some of the principal issues of affirmative action and what they believe should (and should not) be done to fulfill the promise of equality in our society.

In March 1977 a Gallup poll showed that an overwhelming proportion of the public—eight in ten—opposed preferential treatment (see Figure 1). In April 1979 eight in ten college students took the same position, with nonwhites rejecting preferential treatment by 49 percent. Other polls have also confirmed the strong opposition to "giving blacks a preference over whites in certain jobs" (Harris in 1970) or "giving Negroes a chance ahead of whites in promotions where they have equal ability" (82 percent were opposed in the University of Michigan's Survey Research Center study in 1971). In 1974 Gallup found 96 percent favored promoting the "best qualified" regardless of race; over 80 percent of the blacks polled agreed.

FIGURE ONE
The issue of affirmative action was presented by Gallup in broad terms:



	Give Preference	Ability Main Consideration	No Opinion
National	10%	83%	7%
Men	10	84	6
Women	11	82	7
Whites	8	86	6
Nonwhites	27	64	9

In 1977 Yankelovich, Skelly, and White conducted a survey on the issue of job lay-offs. When asked about seniority as the criterion for laying people off, almost two-thirds of the blacks favored special adjustments for blacks, who usually had the least seniority. But 60 percent of the general public once again expressed its opposition to affirmative action policies that turn out to mean special preferences for minorities (see Figure 2).

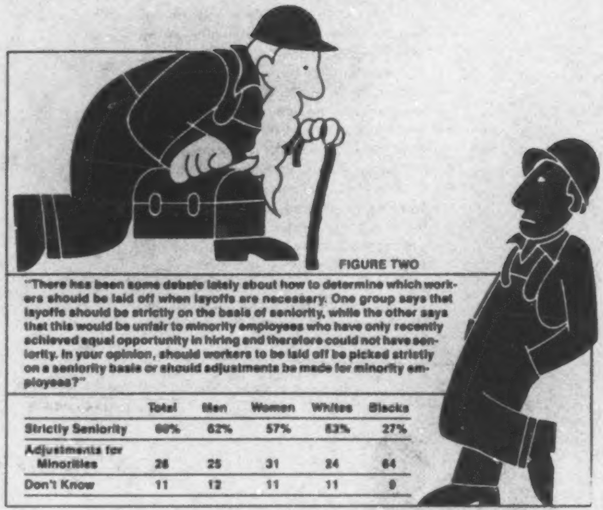


FIGURE TWO

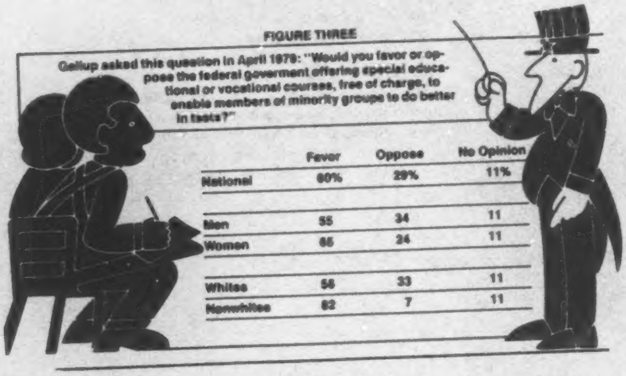
"There has been some debate lately about how to determine which workers should be laid off when layoffs are necessary. One group says that layoffs should be strictly on the basis of seniority, while the other says that this would be unfair to minority employees who have only recently achieved equal opportunity in hiring and therefore could not have seniority. In your opinion, should workers to be laid off be picked strictly on a seniority basis or should adjustments be made for minority employees?"

	Total	Men	Women	Whites	Blacks
Strictly Seniority	60%	62%	57%	63%	27%
Adjustments for Minorities	28	25	31	24	64
Don't Know	11	12	11	11	9

The *Washington Post* and Harvard's Center for International Affairs asked this question in 1976: "Which statement do you agree with more: 1) Quotas in job hiring should be used to increase the number of women in good jobs, OR 2) Job hiring should be based strictly on merit." Whites (82 percent), blacks (63 percent), and women (79 percent) voted for merit hiring. Other polls on quotas for minorities have also revealed strong disapproval.

In contrast to the public's rejection of quotas and preferential treatment, a majority of Americans (as Harris found in his 1978 study) support more government spending and special assistance programs for women and minorities to make up for past discrimination (see Figure 3). A *New*

FIGURE THREE



Gallup asked this question in April 1978: "Would you favor or oppose the federal goverment offering special educational or vocational courses, free of charge, to enable members of minority groups to do better in tests?"

	Favor	Oppose	No Opinion
National	60%	29%	11%
Men	55	34	11
Women	65	24	11
Whites	56	33	11
Nonwhites	82	7	11

York Times-CBS News survey in October 1977 confirmed that both whites and blacks approve of federal compensatory or "catch-up" programs for racial minorities that do not call for absolute preference over whites (see Figure 4). But when the survey asked about a school's "reserving a certain number of places for qualified minority applicants even if it meant that some qualified white applicants wouldn't be admitted," 60 percent of the whites and 42 percent of the blacks disapproved. As pollster Daniel Yankelovich has observed, "There is no ambiguity about where the majority stands. More than 80 percent are against affirmative action when it is carried to the point of reverse discrimination."

FIGURE FOUR

"The government should see to it that people who have been discriminated against in the past get a better break in the future."

	Agree	Disagree
Whites	68%	25%
Blacks	85	9

"What about a college or graduate school giving special consideration to the best minority applicants, to help more of them get admitted than otherwise. Would you approve or disapprove of that?"

	Agree	Disagree
Whites	59%	39%
Blacks	83	16

"How about requiring large companies to set up special training programs for members of minority groups?"

	Agree	Disagree
Whites	63%	32%
Blacks	88	9

It was not always the case that voters felt that the Congress and the bureaucratic functionaries in Washington, who continue to increase the flow of rules and regulations from the executive agencies, were beyond their reach. Sixteen years ago the public supported its elected representatives when Congress decided how to go about achieving the profoundly important goal of equality of opportunity for all Americans. In 1964, when the Civil Rights Act was passed, Congress reflected the general consensus that Americans wanted not only to end discrimination but also to make employment opportunity independent of race, color, religion, sex, or national origin. The new law was to bring Americans together, not separate them into categories. Individuals and groups from every walk of life who participated in the legislative process did not sanction preferential treatment, or special privileges for some, or the establishment of numerical or racial goals, or the concept of statistical parity among groups. They wanted to eliminate deliberate discrimination against anyone.

During the last decade, however, congressional policy has undergone many changes, not by legislators responding to a great reversal of public opinion—as verified by every poll, there has been no such reversal—but by the courts and such enforcement agencies of the government as the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance (OFCC). Former United States Solicitor General Robert H. Bork is right in saying that many of their actions would never be passed by Congress if taken one by one as legislative proposals.

One reason the power of the courts and the federal bureaucracy has increased in recent years (apart from the fact that Congress does not have the time to review the flood of bureaucratic regulations) is that the members of the House and Senate have not always wanted to "take the heat" and deal with some of the controversial issues that require policy judgments in areas where there is no political consensus. (At a private meeting last year, a liberal Democratic member of Congress acknowledged that in the area of affirmative action many of the decisions and policies of the courts and federal agencies do not reflect the feelings of the majority of Americans and have gone beyond the intent of Congress. When asked why he did not draw attention to the problem, he answered candidly, "I do not want to be called a racist by the civil rights activists." His further comments also went on to confirm the growing importance and fervor of single-issue groups and their skill in wielding influence out of proportion to their size.) The result has been that the courts and government agencies have frequently offered solutions that should have been provided by our elected representatives addressing themselves to problems that are fundamentally political and about which the full range of public sentiment deserves to be heard and ultimately reflected in congressional policy.

The liberal tradition of equality of opportunity is presently undergoing a major transformation, not principally through congressional legislation but (in addition to the courts) by aggressive affirmative action policymakers in the bureaucracy who seek to bring about social change through a succession of rules, procedures, and investigatory techniques. The time has come, therefore, for Congress to provide more than ambiguous and inconclusive evidence on how it feels about the redefinition of equality—whether, for example, an explicit (or even implicit) policy of racial preferences in hiring (or school admissions) is the will of the popularly elected branch of our government. Congress could begin by restating the purposes of the Civil Rights Act, and go on to develop additional policy guidelines for the courts and federal agencies. Our elected officials should articulate the terms and standards on which the deeply divisive issue of affirmative action will finally be vigorously debated and then voted on through direct involvement of the political process.

A fundamental policy question for Congress is this: If race or ethnicity, once abolished by the Supreme Court as a permissible basis for governmental classification (the *Brown* case of 1954), is to be reinstated as a legitimate and desirable ground for awarding jobs, social benefits, or opportunities, and if rights and special preferences are to be given to certain groups (but not to others), should the courts or the rule makers in EEOC, OFCC, or elsewhere make political decisions about how to institutionalize the "new legitimacy" without the legislative process being engaged?

It may already be too late. The Supreme Court has severely modified the policy of color blindness, which many people feel is required by the Constitution and the 1964 Civil Rights Act. Nonetheless, there are important questions of public policy for Congress to consider: Should individual rights give way to group rights in the demand for equal rights? Should equality of condition and result rather than of access and opportunity be the defining principle of a "new egalitarianism"? Does Congress endorse a redefinition of equal opportunity in terms of group proportional equality? Does a finding of statistical underutilization of minority workers prove by itself that a corporation or university has been guilty of past discrimination? Does this finding warrant remedial racial preferences and quotas?

Justice Oliver Wendell Holmes Jr. once remarked that legislatures are the ultimate guardians of the liberties and welfare of the people to quite as great a degree as are the courts. In addition to reaffirming the principle of nondiscrimination against anyone on the grounds of race or sex, Congress should address itself to the unresolved and critical issue of how equality in the United States derives its meaning as well as its limits from the larger system of democratic values to which it belongs. An inquiry of this sort could be the opportunity for an airing in the appropriate national forum of whether (or when) overt race-based and group-oriented preferential policies are justified in order to create equal opportunity, with the kind of participation and exposure to public view that will keep the American people informed and involved every step of the way.

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Senator **Hatch**. Let me repeat a question that I raised during the last hearing. One of the aspects of affirmative action that I find most perplexing is its time dimensions.

First, to the extent that affirmative action is defined as being purely remedial in character, how far back in time do we go in order to identify a violation against the protected class?

Second, how do we determine when affirmative action is no longer necessary? What precisely are the criteria by which legislators can say that the effects of past discrimination have been overcome?

Is there going to have to be some demonstration of pure statistical equality?

We will start with you, Professor Smith.

Mr. **Smith**. I had an opportunity to be here last week when William Coleman attempted to respond to just that question.

He responded by saying that affirmative action might no longer be needed when there is substantial equality in average wages between minorities and whites, when there is some approximate equivalent rate of unemployment, when there is some substantial equality in housing conditions, substantial equality in admissions to institutions of higher education, substantial representation in membership and trade organizations, and substantial representation in corporate boardrooms, banks, governing bodies of major political parties, the Congress, and the State legislatures.

After his list, Mr. Coleman said, and I quote:

> When we can show as a nation that we have made sufficient progress in meeting these criteria, then the remedy of affirmative action will no longer be an essential tool in realizing our constitutionally recognized values.

I have found that statement thought-provoking. I am not sure that I buy it all. I am not sure that Mr. Coleman's approach is the most reasonable or the best.

What he did was to invite some concrete alternatives.

I think it is difficult to approach the question or to answer the question of how long, when we are still debating the question of whether.

I would encourage the Senator to ask the second question: How long?

This is the type of question that the society ought to address. This is the type of question that may have different answers. How long we need affirmative action in higher education may be quite different from how long we may need affirmative action in the steel industry or in the construction industry or in the political process.

It seems to me that reasonable people can disagree about what the criteria ought to be for some end to affirmative action.

It does seem to me that Mr. Coleman has started a discussion, a discussion which is endorsed by the U.S. Commission for Civil Rights.

The Commission urges that we begin the process of asking, not only how long but to say that if affirmative action is going to be used, and it ought to be used, under what circumstances and to what extent and for how long and in what degree. Those are the important questions.

I will admit here today that I do not have the answers to those questions, because we have not yet begun that debate. It is an essential debate if we are to address in a meaningful way, not so much affirmative action but the underlying problems that affirmative action was developed to deal with.

Senator **Hatch**. I would suggest that "whether" might also depend a little bit on "how long" as well.

Does anybody else care to comment on this question?

Dr. **Sowell**. I am just staggered by the assumptions that have not been brought out.

Presumably, one can tell how long by proportional representation or by some sort of percentages and numbers.

Again, I know of nowhere in the world where any group has that proportional representation.

We certainly do not have it in basketball, for example, and yet I know of no one who believes that there has been some discrimination against whites in basketball. I hasten to add that when you look for a ridiculous example in affirmative action cases, someone turns up to do exactly what you consider too ridiculous for words. In Cleveland, they now have quotas for whites in basketball.

I think that the logic of that process drives you toward the ridiculous, because there is no stopping place along the way.

For example, we know that in South Africa, the white Afrikaners are absolutely dominant in the society. Yet they have lower incomes than the British and lower incomes than the Jews in the same country. Would you, therefore, advocate affirmative action for the benefit of white Afrikaners in South Africa, the least likely people to need this sort of thing?

If you use your standard, I would love to know some place where the standard actually applies.

Senator **Hatch**. You seem to be saying also that if we use a quantitative standard, we will never reach the end of affirmative action because it does not seem to work to produce the statistical results that those who believe in affirmative action really think it should.

Dr. **Sowell**. That is right.

That is another aspect that gives it an air of unreality.

Professor Nagel's discussion is a complete end run around the question of what results do you have to show for it?

You say that these are the desirable results; these are the intentions we have. This is what we are moving toward.

Yet I say: Where are we moving toward it?

I might as well say that the Robinson-Patman Act is bringing us more sunshine. The logical question would be: Show me where there is more sunshine after the Robinson-Patman Act.

Sunshine is a good thing. Show me where it has happened.

Senator **Hatch**. Do not be too tough on Professor Nagel. He agrees with you on a number of specifics, although I think he is somewhat troubled by these.

Dr. **Sowell**. One last point.

We are talking about what to decide.

Senator **Hatch**. I thought I was the only one who got worked up on this question.

Dr. **Sowell**. I am sorry.

May I just throw in one last thing?

It seems to me that the question of what to decide is one question. The more fundamental question is who is to decide.

The tragic fact is that it is not merely a matter of whether it is a little better to do a little of this and a little better to do a little of that.

The very pursuit of this goal, as Senator Hatch has already pointed out, is not supported by any significant segment of the American population—of any race or sex. There have been innumerable polls on this.

To pursue that requires that you have people who are willing to override the statutory law and, where necessary, the constitutional law in order to get their way.

Mr. SMITH. I can hardly resist responding to that if the Chair will allow.

Senator HATCH. We will allow you to respond, and then I think we had better let Professor Nagel have a few words here and perhaps Professor Bunzel has something he would like to say.

Dr. BUNZEL. I am afraid I do.

Senator HATCH. One thing about this discussion, it always lends itself to a great deal of excitability, regardless of which side you are on.

I have to confess that both sides make very eloquent points. All four of you have done an excellent job here today.

Please proceed, Professor Smith.

Mr. SMITH. Professor Sowell, in his customary fashion, has used the shotgun approach. Let me see if I can respond to just a couple of the broadsides.

First of all, he says: Show me where affirmative action has worked.

I am not sure if Professor Sowell could be persuaded even by statistics.

In 1969, there were less than two dozen blacks on the faculties of the Nation's predominantly white law schools. Ten years later, there were 150 black members of the faculty.

In 1969, there were just over 2,000 black law students enrolled in these schools. By 1978, black enrollment had doubled to 5,350.

Nobody in the law school community will deny that this significant change was due primarily and almost exclusively to affirmative action policies adopted by the law schools in the late 1960's.

This is not an isolated phenomenon. This same thing has occurred in medical schools, and in business schools.

What we find is that colleges and universities, as a consequence of the affirmative action era, have had to make a determined effort to go out and identify people who have always been qualified but always overlooked.

These are demonstrable and, in some cases, dramatic changes. They are due solely to affirmative action.

I am going to quickly move forward, because I see Professor Sowell is beginning to come at me again. [Laughter.]

Senator HATCH. Professor Nagel, I may have to ask Professor Sowell about that. Then I promise that we will get to you.

I just hope that we have enough time to get some other questions in. I didn't realize this question would provoke so much heat.

I love this. I love to see others in the fray, rather than just myself. [Laughter.]

Please proceed.

Mr. SMITH. I am about to get you right into it, Senator.

Professor Sowell seems to have persuaded you on one of his most ridiculous points. [Laughter.]

In fact, I must admit that I was quite disappointed when I picked up the paper in Philadelphia last Saturday. I noticed that you were quoted extensively. I would like to read the quote.

You said: The beneficiaries of affirmative action were "well-educated, well-trained people who were capable of getting jobs anyway."

Senator HATCH. Capable of getting jobs without the need for affirmative action. That is something that Professor Nagel pretty much agreed on with me today.

Mr. SMITH. With due respect to the Senator and to Dr. Sowell, that is ridiculous.

If you look at the litigation docket of the NAACP Legal Defense Fund and the Mexican-American Legal Defense Fund, if you look at the litigation docket of the Committee for Civil Rights or the National Council of Black Lawyers, you do not see a lot of cases attempting to get jobs for the well-educated and well-trained. What you see are cases involving entry level and promotional opportunities.

We tend to focus on academia, mainly because what you have here are four representatives of a well-heeled, federally subsidized industry. Therefore, we look at only the people who are well-trained.

However, affirmative action has been a policy that has been targeted primarily and has affected people in the steel industry, the paper industry, and the construction industry.

If you look at those faces, you are not going to find well-trained, well-educated, middle-class blacks lining up for the production line or the craftworker cases, as the situation in the *Weber* case. Nor do you find those people lined up to work in the prisons, as in the *Minnick* case.

You do not find them lined up for the types of jobs that have produced most of the litigation in this country or where affirmative action plans are mostly implemented.

To focus on that very narrow and very thin tip of the iceberg and to use that as a base from which to launch an attack on affirmative action evinces one either unfamiliar with what affirmative action really is or really does or it evinces a determination not to look at the evidence and to attack affirmative action in what may be its most vulnerable area.

I urge the Senator to look at the facts.

Despite Professor Sowell's persuasive and articulate argument to the contrary, affirmative action is a policy that has helped, and continues to help those in the society who have been most downtrodden and most disadvantaged and who are asking for an even break, as they attempt to move into the lower-level, lower-paying jobs in American society and industry.

Senator HATCH. I guess I will have to go to Professor Sowell, but I do want to go to Professor Nagel next.

Dr. **Sowell.** The acoustics must be very poor in here, because I distinctly recall talking specifically about those people who were the worst off.

Let me, again, go back to those blacks who have not been to college or who do not have extensive job experience—who have from 1 to 5 years of job experience.

As of 1967, people of that sort—black males—had a higher percentage of the white income of white males of that very same description than they had in 1973. In 1978, they have lower yet than what they had in 1973.

The group that you are singling out, where the intentions are noblest, are the groups who are going steadily downhill.

I suppose we could hold this same discussion 20 years from now; and if they were going further downhill, you would say that is all the more reason for affirmative action.

I am perfectly willing to believe that affirmative action increases the demand for lawyers. That is a further argument against it. [Laughter.]

Dr. **Nagel.** Should I say something now?

Senator **Hatch.** We will be happy to hear from you, Professor Nagel.

Dr. **Nagel.** I was accused of an end run, and it is intentional.

It seems to me important to deny the charge of the opponents of affirmative action that its goal is proportional representation. That charge is an important charge in their arsenal of attack, because it allows various reductio ad absurdum arguments like the one about basketball teams.

The target of the policy is a very serious social evil. I think that one's attitude toward this policy will depend on how seriously one takes it.

The aim is not compensation for past injustices but to attempt to remove the insular and chronically handicapped condition of those who belong to the groups that have suffered those injustices. That is something that is in the interests of us all. It seems to me that no one can look complacently at the economic and social position of blacks in this country.

I believe, with both of you, I guess, that the condition of the poorest blacks is the most important in this respect.

Senator **Hatch.** You say in your statement, Professor Nagel, that affirmative action has not done much to improve the position of the poor and unskilled blacks. That is one of my criticisms as well.

Dr. **Nagel.** I was about to say that I am somewhat skeptical of the capacity of affirmative action programs to help those who need help the most and for whom the society should wish the most improvement. I may be wrong here, and perhaps Professor Smith has reason to correct me.

However, I still think that raising blacks into the middle class has an effect on the status of the whole group in such a race-conscious society as we cannot fail to be, in view of our history.

That is an essential component of any policy dealing with this problem.

What results would be needed to justify abandoning the policy? I think there are actually two such results.

One would be that it is not working. Given that it has definite drawbacks, it should not be carried out if it is not having its intended effects at all.

The positive effects that I think would justify abandoning it are not proportional representation but a substantial change in the representation of blacks in the American middle class and in positions of power, so that they are considerably less isolated than they are now.

Because what we are trying to achieve is basically a psychological change—a change of attitudes on all sides—it seems to me that this will take a couple of generations.

The practice of strong affirmative action cannot be assessed yet.

Let me just ask one question of Professor Sowell about his statistics. He said that the average compensation of blacks—in white collar positions, was it?

Dr. **SOWELL**. No.

I am talking about blacks who have not been working more than 5 years and who have not been to college.

Dr. **NAGEL**. In any segment of the economy?

Dr. **SOWELL**. This is a census current population survey.

Dr. **NAGEL**. It seems to me that the important statistic is whether the employment of blacks in positions which they have not previously occupied has been increased by affirmative action, relative to what it otherwise would have been.

This involves a counterfactual, and it is very hard to assess.

It may well be that the average compensation, say, for blacks in white collar positions, has gone down in correlation with the number of blacks in these positions going up, particularly if the numbers go up because of strong affirmative action.

Dr. **SOWELL**. No; it is just the opposite.

The income of blacks relative to whites in those low-level jobs has been going down, while the unemployment rate among black youths has been going up. By going up, I do not mean by small amounts. I mean by five times as high in the 1970s, as in 1948.

Senator **HATCH**. You are saying, since these programs actually came into effect?

Dr. **SOWELL**. Yes.

The point you raise is a valid point in itself. However, factually, the earnings of blacks in the lower level positions has been going down in the affirmative action era, while at the same time a long-term increase in unemployment among black youths has been going up by leaps and bounds over the past two decades.

Mr. **SMITH**. Is that due to affirmative action do you think?

Dr. **SOWELL**. I do not attribute that to affirmative action, but there are other things.

I would say you are right. If, in fact, there are more opportunities for people who are simply, as a statistical matter, not doing as well, in some sense, that is fine. But there is no offset like that; both things are getting worse.

Senator **HATCH**. Professor Bunzel.

Dr. **BUNZEL**. I feel like I am sitting here watching a tennis match, and I appreciate this.

Your question about whether and how long the remedial programs of affirmative action will last, as I think has already been said, is tied really to the question of who is essentially going to determine how it is to be initiated and how it is to be applied.

Thus far, most of the action, as you have suggested, has been from the executive and judicial branches of the Government.

It seems to me now that it is important for the Congress to determine what are some of the principles and whether or not rights and opportunities for individuals should be provided, regardless of their race or color or background, as was the principle enshrined in the Civil Rights Act, or whether entitlements and penalties to individuals are to be based on the significance of their group membership.

That is a public policy matter. I believe it is the kind of question to which Congress should address itself, among many, many others.

If the Congress can determine a policy position, then it seems to me that the political process will have been engaged. By the engagement of that political process, whatever has been adopted has a better chance of being worked with a normative consensus behind it and perhaps then the question of whether it will come to a halt.

The question of whether something should come to a halt is one of those questions that I think cannot be divorced from how it begins.

May I say, Mr. Chairman, that Professor Smith talked about the blunderbuss. I understand this argument, because I think each side can use it.

I recall Professor Smith saying that none of the arguments against affirmative action can withstand scrutiny.

Again, I think one has to ask what kind of affirmative action are we talking about.

He says, and I am quoting again: "Affirmative action works."

I would want to suggest that that is not a sufficient test. After all, discrimination worked too; but that did not make it a good policy. That did not make it something which ought to be constitutionally or politically acceptable.

Senator HATCH. Professor Sowell has stated that affirmative action may not be even working, except for those who are not disadvantaged to begin with. I think you have made that point yourself.

Dr. BUNZEL. Yes, I think so; or I tried to.

When we talk about the results of affirmative action—and some mention was made here of the numbers who have been admitted to law schools—I think there is some truth to this. However, there is a complicating truth here also.

One really needs to go back and take a look at some of the various law schools in this country and see precisely what kinds of admissions policies they had. There were some law schools in this country who very clearly went out of their way to admit blacks, who very specifically had lower scores than any of the others who were admitted and did so on a very race-conscious basis.

What that suggests is that one then needs to take a look at the statistics of how those who graduated from law schools have done when they take the bar examinations.

I think over the 1970's, there has been some discouraging evidence that minorities have not done as well when they have taken the bar exam.

It is also true now that admissions to law schools on the part of minorities, while spotty, are not what they were in the past. They are not increasing. In fact, they may be going down—in business schools, perhaps as an exception—but in many other places as well.

If the rate of admissions of blacks and other minorities to professional schools is declining, does that now prove that affirmative action is not working or are there some other kinds of reasons?

I think the cause and effect relationships here are simply not sufficient to be able to make this an empirical proposition.

Last weekend, Mr. Chairman, I had the opportunity to talk with a professor in a medical school on the west coast who serves on the admissions committee.

He says that over the last several years, an interesting development has taken place. We are getting more blacks applying for our medical school, he said; but with those blacks, are coming letters in writing specifically asking that they not be evaluated separately and that they be evaluated against all of the others. Is that affirmative action, or is that a failure of affirmative action?

I believe that one can argue, in terms of the self-esteem concern that Professor Nagel raised and many others, that the fact that numbers of people have some psychic costs, which they see, to the problems of racially preferential treatment, those minorities or those individuals who want to be evaluated completely along with everyone else, that can be made part of the original purpose of affirmative action, which draws its lineage from the Civil Rights Act. That is nondiscriminatory.

That kind of affirmative action, if we are talking about whether that works, then it seems to me there are some reasons to make the distinctions and suggest that it can.

Senator HATCH. Let me throw out this question.

Last week this committee had the privilege of hearing testimony from the Mexican-American Legal Defense Fund. At that hearing, I posed a number of questions as to how they justified the entitlement to affirmative action of Hispanics on the same basis as blacks, despite the differing histories of discrimination that these groups have suffered in our country.

I would like to pose the same question here.

How precisely do we determine which minority groups are entitled to which kinds of affirmative action? Why Hispanics and not Poles or Asians, for example? Why blacks not Armenians or Jews or Mormons?

To me, these are very difficult questions. Any time you prefer one group over another, generally that preference results from some kind of political pressure. These political pressures change.

I can envision distraught minority groups in this country who do not fall within the protected class categorization and who, in return, feel that they have been treated unfairly.

Even within protected classes, there is room for division. Right now, it seems clear blacks are receiving priority preferential treatment before the EEOC and OFCCP.

I have heard many Hispanics complain about that. Some women complain about it. A number of other ethnic groups in the country complain about it.

Former Cabinet member, William Coleman, last week indicated that that is probably justified when you consider that blacks were the only people in our society who came into our country as slaves, in a condition of servitude, rather than a condition of freedom.

I was watching the representative from MALDEF as he said that, and I do not think she agreed entirely with him, because she represents a different ethnic group.

How do we resolve these problems?

Which groups are entitled to better or different treatment than other groups?

We will start first with Professor Nagel and then go to Professor Bunzel and then to Professor Sowell and then Professor Smith will have the last word this time.

Dr. NAGEL. I think, first of all, it should not be regarded as a question of entitlement but of national interest.

Which groups are in a situation which presents the Nation with a serious problem?

Senator HATCH. You are a philosopher. Would you feel good as a philosopher seeing some group receiving preferential treatment to other groups that may be just as economically disadvantaged or psychologically disadvantaged or job-opportunity disadvantaged or educationally disadvantaged?

Perhaps, I should ask what particular school of philosophy you abide by? Or is it the "eclectic" school?

Dr. NAGEL. I guess I cannot describe myself, but I would probably be called an analytic philosopher.

What you have just said makes me want to make a point that is not directly in answer to this question, so let me make it first.

This whole issue has to be separated from the general issue of equality of distribution, which Professor Bunzel brought in.

There are profound controversies about how much inequality in wealth and in social position among people in a country is legitimate or just.

Those problems are of an extremely general kind and do not have anything particular to do with race or ethnic group.

The special problems of race arise particularly strongly in a society which has large economic and social inequalities, because race can produce an extra disadvantage of a powerful kind at birth, in virtue of the traditional position within the social and economic hierarchy of such a group.

I do not think that the justification for affirmative action for a group is just that on the average members of that group are poorer than others.

It is that there is a certain stigma attached to the group which affects other people's conceptions of it and their conception of themselves and prevents them from mixing into the ordinary competitive game.

Senator HATCH. You seem to agree with the *Fullilove* case, which distinguished between invidious and noninvidious discriminatory practices.

Dr. NAGEL. Yes.

Senator **Hatch**. Noninvidious or nonstigmatizing.

Dr. **Nagel**. Yes. I think that is an important distinction.

As for how you decide which groups are legitimate targets of this kind of treatment, it seems to me that poverty alone is not enough.

I think that a history of discrimination produces certain attitudes in the group and attitudes toward it which make it a legitimate target. For that reason, I think the degree of discrimination and the psychological condition that results from it is the appropriate criterion.

By that criterion, Hispanics do not occupy the same position as blacks. I think their position is geographically variable: There may be parts of the country in which they really have suffered discrimination almost as badly as blacks and occupy a position in the public mind like blacks.

In that case, perhaps strong affirmative action there would be justified.

Nationwide I do not think so. Women do have a nationwide position and history of discrimination. I think that they are less plausible candidates for long-term strong affirmative action, simply because they are completely dispersed in the economic and social structure. Equality of opportunity ought to result within a reasonable amount of time in their overcoming the handicaps produced by past discrimination.

Senator **Hatch**. Professor Bunzel, you make an important point: What do we mean when we say that affirmative action works? When you stop and think about it, how does this differ from the old cliche that Mussolini made the trains run on time?

Any time a society subordinates competing values to a single value—in this case, racial balance—it is a relatively easy thing, it seems to me, to achieve that value fairly effectively.

I think you made an important point on that.

Dr. **Bunzel**. I appreciate that. One of the important points, I think, that needs to be stressed here again is the particular question of how you determine which groups. It is important, but it may be the wrong question if left by itself.

The more compelling question, again, in my judgment, is who is to decide and by what criteria burdens and benefits are to be awarded.

Senator **Hatch**. That is implied in my question.

Dr. **Bunzel**. After all, one of the questions, it seems to me, is should individual rights, which we have honored in the American political tradition, give way to group rights in the demand for equal rights.

If that is to become the basis of public policy and if by extension groups are to be given certain preferences because of their racial characteristics or certain group attributes, that is a departure for a variety of reasons from what has been the expressed consensus of this country and its experience.

If that is to happen, it ought to be done through the political and legislative process.

May I say, that if you start with the question of which groups, you are going to find that the list gets longer and not shorter. If we are going to divide all of this in terms of certain groups to find in certain racial ways, for example, or in certain group ways that devise attributes that we have long since, in many respects, thrown aside, that process is going to ask more groups to come before the Congress to ask for their special entitlements.

Senator HATCH. How well I know that. I have had about 500 groups come to my office already this year and say: We support President Reagan; we want him to cut everybody else, but please do not cut our program because it is the most important program there is.

Dr. BUNZEL. You have that many groups in Los Angeles alone.

When you hear from the rest of the country, you will discover that the list gets longer.

One of the problems here, and as an administrator and a faculty member I am aware of this, is to go back to a special problem.

When a university hires a faculty member, for example, we do not hire a class or a group but we hire an individual.

I think that is another way of suggesting that if we are going to talk about groups as if they are some kind of homogeneous entity, as if all groups are made up of similar kinds of individuals, we have made some very interesting leaps.

The fact of the matter is there are individual variations, and they can be broken down in a number of important respects.

If public policy is suddenly to accord benefits to groups and not to be giving primary consideration to individuals, that is a step that I would suggest would take us down a very dangerous path.

Senator HATCH. Professor Sowell?

Dr. SOWELL. In listening to this, again, I have the same sense of unreality. People are talking as if they were God. Let there be light, and there is light. We cannot say, let there be light and there is light. We have to build power dams and generators and transformers.

There is a process you create. It is not a matter of whether you would like to see this happen.

I would like to see many of the objectives that were attempted to be dealt with by prohibition.

As a young man, I used to walk up the bowery to school at night. Walking past about 2 miles of drunken bums lying in the streets, takes a lot of the glamour out of drinking. When you look at the automobile fatality statistics and so forth, alcohol is an enormously big problem. However, you cannot tell me that the intention to cut down on drinking among Americans justified prohibition.

It did not achieve the result. People kept right on drinking, but we created a great increase in organized crime, whose consequences we are still living with.

We have to talk not in terms of what some goal down the road would be, but what kind of process are we creating in the hopes of reaching that goal.

We do have to monitor ourselves to find out whether we are moving any closer to it by this process, and are we creating many other problems out of all proportion to any advancement we are getting from it?

Senator HATCH. Professor Smith.

Mr. SMITH. Since I am last, I am going to use the opportunity to respond—not only to the question but to an earlier comment by Professor Sowell.

Let me admit at the outset that I have an innate suspicion of averages.

Somehow I realized at a very young age that if one person was making $100,000 and the second person was making nothing, if you averaged that, you had an average of $50,000.

From the standpoint of the person who is making no money at all, that statistic is not meaningful and is virtually unintelligible. I kept that with me for a long time.

I am always concerned when we begin to talk about averages, because I suspect that there are a whole lot of people in that average.

Senator HATCH. I take it that you have suspicions about economists, although not nearly as much as they have about lawyers. [Laughter.]

Mr. SMITH. That is right.

Professor Sowell and I share a common suspicion about each other's professions. However, I think we have a lot more in common than we would like to admit.

Let me suggest that one of the problems with looking at the figures is that we do not disaggregate the growing permanent underclass from a lower class or a working class.

I think it is really important. No one will contend that affirmative action will address in a meaningful way the problems of the permanent underclass. That is why I have urged here today, and I have urged before, that we move beyond affirmative action so that we can deal with the structural barriers in the society.

Professor Sowell also talked about the lack of public support. When we look at the United Steelworkers and the various unions, although we have had problems with the unions at the outset of affirmative action, what we find is substantial support in the labor community for affirmative action.

When we look at the private sector, as William Coleman observed last week, we find substantial support in the private sector.

I am not going to contend that it is enthusiastic always, but we find a growing understanding that affirmative action is a policy which, properly implemented, can help all workers.

What we find is that affirmative action not only has a constituency, but it also works in the sense that it is cognizant of the fact that there are competing interests.

Nobody is contending that we ought to go out and take jobs away from white people. That has never been the contention, nor has anybody asked for statistical equality. These are essentially straw men that have been put up.

Senator HATCH. But you have to admit that Mr. Brian Weber probably did not feel very good about being next in seniority but being passed over for his apprenticeship. His union entered into an agreement to give 50 percent of those job advancement opportunities to blacks, even though they were a relatively small percentage of the work force.

Mr. SMITH. There are a whole lot of people who are terribly concerned about affirmative action. The question is whether you can look at the society and find there is absolutely no support.

That is not true. You will find that there is growing support for affirmative action, and there is a continuing debate about how affirmative action ought to be implemented and how it can be implemented better.

I would call your attention to the statement just submitted by the National Association of Manufacturers. This is clearly not a left-wing radical group. These are people who in talking about the Executive order say: We don't say that we like it; but we do not recommend its repeal. We think that it can be changed, modified, and improved.

This is the sort of meaningful dialog, even though we will continue to disagree.

Senator HATCH. You say it can be changed, modified, or improved. How?

Mr. SMITH. Senator, if I were to tell you how I think affirmative action could be improved, I think you would probably call these hearings off; because I do not think affirmative action goes far enough.

That is one of the reasons why affirmative action has not worked. I do not think we have had the type of total and vigorous commitment to affirmative action that we need.

I will suggest, if we have time, how affirmative action can be improved.

Senator HATCH. We do have time—perhaps, not here today—but I would like you to write us and share your views with us.

Dr. BUNZEL. Mr. Chairman, let me make a quick point here. It was interesting to hear Professor Smith say that, because throughout his testimony at the beginning, he made the point that affirmative action works. Now he has just said that affirmative action does not work.

Senator HATCH. Did he say it that way? Or did he say that it was a far cry from what it could be?

Dr. BUNZEL. I know, but what he is suggesting on the one hand is that it works. However to serve another purpose, it does not work.

Senator HATCH. Admitting that it is not working as well as he would like it to work.

Mr. SMITH. Thank you, Senator. [Laughter.]

Senator HATCH. Do you mean to tell me that I have been praised by somebody who favors affirmative action?

Mr. SMITH. Yes, sir.

Senator HATCH. Professor Smith, you have been abundantly fair here today, and I like that.

Let me say this: I think it is important that you do write to us. We are going to hold hearings in my other committee, as well.

I have spoken out against affirmative action programs. I personally have deep feelings about them. I personally believe we ought to enforce the Civil Rights Act of 1964, as amended, which prohibits discrimination, even some purely private discrimination.

I believe that affirmative action programs have quickly evolved, as was probably inevitable, into Government-enforced quotas.

However, that does not mean that there are not alternative ways that we can work together to try and resolve the problem, which is: What do we do to promote equal treatment in this country? If we abandon affirmative action, what are the alternatives?

We will go into that in a different way, from a different perspective, in the labor committee.

Congress should get involved. I agree strongly with Prof. Bunzel. Congress should determine how to do what is right for all Americans, not just a single, discrete group.

We have to abandon preferential treatment. It is unlawful, unconstitutional, unworkable, and it winds up backfiring against the very groups that were intended to be benefited.

In the end, it seems to me, it does a disservice to everyone.

The problem with Congress is that it has been afraid to discuss these things and examine them for fear that they will be called "racist."

I think this dialog today is extremely important, as have been the prior hearings we have held, all of which have been well-balanced with leading spokesmen on both sides. I commend the four of you.

However, go ahead and answer please.

Mr. SMITH. Let me ask you, if you would, to approach any legislation with all deliberate speed, as it is currently understood.

I am not sure that people who are opposed to Government regulations really want to essentially adopt the view of title 7 of the Civil Rights Act of 1964 that you suggest.

Let me say why. That view would say that we do not want to regulate business except to tell them that they cannot even if they want to make some modest attempt or efforts to remedy what they see as a problem before they get sued.

Those people who are concerned about allowing the private sector to make rational decisions without governmental intervention might well wish to say that maybe title 7, as it is presently construed, ought to be exactly the way it is.

We have companies which are making pragmatic decisions about whether, and to what extent, they are going to employ some modest affirmative action programs in the access of the promotion area.

I would caution you not to really proceed immediately with any reiteration or clarification of title 7 of the Civil Rights Act.

Senator HATCH. I do not think we need to clarify title 7. I think title 7 is pretty darn clear about discrimination and equal treatment.

Mr. SMITH. I do not even want to get into the Supreme Court. As you know, they have spoken on that. They have spoken clearly not with one voice and often not well.

Senator HATCH. There we certainly agree.

Mr. SMITH. Before answering the question—and this is a long way to the question I must admit—your statement and the statements that have been made here today that affirmative action contravenes some traditional values of color blindness, merit, and individual rights, when I think of those statements, I think about this. There is a little store in Philadelphia that has a facetious sign which says: Antiques while you wait. Ready made antiques, or something like that.

When you look at American history, you have a hard time finding any tradition of color blindness or any real tradition of merit or any real tradition of individuals rights', as it relates to minority people in the country.

Senator HATCH. Unfortunately, that is true; it still does not negate as a principle toward which we ought to move the idea of a color blindness public policy.

Mr. SMITH. That is right, Senator. However, let us not extoll it to a traditional value when it is just newly discovered. [Laughter.]

Senator HATCH. Not unless you read the Constitution which does exalt it as a traditional value.

Mr. SMITH. Be careful, Senator. We are now talking about the Constitution that recognized slavery.

Senator HATCH. That is true, but we are talking about a Constitution which for more than 110 years, through the 14th amendment, has spoken about all persons being entitled to the "equal protection" of the laws. All persons.

Mr. SMITH. I have a feeling we could have a really good legal and constitutional discussion that may bore everybody who is not a lawyer.

Now let me answer the question you asked.

Those of us who are going to try every now and then to present you in a good light, would probably want you not to ask the question about preferential treatment or use the words, preferred class.

Black people, and people from other minority groups, have a hard time understanding how in the context of American society, they could be considered the preferred class.

What I think the question is is are we going to have some sort of racial spoils system.

I am not sure who used the term earlier. I was hoping it would come up today, but since it did not, I will use it anyway.

Senator HATCH. It is a term that has been used frequently by defenders and opponents of affirmative action.

Mr. SMITH. The fact of the matter is that we have one now. The spoils are going to people who are white.

I think it is important to understand that the question is: Should we take some steps to undo that?

In terms of whether there is some current, and whether there will be some future, disagreement among groups as to whose problems ought to be accorded priority, I am sure there will be those types of problems.

That is not the issue that is germane here. The question on the table is this: Does the society have to agree on how quickly and to what extent to resolve all of its problems simultaneously, or can it choose to deal with those problems which appear to be more urgent and which appear to urgently need to be addressed now?

I contend that the society can take the latter approach. It can recognize that there may be some problems down the road. However, it can say that those problems are not of the urgency or the significance at this moment as is the necessity to end the condition in which the minority groups which you are concerned about find themselves.

If we address the condition and not the hypothetical or even the real question, I think we will find that those minority groups have a lot more in common than you would like.

With regard to affirmative action, I think you will find that a properly implemented affirmative action policy, which is properly targeted and which addresses the objective conditions and not the theoretical conclusions and which addresses objective conditions, can in fact work. They have in fact worked, and they are in fact elicited not only from those minority groups and not only from women, but they begin to find within the society the sort of broad support that they need to survive.

It will be really a cruel irony, if now they are doing that, that you and other influential members of Congress decide to lead the sort of assault which will tend to erode this support and which will put us back into the polarization that we are now getting out of and which will make the problems even more difficult not to resolve.

Senator HATCH. Dr. Smith, I just do not believe that. The evidence seems much more convincing to me that it is affirmative action itself that is contributing toward racial divisions and polarization, by defining so many public policies in terms of racial considerations.

Could I move on?

Dr. BUNZEL. Mr. Chairman, there is one point here that I think ought to be made.

I realize and I understand the necessity and the generosity of the chairman to try to come to as close to a modus vivendi with Professor Smith, because one does not want this to polarize.

I would suggest too, of course, that both of you are exercising tremendous discretion and patience with each other.

Beneath the discussion are significantly wide differences of opinion which have not erupted here.

Senator HATCH. There is no question about that.

Dr. BUNZEL. I believe that is probably good that you both know this.

Let me suggest to Professor Smith and to the Chairman, whom I suspect already understands this—and I believe that Professor Smith does too—that it is not possible to discuss the policies and principles of affirmative action by putting aside the difficulties and the arguments that surround the proposition about preferential treatment.

It is clear that blacks are not a preferred group in this society—absolutely clear. However, that is not the same thing as saying that the principle of preferential treatment that has been put into practice in different forms in various parts of our society ought not to be reexamined.

May I say, finally, that for anyone who believes that there is growing support for affirmative action—and we use those two words as a code word, but we do not break it down—it is important that this committee and everyone else who takes this argument seriously understand precisely what the polls do show.

Senator HATCH. I do not think there is a growing support at all. I think just the opposite; there is growing antagonism toward it. Every poll, virtually without exception, shows that.

Dr. BUNZEL. I think it is important to make some distinctions here.

Numbers of polls, and the Harris poll is only one, have found that large majorities of blacks and whites both favor setting up special programs for women and minorities, so they can be given every chance to have equal opportunities in employment and education—compensatory programs.

Americans approve of compensatory action to help make up for past discrimination, based on race, sex, and poverty. What Americans do not support is preferential treatment.

That question has been asked—not just quotas, Mr. Chairman. No one really in any significant fashion approves of quotas, but any form of absolute preference is not supported.

That is a datum that the Congress cannot overlook.

Senator HATCH. That is right.

I commend to everybody your excellent article "Prepared and Not Preferred," which was published recently in the Stanford Magazine. It is an excellent article.

Dr. BUNZEL. Thank you, Senator.

Senator HATCH. Let me ask another general, but very important, question.

It concerns affirmative action and its implications for the idea of individual merit.

I would like to ask, Dr. Sowell and Dr. Bunzel in particular, to comment upon the contention of affirmative action proponents that affirmative action does nothing to negate the requirement that individuals be qualified for the particular employment or educational institution that is the object of the affirmative action program.

First: In my opinion, this argument seems to imply that courts and bureaucracies are in a position to judge qualifications for entry into various private institutions.

Second: It seems to imply that qualifications can be understood in an absolute sense—if you are above a certain minimum, you are qualified; if you are below, you are not—rather than as a continuum with respect to which employers and educational institutions invariably attempt to secure the most qualified individual, rather than simply a qualified individual.

If I could ask the panel to briefly discuss the implications of affirmative action for the idea of merit and the concept of standards in society.

Dr. SOWELL. If you are going to have third parties deciding what qualifications are, you are going to be moving into an area of third party decisionmaking which has been disastrous in many kinds of areas.

When you are dealing with third parties, you are talking almost always about so-called objective criteria, which is to say precisely those kinds of paper credentials that are most lacking in the most disadvantaged groups, particularly from the underclass of the most-disadvantaged groups.

In that sense, blacks become even less preferred now as a result of this kind of affirmative action policy.

Of course, the idea is ridiculous that you can break down this long continuum of people into those who are qualified and those who are unqualified.

We have to use some standard, whatever it is.

By whatever standard you use, if the man who is just above that is better than the man who is just below it, then the man who is that far above him is more qualified as well.

If Pat Seerey was qualified to play center field in the major leagues and the other guy was left in the minors, it matters that Willie Mays was a lot better qualified than Pat Seerey.

What it also does is lead to a demand for people who are superqualified, simply because of the fear that the employers have that they are going to have to go through legal processes, regardless of whether they discriminate or not and regardless of whether they are vindicated or not.

Nobody wants to be vindicated at a cost of hundreds of thousands of dollars. That is what hurts the black who has the average qualification or whose qualifications are not yet known, because he is new in the job market, or what have you.

Senator HATCH. Dr. Bunzel?

Dr. BUNZEL. Mr. Chairman, I was just digging out here an exchange that took place in an Appropriations Committee hearing a number of years ago when Edith Green was the chair.

She was questioning the Director of the Office of Civil Rights about its enforcement policy. It goes to the question that you have raised here.

The dialog went this way. "Suppose in an institution of higher education," she said, "there was a vacancy. Ten people applied. Two were obviously far more-qualified than the other eight. These two happened to be white Anglo-Saxon Protestant males. Would they then require the institution to hire one of the other eight, who happened to be a woman or a member of a minority group?"

The Director of the Office of Civil Rights replied: "It depends on whether or not all ten were qualified."

Mrs. Green replied: "For the sake of the argument, let us say that all 10 are qualified but 2 were far more qualified than those who happened to be white males."

His reply was: "Yes. If all are qualified, then they would have to hire a woman or a member of a minority group."

She went on to say: "I do not believe that this policy represents the intent of the Congress."

The question of meritocratic criteria is not one that can be dealt with easily or with rhetorical flourishes. It comes down to judgments that have to be made with respect to individuals and sometimes those difficult questions involve difficult judgments.

In the academic world, with which I happen to be more familiar, part of the business and obligation of professors and committees is to make discriminating judgments about individuals.

One of the things which universities have traditionally believed—let me add quickly that they have not always practiced, but that does not invalidate the principle—they have always believed and should practice the notion that individuals should be judged on the basis of relevant criteria—merit criteria having to do with intellectual capacity and scholarship and teaching.

Many, many institutions for many, many years have believed and have accepted the norm enunciated in this country that race or sex is not a relevant academic criteria for appointment.

At the university with which I was associated, Mr. Chairman, we tried to handle this problem in the following way.

Because we were obliged by policy to collect all of the data of applicants, when anybody applied for a job, we asked those individuals to give us what they had to give us, although we asked them to do it voluntarily—their race and background and all of the other data. We sent that information to the affirmative action office, so that it could compile all of the data and keep it in their bulging files.

We asked the history department and the English department, for example, when they were making judgments—that data was not sent to those departments, because we felt and they felt that the judgments about whom to hire ought to be made on the basis of relevant criteria of merit.

We complied with the rules that we had to give all of the data, but we tried to allow for university faculties to make judgments about whom to hire on relevant criteria of merit. Those are individual criteria which we believe universities should try to live up to and practice on their own.

Again, they have not always lived up to the principle, but that does not invalidate the principle, I say again.

Senator HATCH. Dr. Nagel?

Dr. NAGEL. I think that the sacrifice in qualifications that is involved in strong preference is a serious matter, which should be taken into account in the assessment of any particular affirmative action program.

For that reason, no single form of affirmative action is likely to be justified for all professions or all circumstances.

There are some jobs for which a minimal qualification is probably sufficient, and the range of qualifications above that is not too great.

In a case like that—most notably, unskilled jobs—I do not see anything wrong with even a quota proportional to the representation of minority groups in the applicant pool to enforce weak affirmative action—just to enforce equality of opportunity.

Above that—and the more skilled the job is, the more this comes into play—any quota may require a substantial sacrifice in qualifications. It really has to be assessed according to whether it is worth the cost.

It also depends on the profession involved and how important the qualifications are. I feel very uneasy about sacrificing significant qualifications for schoolteachers, for example.

Senator HATCH. What about philosophers or engineers or doctors or carpenters?

Dr. NAGEL. I think in most of those professions the degree of preference that is currently being exercised—and I may be wrong about this—does not involve a really dangerous or extremely serious level of sacrifice.

If it did, I think that could outweigh the benefits of affirmative action.

My main point is that this is an essentially contested issue with very strong considerations on both sides. You have specified one of the considerations against the policy that ought to be taken into account.

My reason for feeling that strong affirmative action is nevertheless sometimes justified is that I think the social evil at which it is directed is such a serious problem for our society as a whole—not just for the interests of the affirmative action group—that it is worth making some sacrifices of this kind to combat it.

Senator HATCH. You do not think that that social evil of discrimination in our society will be enhanced by affirmative action programs?

Dr. NAGEL. I do not.

I think that while it has costs, it will gradually have an effect on the general social position of blacks in the society, which will pass itself on to future generations of blacks.

Not everyone will agree with me. Probably Professor Smith will not. I believe it is a method which we should prefer not to have to use, but which we must use because it is one of the only really effective ways of tackling a particularly bad problem.

Senator HATCH. Professor Smith?

Mr. SMITH. Professor Nagel is right; I do not agree with him.

I think the qualifications question and the issue is somewhat similar to the smokescreen for three reasons.

One, although color blindness and merit and to a lesser extent individual rights may be new-found phenomena, mediocrity is not.

There were mediocre white people in institutions of higher learning and positions of power and influence in this society long before affirmative action. Some of them are still there.

To blame affirmative action for impugning the integrity or somehow dispoiling institutions with mediocrity, misstates the issue substantially and ignores in fact that our experience is completely to the contrary.

We were not able to root out mediocrity in the society in our institutions before affirmative action. I suspect if affirmative action has done anything, it has enhanced the consciousness about qualifications.

As a friend of mine used to say, the only time you hear the question of qualifications is when a minority candidate comes up to be considered for either hiring, promotion, tenure, or admission.

That is one response to the question of qualifications.

The second response is that the issue of qualifications is often really not at issue. When we talk about the vast majority of entry-level jobs in this society, we are not talking about jobs for which there are any tremendous demands for credentials.

Nobody required a Ph. D. to work in the prison system in California nor in the plant in Gramercy, La. All that was required was that you be in the production line.

Brian Weber did not contend that the person who replaced him was unqualified. He was saying that seniority ought to be accorded him.

To some extent, we ignore again the bulk of affirmative action programs and the bulk of its impact when we talk about qualifications.

Third, and this is something that is particularly true in the selective institutions than in positions of power and influence within the society.

Dr. Sowell talked earlier about playing God. The fact of the matter is we do not admit often enough that we do not know who is qualified and who is not. What we are doing is making seat-of-the-pants judgments and trying to make them sound good, so that we can write them down.

We are using our intuition as much as we are using logic.

We do not know who will be the best law student, nor do we know who will be the best lawyer. We have to find some way to select 200 people out of 4,200 applicants. We use numbers and a variety of means to do that. Those are the tough decisions that we have to make.

If we would admit more often that we do not know and that we are uncertain about these things, then the questions change somewhat.

The question then becomes: Given the uncertainty of prediction and given the fact that mediocrity has not destroyed the society thus far and given the fact that we have made mistakes in the past and will continue to make them and given the urgency of the condition at hand, is it appropriate and is it wise and is it necessary for us to deviate a bit from the traditional patterns and practices and even the traditional criteria to see whether there are some people in the society who ought to be given an increased opportunity?

That is the question on the table. It is not a question of whether we ought to get rid of all qualifications. Nobody has ever contended that.

Senator HATCH. There is a deeper question than that. That is: Can we give maximum opportunities for all individuals without the setting of quotas, goals, and timetables?

I believe that we can.

You had a comment, Dr. Sowell?

Dr. SOWELL. Yes.

As someone who worked for many years as an unskilled worker, I am always horrified when I hear academics from their glorious pinnacles look down and say that all the little ants down there are the same.

I was one of the little ants. We were not all the same.

Second, you talk about how mediocre whites have gotten this and that. What I am saying to you, and what the census data are saying to you, is that as a result of affirmative action, there will be more mediocre whites getting more of those jobs.

Mr. SMITH. We agree on that.

Senator HATCH. I have a number of other questions. Unfortunately, I have run out of time here this morning.

There is one other question that I have of you, however, Dr. Sowell. It is one that while I have you here, I would like to ask you about.

You have just completed a major study of the experience of ethnic groups in the United States. Do you have any feel for the attitudes of these groups toward affirmative action policies? Is there support or opposition toward affirmative action, or is there perhaps simply the feeling that they are not getting a proportionate share of the affirmative action pie?

Dr. SOWELL. There is a great fighting among the various groups for a bigger share, not only in the United States but in every other country in the world—Indonesia, Malaysia, and wherever this has been tried, it has always led to the same kinds of fights.

What was the other question?

Senator **Hatch**. There were two questions.

The other was: What is their attitude, that is, the attitude of these ethnic groups?

Dr. **Sowell**. Neither I nor the Gallup Poll people have ever been able to find any group of people, by race, color, region, sex, or income level in the United States that is in favor of preferential treatment.

Senator **Hatch**. Let me give each of you a final minute. You have all been eloquent, and I want to compliment you all.

Some of us may differ, but I have a great deal of respect for each of our witnesses today.

It has been a very stimulating discussion.

Let us give each of you 1 minute—I have to go vote, so that is as much as we can afford to allow—to sum up what you would like to say.

I think it is only fair that we start with you, Dr. Smith, and then Dr. Nagel, Dr. Bunzel, and Dr. Sowell.

Mr. **Smith**. Senator, affirmative action has had its day in court. Despite a tremendous litigation onslaught, affirmative action managed to survive.

The question now is whether affirmative action can survive the political process.

It seems to me that whether it ought to survive depends upon whether it can demonstrate, one, that it has a constituency and, two, that it is a responsible policy which takes into account the legitimate competing interests.

It seems to me on both counts that affirmative action ought to survive.

The questions which have been asked of affirmative action are important questions. It is about time that we get onto the business at hand of attempting to fashion answers to those questions.

I think it is important that the political process not attempt to act hastily, because it will probably not act well.

It is important that we consider not only what affirmative action promises to do but what affirmative action has done.

The bottom line is that when we look at affirmative action and when we look at how it has affected the lives of real people and not the statistics, we find that affirmative action has worked to make this society a far better place.

Senator **Hatch**. Dr. Nagel?

Dr. **Nagel**. I think that in view of the vexed state of public opinion about the matter, Congress has an opportunity to take a moral lead in this circumstance. It seems to me it is justified in continuing programs of affirmative action.

One point I want to make is that the goal of affirmative action is to deal with a national problem and not simply to hand out benefits to one particular group. It is not a substitution of group consideration for individual consideration.

In general, the problems of distributive justice in this country, with regard to medical care and taxation and the economy, should not be handled along racial or group lines.

Because of our history, there is a very special problem, having to do specifically with groups, that demands an attack which recognizes its special character. Affirmative action is one, although I add, only one, of the methods available to us to attack it.

I think it should be given its chance, which requires several decades.

Senator HATCH. Professor Bunzel?

Dr. BUNZEL. Mr. Chairman, it has been some time since I have heard such enthusiastic words in behalf of mediocrity, as if somehow mediocrity were a principle or a proposition that could be identified with what has always been the case in this society or in the universities or is something that we really ought not to worry too much about, because we have always had it with us.

I remember, when President Nixon nominated a gentleman to the Supreme Court, that a Senator from the United States made the point that it was about time we had some mediocrity on the Court. He was coming to the defense of his nominee.

Senator HATCH. He said that there was a constituency out there to serve that, perhaps, was unrepresented on the court.

Dr. BUNZEL. I do not choose to believe that those who want to make the best argument in behalf of affirmative action in any manner, way, shape, or form want to slide over the proposition that I would particularly endorse, that whether we achieve it or not, it remains a goal; namely, that we ought to try to do things in the best way possible and that we ought to achieve and strive for excellence, and that those things that make for excellence ought to be defined in terms of defensible criteria.

I believe when it comes to higher education that there are criteria for appointments that simply do not apply, perhaps as Mr. Nagel has suggested, in other places, but in higher education, we do have some very important criteria.

Furthermore, I do not believe, Mr. Chairman, that bad means can provide or make for good ends.

I think it fair to say that the whole debate this morning about affirmative action involves, among other things, the relationship of means to ends.

Senator HATCH. Thank you. Dr. Sowell?

Dr. SOWELL. Two things that worry me, principally, about the discussion are these.

One is that we have always talked in terms of internal transfers, as if it is just a matter of taking from this group and giving to that group.

The tragedy is that those who are worse off are made still worse off than they were before. The transfer is not taking place, but the hatred is nevertheless growing as a result of the process of trying to.

The other is that we do have to look at results, because we already know what road is paved with good intentions.

Thank you.

Senator HATCH. I thank all of you.

This has been a very provocative hearing.

I might just mention for everybody in attendance here that I have just now learned that Justice Potter Stewart of the Supreme Court, has just retired and taken senior status.

It will be very interesting to see what happens here and, in particular, the implications for the issue of affirmative action.

Judge Stewart was no admirer of affirmative action, judging by his opinions.

I just thought I would announce that here today.

I want to thank you all. We appreciate having you here today.

The hearing is adjourned.

[Whereupon, at 12:15 p.m., the hearing recessed, to reconvene subject to call of the Chair.]

AFFIRMATIVE ACTION AND EQUAL PROTECTION

THURSDAY, JULY 16, 1981

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 9:36 a.m., in room 2228, Dirksen Senate Office Building, Senator Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senators Grassley and Thurmond (ex officio).

Staff present: Stephen Markman, general counsel; Peter Ormsby, professional staff assistant; and Claire Greif, clerk.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, AND CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. We will call this Subcommittee on the Constitution to order.

Today's hearing is part of a continuing series of hearings by the Subcommittee on the Constitution on the subject of affirmative action and equal protection.

We are fortunate to have with us today an excellent group of witnesses of widely varying prespectives on this critical issue.

What has struck me most perhaps about these hearings so far has been the emotions and the strengths of the feelings that the issue of affirmative action engenders.

This is not, in my opinion, your average garden variety legislative debate. Rather, this is a debate that at its roots relates to the deepest values and principles of this Nation and the objectives toward which we want our Nation to strive in the years ahead.

I may be wrong, but this issue is different from most legislative matters that this committee considers. It is different in that it is not easily susceptible to political negotiations and compromise.

It is different in that the give and take of the legislative process is not likely to result in a consensus that will be accepted, however grudgingly, by all participating interests.

It is different in that both sides, perhaps correctly, view this as an issue of black and white, right and wrong.

My only questions remain much about the same as they did at the outset of these hearings: Can we make exceptions in the law to the principle of equal protection without undermining the principle itself? Is there any basis in the Constitution for making distinctions between permissible and nonpermissible discrimination? Do legal rights in our society belong to individuals or to groups? Should our society apportion benefits on the basis of sex or skin color or national origin or on the basis of traditional principles of entitlement? Is the merit principle undermined by affirmative action? Do we cope with past discrimination by forbidding it or by instituting reverse discrimination?

I have been taken to task, perhaps properly so, for some remarks in which I have analogized affirmative action to heroin addiction. I have apologized for any misunderstandings that my statement may have created.

The fundamental point, however, is one that I believe deserves further discussion. That is, the longer we continue to distribute benefits and privileges on the basis of such factors as race or ethnicity, the more such protected groups come to view such benefits and privileges as entitlements.

The more affirmative action is viewed as an entitlement by its supposed beneficiaries, the more difficult it will be to reverse this policy short of enormous social divisions and tensions.

Affirmative action, in other words, is not an issue that is gently going to go away. We have seen that policies of color-consciousness or race-consciousness are not policies that, for long, contribute to social harmony. They may be tolerated over the short run and forcibly imposed over the long run, but they are not policies that can be maintained in social equilibrium for sustained periods of time.

This has been the experience throughout the world, and it has been the experience throughout the history of our own Nation.

I am looking forward to the outstanding group of witnesses that will be testifying this morning. Each, I know, will make a valuable contribution to the permanent record that this committee is creating on affirmative action.

In doing so, I believe that each will be contributing to a record that will be at the heart of public debate for many, many, years to come.

Let me clarify once more, as we have at all of our hearings, that by the term "affirmative action," we are referring to race-conscious or color-conscious public policies—policies that accord preferential treatment to individuals on the basis of such factors as race, color, ethnic background, or sex or policies which identify discrimination on the basis of numbers, rather than on the basis of discriminatory intent.

Affirmative action does not, however, mean public programs administered totally without discrimination that may be anticipated in itself in improved opportunities for deprived individuals, a disproportionate share of whom may be minorities.

With that definition, we will begin this morning's hearings by calling upon Jack Herrity, who will be our first witness today. He is the extremely able chairman of the Fairfax County Board of Supervisors.

Mr. Herrity has served as chairman for 6 years and will share with this committee some of the experiences of Fairfax County in dealing with the affirmative action requirements of the Federal Government.

Mr. Herrity, we are happy to have you with us.

Your prepared statement, and the prepared statements of all of the witnesses, will be inserted in the hearing record at the completion of your oral presentation.

You may proceed.

STATEMENT OF JOHN F. HERRITY, CHAIRMAN, BOARD OF SUPERVISORS, FAIRFAX COUNTY, COMMONWEALTH OF VIRGINIA

Mr. HERRITY. Thank you, Mr. Chairman.

It is my pleasure to be here, Mr. Chairman. I do appreciate the opportunity to bring the case of the citizens of Fairfax County, some 600,000 strong, to the Congress today. We have been seeking for many months, any forum we possibly can find to tell our story which we think is one that bears hearing by not only this subcommittee but the whole Congress, and, indeed, the people of this great country.

In his opinion of April 20, 1979, Judge Bryan, the district court judge for the district court in Alexandria, commended Fairfax County with the following statements, and I quote Judge Bryan:

"Testimony of O'Kane,"—Mr. O'Kane is the personnel director for Fairfax County—"the present acting director of personnel for the county, outlining the vigorous and successful affirmative action efforts on the part of the county, is impressive and persuasive. The fact that these efforts are implementations of a plan effective January 1, 1978, but adopted October of 1977 before the county was aware of the Government's investigation, makes them even more credible."

Mr. Chairman, we have impressive statistics which should be of interest to you that support and document Judge Bryan's remarks.

In equal opportunity category 2, professionals, of all hires made in Fairfax County in 1979, 59.9 percent were females. In 1980, 58.3 percent were females. However, Fairfax County was found guilty of discrimination against females in this category.

In equal opportunity category 3, technicians, of all hires in 1979 in Fairfax County, 65.6 percent were females. In 1980, 63.7 percent were females. However, Fairfax County was found guilty of discrimination against females in this category.

In equal opportunity category 5, paraprofessionals, in 1979, 64.9 percent of all hires were females. In 1980, 77.3 percent of all hires were females. However, Fairfax County was found guilty of discrimination against females in this category.

The legislative body of Fairfax County is deeply disturbed that such shocking and seemingly unreasonable conclusions have been rendered.

We can expect to have no relief from the courts for they are bound by a decade of precedential decisions which now offer little leeway in final judgment making. Essential or blatant discrimination is no longer identified or searched out. Rather such terms as "value of one standard deviation, disparity in standard deviation, and significant level" have become terms of art which lead to this increasingly grotesque establishment of statistical guilt in place of real guilt.

Notwithstanding the judicial constraints, the judgment in the case by the Federal District Court found that the County of Fairfax was guilty of discrimination in six of eight equal opportunity categories with respect to females.

The resultant master's process, presently on-going, will require our county to communicate with all identifiable applicants in the aforementioned categories back to 1972—by certified mail, return receipt requested—and invite litigation.

It would seem that we will be dealing with tens of thousands of such letters.

In addition ads are to be placed in all standard metropolitan statistical area—SMSA—daily newspapers twice a week for 4 weeks stating the court's determination of guilt and inviting litigation. Ads are also to be placed in all SMSA weeklies for 4 weeks with the same message.

Further, radio spot announcements are to be placed up to a maximum cost of $4,000.

All of the aforementioned methods of communication may be formatted according to the desires of the Department of Justice.

The litigant population which results from this mandated mass communication will then appear individually before a court-appointed master. Unless our county can prove that the appointee being contested was demonstrably better qualified, the litigant will be adjudged to have been discriminated against and will receive immediate appointment with retroactive pay to October of 1975 with 8 percent interest on such moneys, all accumulated vacation and sick leave retroactive to October 1975, and retroactive pension credits purchased for the same period.

And this shocking litany goes on and on and on.

Many questions arise. Any reasonable person looking at Fairfax County's employment data would conclude that it has not been performed in a bigoted or biased manner. In fact, since the enactment of the comprehensive affirmative action plan which became operative in January 1978, our performance has been increasingly positive as the statistics I have mentioned would indicate.

Why then did the Justice Department ask the court to set from 1972 as the legally vulnerable period? I am sure they would answer that it was because the Equal Opportunity Act of 1972 extended title 7 of the Civil Rights Act to cover Federal, State, and local public and educational institutions.

That only answers as to the outer limits they could ask for. Why did they insist on the extreme?

Why did the Justice Department insist on backpay to October 1975, 8 percent interest on such moneys, and the humiliating extent of public advertising? All of these and more represent the extremes of what could be asked for. Why did they go so far?

Again, the reasonable person would examine the potential benefits received by successful female litigants in the equal opportunity paraprofessional category, knowing that in 1979 64.9 percent of all hires were female and 77.3 percent in 1980, and would conclude that sanctions are being imposed to such inappropriate and destructive extremes that it approaches lunacy.

Fairfax County is deeply troubled with the irrational whirlwind that has descended upon us.

Whatever their laudable activity in the past, there is little doubt that the Civil Rights Division of the Justice Department has now become a battering ram of punitive action against the cities and counties of this Nation.

Many of these cities and counties, disheartened at the improbable burden of surmounting the statistical guilt obstacle in the judicial environment, have signed onerous, exorbitant, and unjust consent decrees with the Justice Department.

Fairfax County is the first county or local jurisdiction in the United States that has had the guts to take on the Justice Department head-on in one of these suits.

Senator HATCH. Perhaps you are one of the few that possess the finances to take them on—or do you?

Mr. HERRITY. If this committee were to communicate with these political subjurisdictions which were forced to sign consent agreements, such as Los Angeles, Philadelphia, cities in Florida, and countless others, they would find in the analysis of these decrees a massive indictment against the activities and powers of the Civil Rights Division of the Justice Department.

Whatever caused the Civil Rights Division to become what it is today is most puzzling.

Affirmative action activities and plans for the protected classes throughout the Nation are laudable and should obviously be pursued vigorously.

Political subjurisdictions of the Nation guilty of true discrimination and recalcitrant with respect to recommendations for improvement must, of course, have mandated measures imposed.

However, that is not the problem I am addressing. There is something despotic in the force generated by the Civil Rights Division of the Justice Department which can force Fairfax County into humiliating procedures which can finally result in the possible expenditure of millions of dollars of taxpayers' money, demand that other dignified cities and counties place millions of dollars in escrow, mandate appointments, mandate promotions, and hold the appointments of highly qualified persons in abeyance. Something has gone shamefully awry.

Among the many governmental victims of statistical guilt as applied by the Justice Department was the Office of Personnel Management of the Federal Government. I have been given to understand that the widely praised and thoroughly validated PACE examination—the professional and administrative career examination—having been found to fail more Hispanics and blacks than white males and females, has occasioned still another debilitating consent decree forced by the Justice Department.

I understand that this calls for the dismantling of the PACE examination, as well as other examinations, and calls for the payment of $3,000 to any black or Hispanic who contacts the court who has ratified the consent decree and can prove that he took the examination and failed it.

Considering that the device has probably been administered to over 200,000 candidates per year for a number of years, the cost both in moneys and the loss of a superbly predictive management competence device is significant.

Unless the attitude and the modus operandi of the Civil Rights Division of the Justice Department is radically modified, the status of affirmative action as practiced by conscientious jurisdictions will remain in an environment of fear, as it is at the present time.

There is fear of the monetary impact—in this case, between $300,000 and $400,000 to date—demeaning practices, and loss of management control whenever the Justice Department knocks on their particular door.

It has become a pervasive anxiety, because the legal actions and consent decrees implemented by the Civil Rights Division have become so numerous and notorious that there are few jurisdictions which do not have neighbors or administrators who do not have colleagues that have been punished inordinately.

This whole situation raises several questions in my mind. I question the evenhandedness of the Justice Department when a law prevails in the District of Columbia which requires District employees to be residents of the District of Columbia, while a regional hiring quota is being required of neighboring Fairfax County.

I question the Justice Department's methods in making late-night phone calls to county employees in a last-minute effort to substantiate their charges.

However, my more important question is: Why is there no requirement for the Justice Department to find actual cases of discrimination? Instead, there has been an assumption of guilt, and Fairfax County has been put in the posture of having to prove its innocence rather than the Justice Department having to prove Fairfax County's guilt.

In closing, it would be my plea that this committee use its offices to restore affirmative action to the positive practice it should be. It should suggest persuasive rectifying methods for those units of government which have been lethargic in their activities and propose a graduated system of sanctions for the more obdurate governmental jurisdictions.

This would be effective and constructive, as opposed to continuation of what is rapidly becoming a despotic intimidation of government officials across this Nation by the Civil Rights Division of the Justice Department.

Please accept my sincere gratitude for the privilege of addressing this body.

I have attached a chronology of events, beginning October 1977 through May 12.

Also attached is a copy of a portion of Judge Bryan's decision with the quote I gave at the beginning of my statement.

Senator HATCH. Thank you, Mr. Herrity.

You discussed "statistical guilt" in your statement, in contrast to what you refer to as "real guilt." Could you please explain to us what you consider to be the distinction?

Mr. HERRITY. I guess when you have a judge say that your affirmative action hiring plan is doing a good job and when you have the statistics that we have had for the last couple of years to back that up——

Senator HATCH. Well over 50 percent?

Mr. HERRITY. There are 60 percent in some categories and 70 percent in other categories of hiring.

When the judge says you have a good plan and then the court imposes the burdens that they imposed on Fairfax County to rectify what you may not have done in 1978, 1977, or 1975, I think that, in effect, is almost a punishment that does not relate to the correct situation that exists.

The Justice Department should have specific examples of discrimination.

The late-night calls I mentioned were an activity by the Justice Department which violates the rules of civil procedure. They were calling our employees at 11 or 12 o'clock at night, trying to find out whether they had been discriminated against.

They have really never produced individual people at their trial who could allege and prove that we discriminated against them. Individuals were not involved in this lawsuit. This was a statistical thing.

Senator HATCH. What you are saying is that they are attempting to prove that Fairfax County was guilty of discrimination, based upon statistics, not based upon any proof of intent to discriminate or any indication of intent to discriminate.

Mr. HERRITY. The fact of the matter is that for the last 2 years they could not even prove statistical guilt.

Senator HATCH. You are saying that the statistics do not even prove it.

Mr. HERRITY. Not for the last 2 years.

As the judge said and as my figures indicate, our affirmative action plan has been doing an outstanding job. The judge said so before he lowered the boom on us, which is rather incredible.

Senator HATCH. You are saying that Fairfax County has been adjudged in violation of the law and has had assessed against it certain legal sanctions because, before 1979, the Justice Department felt that you did not hire enough women, blacks, or other minorities, from a statistical standpoint?

Mr. HERRITY. That is correct.

Senator HATCH. Since 1979, you have been hiring well over 50 percent—in some cases 60 or 70 percent—of women, blacks, and minorities.

Mr. HERRITY. That is correct.

Senator HATCH. And they have still found statistically that you are violating the principles of affirmative action?

Mr. HERRITY. That is correct.

Senator HATCH. There has been no proof of intent to discriminate whether by circumstantial evidence or otherwise?

Mr. HERRITY. Or specific examples of people who were discriminated against, either intentionally or unintentionally.

We are not dealing with individual human beings that you can reach out and feel and touch and talk to. We are dealing with sociologists, lawyers, and statisticians who have mounted the barricades by the hundreds and by the thousands, descending on us and other local governments in this country to perpetrate this kind of travesty on the people of this Nation.

Senator HATCH. And all the while the judge has been complimenting Fairfax County on a fine job performance.

Mr. HERRITY. Exactly right.

Senator HATCH. This has so far cost the taxpayers of Fairfax County $300,000?

Mr. HERRITY. That is just the dollar cost.

Senator **Hatch**. That is the attorney fees for defending yourselves?

Mr. **Herrity**. There are bigger costs in terms of morale.

We have a government of 600,000 people. We have about 18,000 employees in the county government. There are 6,000 in the general county government and 13,000 in the school system.

The morale of those people who should have been hired or should have been promoted within the county system who are not being promoted and the thought that we may have to start hiring unqualified people because of this makes us unable to effectively, in my opinion, potentially discharge the duties of government to fill potholes, deliver school educational services, and other services that the county government is set up to fulfill.

It is hard to measure the value of a morale problem that something like this creates in your work force in actual dollars and cents. You measure it in terms of what may not be done in the long run by your government employees.

Senator **Hatch**. Congress was involved last year in addressing a similar distinction in the context of legislation designed to extend the Open Housing Act provisions.

The issue that eventually defeated that measure, even though we came a long way toward resolving some of its problems, was opposition by myself and others to a test for determining discrimination that looked not to discriminatory intent or purpose but purely to the so-called discriminatory effects or disparate impact of some otherwise legitimate action.

It was my view at that time that the effects test was a club that could be used by the Federal Government to impose its own notions of racial balance upon municipalities and neighborhoods.

I gather that you see the tremendous potential for the Federal Government to harass communities through use of the effects test as well—a test that relies on statistics rather than on state of mind to uncover discriminatory activity. Am I correct in this?

Mr. **Herrity**. I think that is correct.

Maybe there is some full employment act for statisticians that people are trying to enact, because I certainly think they have gotten a considerable amount of employment from these types of cases and potential cases like that. Statisticians in these particular cases are achieving a greater degree of notoriety and importance than even lawyers. I think that the bar should maybe be concerned about that.

Sociologists are even background to the statisticians in some respects.

I think the profession of sociology and the legal profession may be wary of statisticians.

Senator **Hatch**. You mean competition exists for lawyers as the most despised group in society? [Laughter.]

Mr. **Herrity**. That is right.

I think the statisticians are gradually assuming a preeminence in these types of things.

Senator **Hatch**. This is what we were worried about in that debate; it worries me even more today as I listen to you.

If Fairfax County, with what you suggest are commendable minority hiring practices, in the neighborhood of 60 to 70 percent, which is far above almost all other municipalities in this country, can suffer this type of onerous, burdensome, governmental harassment as you are explaining it to us, then what does that mean to every other city or town in America? What are the implications if the effects test can impose these burdens upon a community without any demonstration at all of wrongful intent?

Mr. HERRITY. As I said, we are the only jurisdiction in this whole country that has either had the money, as you indicated, or the personal fortitude and integrity to attempt to defend our county and our system of government against this unwarranted attack and invasion by the Federal Government on the local prerogatives and on an operation that we consider to be operated fairly and equitably in terms of the rights of minorities in Fairfax County in this region.

Believe me, this type of decision is not taken lightly by our local governing body. It was not easy. It was taken on the basis of principle and on the basis of practicalities of operating a government.

It was a combination of the two that led the board of supervisors to do it.

We have been through two district court hearings already and the court of appeals. We have petitioned the Supreme Court and now we are back to the court of appeals. Presumably, if the court of appeals does not listen to us, we will go back again to the Supreme Court on different grounds.

Senator HATCH. Is the attitude of the new administration's Justice Department any different from the attitude of the previous administration?

I understand that you called upon President Reagan to discontinue the Justice Department's suit; has there been any change?

Mr. HERRITY. There has been absolutely no change. As a matter of fact, I was talking to my personnel director. They have actually had a greater horde of Federal bureaucrats invading Fairfax County in the last couple of weeks, Xeroxing a lot of our personnel things to go out to all of these applicants back to 1972.

My understanding is that they have a list of 25,000 people. We are going to have to spend about $50,000 to deliver certified, return-receipt-requested letters. There have been hordes of them roaming around our county building Xeroxing all this material.

The answer is absolutely not.

We have attempted to settle this issue with the Justice Department by a simple agreement—many times we have—by indicating that we will continue to pursue the affirmative action plan that we have in place that Judge Bryan said was an outstanding plan that had been instituted prior to Government investigation. It was not inspired by the Federal Government; it was inspired by a policy of the county.

The facts in the last 2 years indicate that it has been successful.

We will continue that program without the Justice Department harassing us.

They have turned this type of settlement down many times.

I would never believe that it is too late for reasonable people to get together and solve a problem in a responsible way, rather than solving it in a way that amounts to a vendetta against the people and governing body of one of the oldest counties in this country—the birthpace of George Washington.

Senator **Hatch**. Has the Civil Rights Division ever specifically pointed to any actions by yourself or Fairfax County that evidenced a discriminatory purpose? Do they even consider that a relevant issue, in your opinion?

Second, is Fairfax County the only jurisdiction in the country without the precise proportions of blacks and women which would satisfy the Civil Rights Division?

Mr. **Herrity**. The answer to your first question is that they have never indicated any discriminatory intent nor have they found specific people who have been discriminated against.

The purpose of these midnight calls that I mentioned, which violate the rules of civil procedure, was to find litigants for the case. They are currently in a retrial before Judge Bryan.

After I called their hand on that, they stopped the calls because they did violate the rules of civil procedure.

They were actively seeking potential plaintiffs during these midnight calls that I mentioned in my testimony.

Not only have they not found a purpose, but they have not even found people who will come forward who are currently employed by the county government who may have been denied promotion opportunities. Nor have they found any credible people as litigants who have not been fired to go forth with the case. They not only do not have the purpose and the broad context, but they do not even have people.

Senator **Hatch**. That is astounding to me.

The administration nominee for the head of the Civil Rights Division, Mr. Bradford Reynolds, will testify before our full committee tomorrow morning.

If I am able to do so, I will question him concerning your case and what you have discussed with us this morning. We will be happy to consider any suggestions you have concerning what we ought to ask him.

Assuming that your testimony is as accurate as I believe it to be, it is shocking. If that can happen in a county which possesses the record that Fairfax County possesses, can you imagine what could happen in other counties?

I assume from your remarks that you are not the only one unhappy with what has occurred in your county.

Mr. **Herrity**. That is absolutely correct.

As a matter of fact, our personnel director and some of our staff have been very popular among local jurisdictions. They have been asked to talk to other jurisdictions about how we have handled the case. They want to know what to avoid, I guess, in terms of problems.

As I say, we are the only jurisdiction in the country that has faced this head on. We have a reservoir of knowledge, obviously, that is available to other jurisdictions nationwide who may be forced to undergo similar treatment.

Some of our staff people have been communicating and discussing this on the telephone and through meetings with local jurisdictions throughout the country.

Senator HATCH. We are happy to have Senator Grassley here from Iowa.

I will turn the time over to him right now.

I am going to step out of the room and shall return in 1 minute.

Senator GRASSLEY. Jack, I have not had a chance to visit with you in a couple of years; but I appreciate the job you are doing in Fairfax County. I live and pay taxes there.

I do not have any questions, but I am interested in your testimony because I know that your goals have been to be fair. I am sure that you are incredulous that the things that happen, happen as they do, based upon the good intentions you have.

I guess that is the way things work in our society. Of course, that is what the process of legislating is all about—to correct those injustices so that good intentions will be recognized.

I do not have any questions.

Mr. MARKMAN [acting chairman]. Thank you, Mr. Herrity. We will contact Mr. Reynolds.

Mr. HERRITY. Thank you very much for the opportunity to appear.

Mr. MARKMAN. We will now call Dr. Joseph Lowery to the witness table.

Dr. Lowery is founder and president of the Southern Christian Leadership Conference. In addition to his leadership activities in the civil rights community, Dr. Lowery is pastor of the Central United Methodist Church in Atlanta, Ga. He is one of the most articulate spokesmen in the national civil rights community.

Senator HATCH. Dr. Lowery, we are happy to have you here.

[Letter to Senator Hatch from Assistant Attorney General Reynolds follows:]

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

SEP 16 1981

Honorable Orrin Hatch
United States Senate
Washington, D.C. 20510

Dear Senator Hatch:

During my confirmation hearings you requested that I look into and report to you on the Department's handling of *United States* v. *County of Fairfax*, Civil Action No. 78-862-A (E.D. Va.). I have looked into the matter and would like to advise you of what I found and have done. I have therefore enclosed for your consideration (1) the decision of the United States Court of Appeals for the Fourth Circuit, in this case, 629 F.2d 932; (2) the Memorandum Opinion and Decree issued by the United States District Court for the Eastern District of Virginia on March 30, 1981, 25 FEP Cases 662; (3) the United States' Proposed Findings and Supplemental Findings of Fact, adopted in part by the District Court in its Opinion (circled findings adopted), and (4) the Order of Reference entered by the District Court on May 12, 1981.

This case was initially tried on April 9-11, 1979. The evidence before the Court consisted primarily of Fairfax County's hiring record from 1974-1978. Based on that record, which included both statistics and individual witnesses to discriminatory employment practices, the decision of the Court of Appeals for the Fourth Circuit as to the law to be followed in this case, and additional evidence taken on retrial in March, 1981, the district court found that Fairfax County had engaged in a pattern and practice of intentional discrimination against blacks and women in violation of Title VII of the Civil Rights Act of 1964, and the nondiscrimination provisions of the Revenue Sharing Act and the Safe Streets Act in job groupings covering most of the employees of the County.

As is usual in cases of this kind, the district court not only entered a decree designed to prevent future discriminatory practices, but also ordered relief designed to make whole those individuals who had been the victims of Fairfax County's past discriminatory practices. This remedial stage includes notification to persons who may be victims that they are entitled to apply for relief, and individual relief proceedings designed to identify which persons were, in fact, victims of discrimination and to remedy that discrimination through the use of back pay or priority hiring offers where appropriate. These remedial procedures, outlined in the Court's Order of Reference, attached hereto, are consistent with Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-5(g), and the rulings of the federal courts. See, for example, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Franks v. Bowman Transportation Co., 424 U.S. 747 (1976); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 361 (1977).

After my confirmation on July 24, 1981, I met with Mr. John F. Herrity, Chairman of the Fairfax County Board of Supervisors, and with other representatives of the County to discuss this case. Consistent with the purposes of Title VII and the nondiscrimination provisions of the Revenue Sharing Act and the Safe Streets Act, and the long continued policy of this Department, I assured the representatives of the County of our continuing interest in the settlement of this case, consistent with our obligations to enforce the law. While there remain some differences between the County and this Department, I believe that the meeting helped to clear the air, and to lay the foundation for a better working relationship in the future.

I hope that this information is responsive to the request you made at my confirmation hearings.

Sincerely,

Wm. Bradford Reynolds

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

STATEMENT OF REV. JOSEPH E. LOWERY, PRESIDENT, SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE

Reverend LOWERY. Thank you, Mr. Chairman.

Thank you for the opportunity to address this very vital issue which faces our country.

I am pleased to be accompanied this morning by the Reverend William Revely of the Mount Gilead Baptist Church and the Reverend J. Terry Wingate of the Purity Baptist Church, both of Washington, D.C. They are members of the Washington, D.C., contingency of the Southern Christian Leadership Conference and distinguished pastors in this community.

The Constitution of these United States, it is generally agreed and historically affirmed, is basic to the national guarantee of equality of opportunity for all Americans.

Its noble sounds for life, liberty, and equality have served as a model for younger governments which sought freedom as bedrock and equity as hallmark.

It is unthinkable that the Constitution should ever be used to restrict or even discourage efforts to achieve those goals. It is disconcerting to even fantasize that the Constitution, considered the cradle of liberty, should become the tomb of the national commitment to achieve equality.

Is there any reason to question the need for affirmative action? Are the reasons that it became a part of the national policy no longer valid?

It is an indisputable fact that there is a widening gap between the economic condition of whites and blacks in this country. Almost one-third of the blacks in this country are in poverty, while less than 8 percent of whites fall in that category.

Think of it. Almost one out of three blacks is in poverty.

It is a fact that unemployment among blacks is two to four—in some age groups, it is higher—times higher than among whites. There can be no denying the fact that the median income of blacks is less than 59 percent of the median income of whites, and that is lower than it was in the 1970's.

It is a fact that a black male college graduate earns only about the same annual income as a white high school graduate.

It is a regrettable fact that denial of equal opportunity means that black families are unable to afford adequate medical care, dental care, housing, and education. Black life expectancy is 5 to 6 years less than the life expectancy of whites.

However, if it please the committee, I am aware that you have received from earlier testimony and from your competent staff more than adequate facts and figures to establish the case for continued inequities and documentation for the widening gap between black and white, as well as the nagging discrimination against women.

May I then address briefly the devastating effects of the abandonment of strong affirmative action at the level of the National Government.

Let me respond to a question about who opposes affirmative action. There are strange combinations of alliances on this issue.

Among the earliest and the loudest to engage in public attack on affirmative action was the Ku Klux Klan, a resurging, violent, hate group. They shouted it in Decatur, Ala., where they shot four young, peaceful demonstrators and where they attempted to kill me and shot into my wife's car in an attempt to kill her.

They have blamed affirmative action for denying white males jobs, while they burned crosses, shot into homes, shot down women and young people, lynched, intimidated, and terrorized.

There are others who oppose affirmative action who are not members of the Ku Klux Klan. There are powerful foundations.

There are others who are sincere but mistaken or confused, and some who seem unaware of the continuing inequities and discrimination against minorities.

There are still others who say that because European immigrants made it without affirmative action that it is not needed for blacks.

Such a claim ignores much of history. It ignores the devastating impact of slavery. It ignores the color consciousness and racial bias which plague black Americans. It ignores the long-range effects of a legal, segregated socioeconomic system sustained by concepts of white supremacy. It ignores the effect of laws enacted for the sole purpose of abridging, restricting, denying the rights, and dehumanizing blacks.

It ignores the fact that inequities exist because of intentional, deliberate, intense, often vicious efforts, programs, and policies.

Can these inequities be remedied by any means other than legal, intentional, deliberate, intense programs and policies? It seems to me this is the question.

Shall race, the one factor that abetted the creation of inequality, now be excluded as a factor to remedy that inequality?

It is the race/color factor that spawned the laws, customs, and policies that discriminate against blacks. It is race/color that continues to provide the emotional support for physicial, political, and economic assault on blacks and browns.

How then can we realistically remedy the effect of assault and discrimination without considering the principal causal factor?

Are we not saying to millions of Americans when we try to do this: It is your race/color that has you cast into the turbulent sea of deprivation, but we must ignore that factor as a means of deliverance.

Or is the attempt to outlaw intentionality or affirmative action another way of saying that the Government should have no desire to remedy, no responsibility to establish leadership and motivate remedial policies, and no charge to set an example of remedy?

I confess that there are those in this Nation whose hatred, and bias, and adherence to concepts of white supremacy might be sufficient to deliberately perpetuate inequity and have our Government withdraw from efforts to change this sorry state of affairs.

They may be loud in voice but I believe they are relatively small in number. There may be honest differences of opinion about methodology, but I believe the majority of Americans share the American dream of justice and equity.

It is to this majority that I appeal—as to those in this room. Hear me when I assure you that by painful experience we have learned that intentionality is the only means of closing the gap.

Strong affirmative action is the only vehicle that has delivered any progress at all.

Left alone, the system will not correct itself. Without forceful leadership at the national level, the States will not move forward.

States' rights for us have historically meant States' wrongs. The private sector has always needed the National Government as leader, example, and enforcer.

Let me urge that you reject the cry of preferential treatment for what it is—a smokescreen to obscure the reality of inequity and the lack of commitment to any remedy.

If two fingers on your hand are wounded and bleeding, is it wrong to treat them urgently and preferentially? Is that preferential treatment or simply survival? Is it not beneficial to the other three fingers whose welfare is treatened if they are infected by the neglected? Of course the hand benefits from the healing of the wounded fingers.

Realistically, we have always engaged that brand of intelligent treatment. Have we not so addressed the need of veterans and handicapped? Have we not preferred justice over injustice and healing over perishing?

It is in the highest and noblest tradition of the Judeo-Christain heritage that we exercise intentionality and affirmative action to rectify wrong and minister to suffering and need.

What then makes affirmative action now so wrong? Is it that one distinguishing faction—race/color?

The cry against quotas is irresponsible, and the cry against goals is illogical. No one is insisting on quotas, but every quest must have a goal. Who can be serious about a journey that has no destination? How will we measure progress or failure?

It is truly sad to hear those who claim to be friends and allies denounce affirmative action. It is painful to witness the abandonment of the ship when salvation is possible if we man our stations.

The truth of the matter is that even on the international level, nations have engaged in affirmative action to carve out a nation from a desire and commitment to remedy historical wrongs.

In conclusion, may I assure you that any retreat from a strong commitment—from intentionality to close the gap—on the part of the National Government will have negative repercussions.

Make no mistake about it. We are experiencing an unemployment crisis that worsens and is having, and will have, a disproportionately negative impact on minorities.

In London, we are witnessing the regurgitation of overdoses of unemployment, and repression, and hopelessness.

In America, we are experiencing assault on black life that is frightening. That assault must be met by forceful affirmative redress by the National Government and in the national conscience.

Hate groups are gaining new levels of respectability, in spite of their killing and terrorizing, with impunity for the most part.

They will be encouraged by a retreat from affirmative action on the part of the National Government. As a matter of fact, in the southern part of Georgia a few weeks ago, a Klansman said he was disbanding his Klan because when he heard what they were going to do in Washington, he felt they did not need it any more.

Hate groups have lynched in Mobile, killed in Buffalo, shot down women on the streets in Chattanooga, conducted killer training camps in Alabama, Texas, and elsewhere, forced a young black lad out of school this day in Rome, Ga., by threats and intimidation, killed in Utah, and gunned down citizens in North Carolina.

Blacks and other minorities are beginning to feel deserted by the National Government.

Finally, the late Senator Hubert Humphrey said:

> The test of Government is in how it responds to the needs of those in the dawn of life—the young; those in the twilight of life—the aged; and those in the shadows of life—the weak, the handicapped, the dispossessed, and the oppressed.

How shall we meet that test today?

We do not come, sir, seeking handouts—only standups.

We challenge our Government to stand up before the Nation and before a world that needs to see a united America working diligently for liberty and equity. Any retreat now will give aid and comfort to the enemies of justice.

Let us not retreat but move forward to that day when color will become irrevelant—when every man and woman can sit under his or her own vine and fig tree and none need be afraid, when full employment has become a reality, when men study war no more, when black will not be asked to get back, when brown can stick around, when the red man can get ahead man, when white will behave all right, when we shall be that great Nation united and shining in the sunlight of justice, and equity, and inspiring peace all over the world.

Thank you.

Senator HATCH. Thank you, Dr. Lowery.

Could you share your views with this committee with respect to how Congress determines when affirmative action programs are no longer necessary? When would we reach the stage you refer to if we keep affirmative action going?

Reverend LOWERY. I hope we reach it soon.

I think we will reach it when we experience de facto justice and integration in our employment opportunities in jobs.

I guess the main point I am trying to make, Senator, is that obviously we have not reached it. I do not think anybody can deny that we have not reached equity, and that there is still discrimination.

Senator HATCH. There is little question about it.

Reverend LOWERY. My point is that we will never close the gap unless we are intentional. It will not close by osmosis or accident. There has to be intentional, deliberate, and enforced efforts to close it.

Senator HATCH. Let me put that another way.

Assuming that Congress chooses to maintain affirmative action programs, at what point would you be prepared to concede that affirmative action programs are no longer needed? Could you be as precise as possible in your answer?

Reverend LOWERY. Let me see if I can try that one.

I would say that one of the criteria would be that the unemployment rate among blacks would be consonant with the general unemployment rate and not three to four times higher.

Senator **Hatch**. I might point out to you that evidence indicates that the unemployment rate was lower before these great social programs were initiated. The unemployment rate has actually risen as Government has expanded during the fifties and sixties.

Reverend **Lowery**. It has risen among both blacks and whites.

Senator **Hatch**. Yes; but it has risen particularly and most dramatically among blacks since these programs have been initiated.

Reverend **Lowery**. I do not think we can blame the programs. I think unemployment has risen dramatically among whites. There are 8 million people unemployed.

Senator **Hatch**. There is no question about that.

Reverend **Lowery**. That is significant.

The problem is that it has risen disproportionately among blacks because the efforts to maintain a balance have not been intentional enough.

Senator **Hatch**. Black unemployment has grown disproportionately in the last decade and a half. And we have probably experienced the most expansive Federal Government jobs programs ever in those 15 years. Yet we are worse off today than we were then.

Reverend **Lowery**. I suggest we are not as bad off as if there had not been intentionality on the part of the Federal Government.

Senator **Hatch**. You think it would have been worse?

Reverend **Lowery**. There is no question in my mind that it would have been worse had there not been intentionality on the part of the Government.

The States have historically systematically discriminated. The private sector has not committed itself to strong affirmative action without the leadership and enforcement of the Federal Government. Those are just historical facts.

Senator **Hatch**. I think you came in after Mr. Herrity testified. He is the head of the Fairfax County Board of Supervisors.

He said that with employment of women and blacks in Fairfax County of well over 50 percent—in other words with Fairfax County doing a very decent job of trying to meet what they consider to be affirmative action guidelines and with no proof of intent to discriminate whatsoever—they were hit with a suit by the Federal Government which is costing them $300,000 or $400,000 in legal costs. And they are furious about it.

They feel that these affirmative action programs are being used to harass municipalities without any indication of a purpose or intent to discriminate.

How would you answer Mr. Herrity?

Reverend **Lowery**. I could not speak intelligently to that specific case without studying the facts.

I would say as a matter of general experience, hardly ever can you get a government or a business to confess their sins. There seems to be a pretty stubborn reluctance to admit any fault.

Senator **Hatch**. Or by an individual?

Reverend **Lowery**. Absolutely and amen. [Laughter.]

I have to accept what he says and that it is in good faith, but experience has taught me that those who occupy positions of privilege never confess their sins and reluctantly relinquish their positions. It has to be nonviolently and legally wrested from them.

That is just a fact of history.

We swear to it, sir, by blood, sweat, and tears. We have had to struggle and sacrifice every step of the way.

Senator HATCH. You have been a distinguished civil rights leader in America. I respect you greatly for that.

However, how would you respond to Dr. Thomas Sowell, the black economist from the Hoover Institution who testified here several weeks ago and argued that affirmative action programs tend to benefit those individuals who are the least disadvantaged of minority individuals. That is, those minority individuals who possess all the proper credentials and degrees.

In the meantime, those who are the most severely disadvantaged suffer because employers are concerned that they will not be able to fire or demote minority individuals who do not perform adequately.

His point basically is that affirmative action programs may help those who are highly educated and already possess the necessary credentials; it does however limit the hiring of those who are the most disadvantaged.

Reverend LOWERY. If there is such stiff resistance against hiring persons who are trained and qualified, I tremble at what might happen to those who are not.

I find it ludicrous at best to say that we ought to disband affirmative action because it has not been perfect and because it has not worked everywhere and in every instance perfectly.

I think it needs strengthening. I think the evidence that we have not reached a certain segment of society points up the need to extend and strengthen job training and job training opportunities in order to help people become qualified for the available jobs.

I do not think that is any reason to eliminate intentional efforts to eliminate racial discrimination. We need to expand, and we are not. We need to expand training opportunities to make more people qualified, so that they become a part of the economic and employment mainstream.

I do not think we ought to throw out the whole program of affirmative action because we have not provided training opportunities for those who have been historically shut out of educational opportunities.

Senator HATCH. Would you disagree entirely with my opening remarks that affirmative action may be an inherently unstable social policy in the sense that it can do nothing but create constant divisions and animosities between protected groups and nonprotected groups?

Judging from some of the remarks that I have heard from the Hispanic community regarding the respective policies of the EEOC toward blacks and Hispanics, it seems to have created even divisions among protected groups.

Do you really believe that affirmative action is contributing toward racial harmony?

Reverend LOWERY. I am certainly not going to contribute to that old ploy of divide and conquer. I am not going to do it.

I think that whatever squabble there may be of an inter-ethnic squabble is entirely subsidiary to the major problem.

The problem is that we are fighting over the crumbs. What the Government needs to do is to provide the kind of leadership that puts the whole loaf out there where everybody can have equity and not just a few crumbs over which those who have been historically shut out have to fight.

I do not believe that affirmative action ought to be judged because it has not solved all the problems.

What is the alternative to intentionality in closing the gap? If no intentionality, what is the alternative? It will not close by itself.

If the national commitment is to close the gap, how else can it approach the problem except with a great deal of intentionality which I consider to be affirmative action.

Senator HATCH. I would answer clearly that a policy of nondiscrimination is the alternative.

Showing preference to one racial ethnic group inevitably leads to conflicts and antagonisms. There will always be groups that feel unfairly treated because they believe that they should also be "protected" or given political preferences, that jobs should be appropriated on a proportional basis; and so on.

I suggest that there is an alternative to what you are saying. The alternative would be a program of genuine nondiscrimination as defined under the 1964 Civil Rights Act.

What are your views on this?

Reverend LOWERY. It is a nice beach for those who are sitting comfortably with good incomes and do not experience the dregs and hardships of poverty.

I suggest, sir, that is is not discriminatory against the three fingers that are not bleeding to minister to the two that are. I do not consider that discriminatory at all.

I do not think you would consider it discriminatory to give attention to the two fingers that are infected. As a matter of fact, I think it serves the whole hand—all five fingers—to minister to those that are wounded.

Jesus himself said that those who are well do not need a physician, but those who are seek. He said he came to seek and save the lost. It is blasphemy to say that Jesus was discriminating against the well because he set his mission toward those who were sick and ill.

I do not think affirmative action ought to be abandoned because somebody interprets an intent to discriminate against those who are well. Its intent is to create equity.

If we are 10 yards behind, unless we are helped to accelerate our pace, we will never catch up. We are not asking those who are ahead to slow down. We are just saying: Help us accelerate our pace so that we can walk hand in hand, heart in heart, in equity and equality in this country.

Senator HATCH. With, all due respect, you know of course that question is whether the "wound" is actual discrimination or simply racial imbalance.

Frankly, I perceive that the "wound" is actual discrimination not statistical disparity among races.

Be that as it may, one question that I do have great problems with relates to your comment that blacks have entered this society in a unique fashion. They came to America as slaves and consequently entered society with inherent disadvantages.

Those disadvantages have continued through the years for many reasons.

There are a number of sincere, honest, intellectually sound, and good people however who believe in the objectives of the civil rights movement, as do you, and who believe that affirmative action programs are in violation of the original intent of the movement. This was the establishment of a colorblind society free of discrimination. Instead, we now have government-mandated discrimination based on skin, color, sex, ethnicity, and so forth.

Let me ask you this one: How would you respond to the argument that affirmative action may ironically lead to diminished long-term protections for minority groups by establishing their entitlement to public benefits on the basis of their short-term political influence, rather than on the basis of the absolute and more enduring equal protection guarantees of the 14th amendment?

Do you see any basis in that suggestion? That is, that affirmative action actually makes minority group members more dependent upon the good will of the majority by undermining any principled, constitutional basis for equal treatment.

There are for example those who point out that the Hispanic community will outnumber blacks by the year 2000, and that they will have more political clout at that point than will the black community.

At that point, would Hispanics have the political influence to say: We want these rights that you have accorded blacks all these years; we do not care what you do for the blacks. You can give them whatever is left over.

How would you respond to that problem?

Anytime you steer away from equality and equal protection under the law, preferential treatment of people results. Why do you assume such a hierarchy of preferences to be static?

Affirmative action gives up the most secure and fundamental equal protection guarantees of the 14th amendment in return for special protected class preferential treatment policies. Is that really a superior long-term protection for a minority group?

Reverend LOWERY. I would deny that affirmative action does that.

I do not think, as I said earlier—and I guess we are going to go around in circles—I do not believe that helping a person who is drowning discriminates against those who are standing on the beach watching. I just cannot understand that kind of logic.

I cannot accept the fact that because the Ku Klux Klan wants to make black scapegoats from the economic crisis that that is a logical argument against——

Senator HATCH. I think that the issue of the Ku Klux Klan is irrelevant in the context of this debate. What we would like to talk about is the serious debate on affirmative action.

Reverend LOWERY. The Ku Klux Klan may be irrelevant to some people. For those who are being terrorized by them it is not. [Laughter.]

Senator HATCH. To this debate, it is not particularly relevant.

Reverend LOWERY. No; it is not.

The Klan mentality is the mentality that is making forceful arguments against efforts to remedy historical inequity.

Senator HATCH. I do not think that they even know how to make a responsible or cogent argument.

There are people within the civil rights movements who would disagree with you.

Reverend LOWERY. I do not doubt that.

Senator HATCH. And sincerely so.

Reverend LOWERY. We are not just talking about the Klan in the sheets. There are some Klan in the suites as well that we have to deal with. [Laughter.]

On the question of denying affirmative action: There is a difference between inequality and equity.

One man's infected throat may only need 100,000 cubic centimeters of penicillin. If another man has another kind of infection, giving him 100,000 cubic centimeters, even though it is equal, may not be equitable.

May I tell you a little story about equality and equity?

Senator HATCH. Certainly.

Reverend LOWERY. There was a farmer who loved sausage. The doctor took him off pork. He was so crazy about sausage that he made rabbit sausage.

It was so good that everybody in the community encouraged him to go into business, and he did. He went into business and made a fortune selling rabbit sausage.

Rabbits got scarce, and he started supplementing his sausage with horse meat.

Finally the Government came in and said: We heard that you have more horse meat than you have rabbit, and yet you are selling this as rabbit sausage.

The farmer said: No, sir, it is equal. Everytime I make up a batch, I put one horse and one rabbit in it. It is equal. [Laughter.]

Let me suggest that equality is not always equity.

To talk about dealing with people who are drowning as the same as those who are lying on the sand sunbathing is not equity.

Senator HATCH. To use your analogy, if there are two blacks drowning and two Hispanics drowning and only two lifeguards and they choose to take care of the two blacks rather than the two Hispanics because of racial considerations, I think the two Hispanics might feel a bit bad about it. I am not particularly enamored by this analogy, however.

Reverend LOWERY. That is hypothetical.

Senator HATCH. You're probably right.

Reverend LOWERY. That is a hypothetical illustration that I doubt will ever occur.

Senator HATCH. That is an analogy.

Reverend LOWERY. I want the Hispanics to have equity.

Senator HATCH. As we all do.

Reverend LOWERY. I want the blacks to have equity, and I want whites to have equity.

What we are talking about here is not parceling out and choosing between blacks and Hispanics. We are talking about providing equity for all the citizens of this country.

We cannot do that by business as usual. We simply cannot do it.

We cannot do it by saying—now we are going to exercise the 14th amendment—when you have people who have historically been shut out with intentionality and with deliberate schemes and laws.

Senator HATCH. I understand your argument.

Reverend LOWERY. You cannot remedy that by business as usual, and that is the question that the Government has to answer.

Are we sincere about remedying, or do we simply want to throw up speeches and rhetoric and the letter of the law and the Constitution? Are we really serious about eliminating inequity in our society?

If we are, we have to be intentional. We have to exercise extraordinary measures.

I do not see affirmative action as a permanent and eternal part of the American system. I see it as an emergency measure to meet an emergency critical situation.

When the crisis has subsided, then I think we can go back to the beauty and justice and equality of the 14th amendment and equal protection under the law.

Right now, we have not for a long time provided that equal protection. If we are going to bring it up, there has to be compensatory action. It is as simple as that. There has to be compensatory action.

That is how I see affirmative action. I do not see it discriminating against the majority. I see it simply as bringing the minority up to par with the majority.

Senator HATCH. I appreciate your remarks, Reverend Lowery. You have been eloquent and served your cause well.

However, how is "equity" defined in your view? Does it mean "equal opportunity" and "equal protection" as has traditionally been the case, or does "equity" mean "equal results?"

I sometimes get the impression from those who argue for affirmative action programs that they do not care about anything else except equality of results. They are more concerned about making sure that some particular collective group of people receives preference.

To a person who loses a job, a promotion, or a job opportunity because of the color of his or her skin, affirmative action does not have nearly the meaning that it might have for you.

This is one of the things that is bothering me.

Should we ever "prefer" people solely on the basis of skin color, or whatever? This is a difficult issue, in my view.

I have to admit that I am doing as much splashing around in the water trying to find the dry ground as anyone with respect to this issue.

I have been listening to you and yet I still have significant problems with permitting changes in our basic constitutional conception of equality and equal protection. I don't know how one resolves the problem of a people who entered American society inherently disadvantaged and have been subsequently mistreated in many ways ever since, but I am convinced that affirmative action is a purely illusory "solution."

It is a very difficult question, but so are the ideas of equality and equal protection.

I respect your viewpoint Reverend Lowery, and we are happy to have been able to hear your views and we are appreciative of the time you have taken to come and express them to us today. It has been a very good exchange; at least I have gained a lot from you.

Reverend LOWERY. Thank you, Senator. I appreciate the opportunity.

Senator HATCH. I am delighted to say that my admiration for you has been enhanced by this discussion.

Reverend LOWERY. Thank you, sir.

My admiration for you has not been hurt at all by this exchange.

Senator HATCH. That is wonderful. You may be the only person who claims that. [Laughter.]

Reverend LOWERY. I meant that sincerely, Senator.

Senator HATCH. I will not ask you to elaborate upon the extent of your admiration for me.

Reverend LOWERY. Let me just say that I do not want to suggest that the problem we face is easy.

Senator HATCH. No, it is certainly not.

Reverend LOWERY. I want to suggest that it is difficult.

Senator HATCH. If it were easy, I would not be holding these hearings.

Reverend LOWERY. Recovery or convalescence is always difficult and always requires extraordinary measures.

Let me just say this as I leave, and I thank you again for the opportunity.

Affirmative action may cause some widely separated inconvenience and discomfort. It may. Without strong affirmative action, there is absolutely no doubt that we will never close the gap that exists between minorities and the majority in this country.

The question of who does not get a promotion at this point fades into irrelevance when measured against the millions of persons who are completely outside the door. They do not even have the opportunity to consider promotion, because they cannot get employed.

I suggest that the better choice is the inconvenience and discomfort of the extraordinary measures for a period in history until the millions of persons who have been shut out are brought in. Then we can go back to being equal.

Thank you very much.

Senator HATCH. Thank you. I appreciate your testimony.

Senator Grassley?

Senator GRASSLEY. I did not have any question for you, Dr. Lowery, but I did want to solicit any help you can give me.

On two or three occasions since the first of the year, I have had an opportunity to speak on the floor of the Senate about the growth of the Ku Klux Klan to make people aware of the rapid increase in numbers and their activity, particularly that it is not just affecting blacks but also the shrimp fishermen with the Vietnamese background and the Indians and groups like that.

I am concerned about it. If you have any information that should be made available, I would be happy to disseminate it through the Congressional Record.

I will continue to monitor this on a personal basis.

Reverend LOWERY. Thank you, Senator.

We found an anti-Klan network at our convention in Norfolk in 1979. I will have them put you on the mailing list and send you the material.

The Klan is gaining a new level of respectability in the white community. I think one of the reasons for that is a failure of the Federal Government to enforce the laws as they relate to the Klan.

The Justice Department has said to us that they cannot do it because they cannot infiltrate. I find that interesting, because they did a pretty good job in Abscam and getting Congressmen put in jail.

I suggest that it they can do that to Congressmen, they ought to be able to do it to the Ku Klux Klan, who Senator Hatch said did not have sense enough to talk about scapegoats and affirmative action.

Thank you.

Senator GRASSLEY. Thank you.

Senator HATCH. That is right. Thank you.

[The prepared statement of Dr. Lowery follows:]

PREPARED STATEMENT OF REV. JOSEPH E. LOWERY

Distinguished members of the Sub-committee—Thank you for this opportunity.

The Constitution of these United States, it is generally agreed and historically affirmed, is basic to the national guarantee of equality of opportunity for all Americans. Its noble sounds for life, liberty and equality of opportunity for all Americans have served as model for younger governments which sought freedom as a bedrock and equity as hallmark.

It is unthinkable that the Constitution should ever serve to restrict or even discourage efforts to achieve those goals. It is disconcerting to even fantasize that the Constitution, once the cradle of liberty, should become the tomb of the national commitment to achieve equality.

Is there any reason to question the need for affirmative action? Are the reasons that it became a part of the national policy no longer valid?

It is an indisputable fact that there is a widening gap between the economic condition of whites and blacks in this nation. Almost one-third of blacks in this country are in poverty, while less than 8 percent of whites fall in that category. Think of it, almost one out of three blacks in poverty!

It is a fact that unemployment among blacks is two to four (and in some age groups even higher) times higher than among whites. There can be no denying the fact that the median income of blacks is less than 59 percent of the median income of whites, and that is lower than it was in the early 1970's.

It is a fact that a black male college graduate earns only about the same annual income as a white high school graduate. It is a regrettable fact that denial of equal opportunity means that black families are unable to afford adequate medical and dental care, and housing and education . . . Black life expectancy is 5-6 years less than whites.

However, if it please the committee, I am aware that you have received from earlier testimony and from your competent staffs more than adequate facts and figures to establish the case for continuing inequities and documentation for the widening gap between black and white as well as the nagging discrimination against women.

May I then address briefly the devastating effects of the abandonment of strong affirmative action at the level of the national government.

First, may I enumerate some responses to the question of who opposes affirmative action. There are strange combinations and alliances on this issue.

The Ku Klux Klan—a resurging, violent hate group . . . was among the earliest and loudest to engage in public attack on "reverse discrimination."They shouted it in Decatur, Alabama where they shot four young peaceful demonstrators; where they attempted to assassinate me and shot into the car in an attempt to kill my wife. They have blamed affirmative action for denying white males jobs as they burned crosses, shot into homes, shot down women and young people, lynched, intimidated and terrorized.

There are others who oppose affirmative action who are not members of KKK. There are powerful foundations that file "friend of the court" briefs. Some are anti-union.

There are others who are sincere but mistaken, or confused and some who are unaware of the continued inequities and discrimination against minorities.

There are still others who say that because European immigrants made it without affirmative action that it is not needed for blacks.

Such a claim ignores much of history. It ignores the devastating impact of slavery. It ignores the "color consciousness" and racial bias which plague black Americans. It ignores the long range effects of a legal, segregated socioeconomic system which was sustained by "white supremacy." It ignores the effect of laws enacted for the sole purpose of abridging, restricting, denying, and dehumanizing blacks.

It ignores the fact that inequities exist because of intentional, deliberate, intense, often vicious efforts, programs and policies!

Can these inequities then be remedied by any means other than legal, intentional, deliberate, intense programs and policies?

Shall race, the one fact that abetted the creation of inequality now be excluded as a factor to remedy that inequality?

It is the factor race/color that spawned the laws, customs, policies that discriminated against blacks in education, employment, government and health. It is race/color that continues to provide the emotional support for physical, political, and economic assault on blacks.

How then can we realistically remedy the effect of assault and discrimination without considering the causal factor? Aren't we saying to millions of Americans: It is your race/color that cast you into the turbulent sea of deprivation but we must ignore that factor as a means of delivering you from destruction.

Or, is the attempt to outlaw intentionality (affirmative action) another way of saying that the government has no desire to remedy; no responsibility to establish leadership and motivate remedial policies; and no charge to set an example of remedy?

I confess that there are those in this Nation whose hatred and bias and adherence to concepts of white supremacy might be sufficient to perpetuate inequity and have our government withdraw from efforts to change this terrible state of affairs. They may be loud in voice but they are small in number compared to the great majority—like those in this room—who want inequities eliminated. There may be honest differences of opinion about methodology but we share the American dream of justice and equity.

It is to this majority that I appeal. Hear me when I assure you that by painful experience we have learned that intentionality is the only means of closing the gap. Strong affirmative action is the only vehicle that has delivered any progress at all. Left alone, the system will not correct itself. Without forceful leadership at the national level, the states will not move forward. States rights for us have historically meant states wrongs. The private sector has always needed the national government as leader, example, and enforcer.

Let me urge that you reject the cry of "preferential treatment" for what it is . . . a smoke screen to obscure the reality of inequity and the lack of commitment to remedy.

If two fingers on your hand are wounded and bleeding, is it wrong to treat them urgently and preferentially? Is that "preferential" treatment or "survival" treatment? Is it not beneficial to the other three fingers whose welfare is sorely threatened if they are infected by the neglected? Of course, the hand benefits from the healing of the wounded fingers as the hand suffers from possible infection from the injured two.

Have we not always engaged that brand of intelligent treatment to address critical issues? Have we not so addressed the needs of veterans and the handicapped? Have we not always preferred justice over injustice; healing over perishing; order over chaos?

It is in the highest and noblest tradition of our Judeo-Christian heritage that we exercise intentionality and affirmative action to rectify wrong and minister to suffering and need.

What then makes affirmative action now so "wrong?" Is it that the one distinguishing factor is race/color?

The cry against quotas is irresponsible, and the cry against goals illogical. Can we be serious about a journey that has no destination? No one is insisting on quotas, but every quest must have a goal. How will we measure progress? Or failure?

It is truly sad to hear those who claim to be "friends" and "allies" denounce affirmative action. It is painful to witness the abandonment of the ship when salvation is possible if all hands would man their stations.

The truth of the matter is that even on the international level nations have engaged in affirmative action to achieve the goal of nationhood out of a desire and commitment to remedy historical wrongs.

In conclusion, may I assure you that any retreat from a strong commitment * * * from intentionality to close the gap * * * on the part of the national government will have negative repercussions throughout the nation. Make no mistake about it, we are experiencing an unemployment crisis * * * that worsens and is having and will have a disproportionate impact on minorities. We are witnessing the regurgitation of overdoses of unemployment and repression and hopelessness in many parts of the world. In America we are experiencing an assault on black life that is frightening. That assault must be met by forceful, affirmative redress of the national government and the national conscience. Hate groups (KKK, Nazi) are gaining new levels of respectability in spite of their killings and terrorizing * * * (with impunity for the most part).

They will be encouraged by a retreat from affirmative action * * * on the part of the national government. As a matter of fact, in the southern part of Georgia a Klansman said he was abandoning his Klan when he heard what they were going to do in Washington. He said they were not needed anymore.

Hate groups have lynched in Mobile; killed in Buffalo; shot down women on the street in Chattanooga; conducting killer training camps in Alabama, Texas, and elsewhere * * * forced a young black lad out of school by threats and intimidation in Rome, Ga. * * *; killed in Utah; and gunned down citizens in North Carolina * * *.

Blacks and other minorities feel deserted by the national government.

Hubert Humphrey said * * * that "the test of government is in how it responded to the needs of those in the dawn of life—the young; those in the twilight of life—the aged; those in the shadows of life—the weak; the handicapped * * * the dispossessed * * * the oppressed * * *."

How shall we meet that test today? We do not come seeking handouts, only standups * * *. We challenge our government * * * to stand up now before a nation and world that needs your leadership * * * a leadership that is serious about remedying inequities. Any retreat now will give aid and comfort to the enemies of justice and equity. Let us not now retreat but move forward toward that day when color will become irrelevant; when every man and woman can sit under his or her own vine and fig tree and none need be afraid; when full employment has become a reality; when men shall study war no more; when black will not be asked to get back; when brown can stick around; when the red man can get ahead, when white will behave all right, when we shall be that great nation united, shining in the sunlight of justice and equity, and whose light shines around the world inspiring peace with justice—all over God's world.

Thank you.

Senator **Grassley**. Mr. Chairman, I would like to insert a couple of articles into the record.

We find that the FCC now has as part of its function the role of racial determinator. The FCC staff now has to spend apparently considerable time in determining whether or not applicants are Hispanic.

A second article, and these are articles in yesterday's paper, detailed latest efforts of the Federal Government to classify each of its 2.8 million employees by race.

These articles clearly bring home the sad point that our Government in many ways is no longer just concerned about protecting individuals from discrimination based on race, but it is actually involved in the very big business of being a determinator of race.

I think the articles will point out that it is not very effective in determining what is the race of people.

I would like to include those in the record.

Senator **Hatch**. Without objection, those will be included in the record at this point.

[Articles supplied by Senator Grassley follow:]

[From the Washington Post, July 15, 1981]

SI SI, SENORS KRAMER AND LIBERMAN, SI SI

Mr. Liberman and Mr. Kramer, who just bought radio stations, have been duly found by the Federal Communications Commission to be Hispanics. That means the sellers of those two radio stations get a nice tax break because they have contributed mightily to the FCC's policy of encouraging "significant minority interest" in broadcast holdings.

Adolfo Liberman's family owns K-Love Radio Broadcasting Inc., which bought KTNQ in Los Angeles from Storer Broadcasting. Liberman, born in Poland, descended from Spanish Jews expelled from Spain in 1492, according to the FCC order. He immigrated to Mexico in 1921, and lived in Guatemala and Costa Rica before coming to the United States. The Liberman family speaks Spanish "a majority of the time," the FCC said.

Oscar Luis Kramer, meanwhile, owns 95 percent of Central Florida Spanish Broadcasting, which bought WMJK in Kissimmee, Fla., from Major Market Media Inc. Kramer was born in Cuba, as were his parents, and immigrated to the United States in 1961. He worked in Spanish-language radio in Miami before moving to Orlando, where he was active in Hispanic affairs.

An FCC policy statement says that minorities include ". . . Those of black, Hispanic surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction." The FCC, a spokesman said, followed the guidance of the Equal Employment Opportunity Commission, which refers only to "Hispanics," not "Hispanic-surnamed."

[From the Washington Post, July 15, 1981]

THE RACIAL/ETHNIC LABELING EXERCISE

(By Mike Causey)

The U.S. government is in the midst of one of the most ambitious racial/ethnic labeling exercises in history. Purpose is to figure out the race or national origin of each of the nation's 2.8 million bureaucrats without offending any of them.

To get at peoples' roots diplomatically, Unicle Sam uses localized yardsticks to measure color and nationality. Because ours is a complicated society, definitions vary from Washington to Honolulu to San Juan.

Federal workers here, in Guam and in every state but Hawaii had the option in January of picking another race or national origin if they didn't like the listing they had on file. Options ofered here and elsewhere included (A) American Indian or Alaskan Native, (B) Asian or Pacific Islander, (C) Black, not of Hispanic origin, (D) Hispanic or (E) White, not of Hispanic origin. It will be some months before the government knows its As from its Es.

At the same time federal workers in Puerto Rico, conforming with Census Bureau guidelines, were given two choices. They could list themselves as either (1) Hispanic or (2) Not Hispanic.

The trickiest head count of all will take place this fall in Hawaii, which is, as any anthropologist will tell you, wonderfully mixed up. The 30,000 plus federal civil servants in the island paradise will have 15 different choices. They will have the same A through E options as colleagues in Washington, but also will be able to more closely identify themselves as (F) Asian Indian, (G) Chinese, (H), Filipino, (J) Guamanian, (K) Hawaiian, (L) Japanese, (M) Korean, (N) Samoan, (P) Vietnamese or (Q) All other Asian or Pacific Islanders.

Idea behind all this is to help government develop better equal employment opportunity data, it says, and to conform with Commerce Department guidelines of race/ethnicity. By law, employes may designate themselves anything they want, within the geographic choices offered. That means a blue-eyed, blond could list himself as Japanese in Hawaii or black in Washington or Wyoming. Federal supervisors have been told to counsel people who do such things, but not to change anyone's designation if his mind is made up.

In the 1960s, the government shifted from an "eyeballing" system, under which supervisors listed the race and ethnicity of employes, to a self-designation system. The results were embarrassing in a couple of places. Hundreds of State Department employes, who wouldn't know a peace pipe from a piece of pipe, said they were American Indians. It made State look awfully good in its affirmative action program, but did not do much to give an accurate picture of the makeup of the department.

The result was that many agencies and departments went back to the eyeballing method. Officials hope to have an accurate racial/ethnic head count of mainland workers, as well as those in Guam, Alaska and Puerto Rico fairly soon. Hawaii will take a little longer. Results from several places may be surprising.

Senator HATCH. Thank you, Senator Grassley.

Our next witness is Michael A. Warner, a member of the very distinguished law firm of Seyfarth, Shaw, Fairweather & Geraldson.

As chairman of the Labor and Human Resources Committee, I have come to respect the abilities of this law firm, particularly in the area of labor and employment discrimination law.

Mr. Warner, who practices in the Chicago office of Seyfarth, has been especially active in representing employers in labor and personnel matters. He is one of the most articulate and knowledgeable practitioners in the area of employment discrimination law.

We are very happy to have you here, and we look forward to taking your testimony.

I have to slip out for just 1 minute. Go ahead with your testimony, and I will be right back.

STATEMENT OF MICHAEL A. WARNER, SEYFARTH, SHAW, FAIRWEATHER & GARALDSON, CHICAGO, ILL.

Mr. WARNER. Thank you, Mr. Chairman.

I. INTRODUCTION

I very much appreciate the opportunity to present my views before this subcommittee on the subject of affirmative action and equal protection, particularly because I believe my views come from a somewhat different perspective than many of the other witnesses who have appeared before this committee.

I have been in the private practice of law for over 15 years. During the last 12 years, I have actively represented employers in labor and personnel matters with a heavy emphasis on employment discrimination matters.

During that time, I have observed at extremely close hand the actual day-to-day effects of the enforcement of the employment discrimination laws on numerous employers of all types and sizes and in a variety of industries.

Thus, I hope I can give some practical day-to-day meaning to the moral and ethical issues which have been so ably debated by others who have appeared before this committee.

II. SUMMARY OF CONCLUSIONS

At the risk of overgeneralization, I will attempt to summarize my overall conclusions with respect to the issue of affirmative action at the outset.

No. 1, employers should expect nothing less than vigorous enforcement of the antidiscrimination laws. This enforcement must be rational and realistic if it is to be truly effective and credible.

No. 2, the awarding of relief to specifically identified victims of discrimination in the form of absolute rights to future vacanies is fully consistent with the antidiscrimination laws.

No. 3, on the other hand, to disregard relative merit and to make employment decisions by granting preferential treatment on the basis of race, sex, or other protected group status, in order to change alleged statistical imbalances in the work force, is in my opinion not only wrong legally, constitutionally, and morally but is of minimal practical utility. The adverse consequences flowing from such preferentially based decisions more than cancel out any benefits which may be derived.

No. 4, while affirmative action has in recent years come to be defined solely as a process of race and sex-based preferential decisionmaking without regard to merit, the original purpose of affirmative action—to take affirmative steps to insure equal treatment—is a valid and important concept which should not be submerged under the now accepted practice of defining affirmative action solely in the context of quotas and preferences.

III. QUOTAS AND PREFERENCES AS A SYMPTOM OF THE UNDUE EMPHASIS ON STATISTICS IN EEU ENFORCEMENT

It is imperative to recognize that quotas and race and sex preferences are seldom the result of direct Government fiat. Rather they are a symptom of the way the nondiscrimination laws have come to be enforced.

It is now common for the enforcement agencies to rely almost exclusively on the theory that discrimination will be presumed based solely upon a finding of a statistical underrepresentation of protected group members in a particular employer's work force, as compared to the percentage of protected group members in the labor force generally.

Invariably, these findings are made by failing to even consider the many factors other than employer discrimination which may explain the statistical disparity.

In passing title 7 of the Civil Rights Act, Congress sought in the most specific words possible to prohibit reliance on the statistical parity theory, because it expressly forecasted that the inevitable effect of such an approach would be to require employers to hire on the basis of race and sex.

The Supreme Court, although accepting that statistics may be relevant circumstantial evidence in some circumstances, has also repeatedly cautioned that statistics should not be given determinative weight. They are not irrefutable, and their usefulness depends on all the surrounding facts and circumstances.

Despite these and similar warnings, however, the EEOC continues to press in title 7 cases the slogan that figures speak and courts listen and routinely issues administrative decisions based on little more than statistical presumptions of questionable validity and without any other supporting evidence.

Moreover, the trial courts often take the easiest way out and accept superficial statistical showings by the plaintiff as virtually determinative.

This unfairly shifts the entire burden to the employer to prove its innocence—often a most expensive, time-consuming, and risky proposition.

Thus the message is sent loud and clear. If an employer wants to avoid enforcement based upon a perceived statistical disparity in its numbers, it must do whatever is necessary to achieve statistical parity, even if it means employing race and sex preferences to that end.

IV. QUOTAS AND PREFERENCES AS A SYMPTOM OF UNREALISTIC AND RIGID GUIDELINES ON EMPLOYMENT SELECTION

As the result of unreasonable interpretations and unnecessarily rigid guidelines, the enforcement agencies have also set compliance standards of what they will accept as job-related selection criteria which are virtually impossible for employers to meet in most contexts and which have been heavily criticized by experts in the field.

The inevitable result is to again force employers to abandon what might well be the most fair and valid selection critiera in favor of random or quota selection.

V. THE UNDUE CONCENTRATION ON NUMBERS UNDER THE EXECUTIVE ORDER

The concentration upon numbers has become almost fanatical under Executive Order 11246 which prohibits employment discrimination and imposes affirmative action requirements on Government contractors.

The order itself cannot be reasonably interpreted as authorizing race or sex-conscious preferences. On the contrary, the order's invocation of affirmative action is specifically linked to efforts to insure nondiscrimination—not preferential treatment.

As originally conceived and implemented, affirmative action programs concentrated on affirmative steps to achieve equal treatment.

Despite this honorable beginning, however, the program has now veered off its course and turned into a numbers game of dubious effect which is open to serious constitutional challenge.

If an employer fails to meet its technical and numerical goals and timetables required by the OFCCP rules, it faces the threat of enforcement proceedings and possible debarment.

As a practical matter, few excuses satisfy most compliance officers. The pressure to hire and promote to meet the numerical objective becomes intense.

While the Government sometimes tries to draw a distinction between goals and quotas, it is not surprising that line supervisors, unsophisticated in the nuances and intricacies of the bureaucrats' jargon, have difficulty making the distinction.

Too often it is easier and safer to succumb to the Government's demands for preferential treatment than to antagonize a compliance officer and cause an expensive and protracted enforcement proceeding.

VI. THE SUPREME COURT'S ENDORSEMENT OF VOLUNTARY QUOTA IN WEBER

All of the pressures toward racial and sex preferences by employers came to a head in the Supreme Court in the case of *United Steelworkers* v. *Weber*.

In that case, reacting to pressure from the OFCCP and others, in 1974 Kaiser Aluminum Co. had entered into an agreement with its union, the United Steelworkers, which provided that one black was to be admitted for every white to a new in-plant training program for craft positions—in other words, an overt quota.

Brian Weber, a white who was rejected for admission in favor of a junior black, claimed that the affirmative action program discriminated against him and other similarly situated white employees in violation of title 7.

The Supreme Court held against Weber. Five of the seven justices participating in the decision held that the quota was not barred by the provisions of title 7 because title 7's prohibition against racial discrimination "does not condemn all private, voluntary, race conscious affirmative action plans."

Justices Burger and Rehnquist, writing separate dissenting opinions, argued that title 7 is unequivocal in prohibiting all race-conscious decisions and detailed the numerous and unanimous views of every Congressman who spoke on the issue during the title 7 debates, which are directly contrary to the majority's holding.

No matter what one's views are on the legitimacy of the *Weber* holding as a matter of policy, in this commentator's opinion, the majority's opinion is unprecedented to the degree to which it does violence to traditional legal principles and conventional legal analysis.

Analyzed, however, as a piece of legislation, it is noteworthy that the decision is a victory for the establishment.

A major employer, a major labor union, the organized civil rights movement, and the Federal Government were all unanimous in favoring the Kaiser quota.

Thus, it is somewhat understandable that when the court put on its legislator's hat, Weber had little chance of prevailing.

Justice Blackman's concurring opinion probably tells best what was going on. Justice Blackman acknowledged the legitimacy of the dissenter's view that Congress did not, in drafting title 7, intend the result he and the rest of the majority now upheld. However, he joined the majority so that employers are not left on a high tightrope without a net beneath them.

Given the essentially legislative nature of the *Weber* holding, the future of affirmative action, I submit, will depend more on social, economic, cultural, and political factors than upon finer interpretations of the words of that decision.

This is what I perceive to be the purpose of these hearings. Hopefully, the result will be a long look at the high wire which employers are forced to tread and the development of a balanced and creditable enforcement approach which does not compel race and sex preferences.

VII. THE ADVERSE CONSEQUENCES OF PREFERENCES AND QUOTAS

I must conclude from my experience that the statistical parity theory of enforcement and quota demands are not justified. Quotas and preferences do not even purport to accomplish the objective of the civil rights laws. Not only do they sacrifice race and sex neutrality, but they are not intended as redress for legal injury.

Persons benefit not because they have personally shown that they have suffered from bias or prejudice at the hands of their employer, but only because they happen to be a member of a race or sex which at that particular time was statistically underutilized and the subject of a goal or quota.

There are also many other practical difficulties with quotas which I have observed in my practice.

First, the emphasis on statistical parity and quotas is demeaning to the very groups that the law is intended to benefit, by implying that the protected group members are not capable of competing on their own merit.

Second, and most obviously, the morale of passed-over employees is severely undercut when protected group members are granted preferences for hiring and advancement, so that the employer can achieve parity.

Not only does this destroy legitimate expectations and the incentive of the passed-over employees, but it tends to increase racial tensions by giving a justification for bias.

Third, the incentive and ability of managers and supervisors to manage is threatened when random or quota selection replaces their right to evaluate and select employees based upon merit.

Fourth, the statistical parity theory invariably results in the abandonment of the most-qualified standard for the basically qualified or lowest common denominator standard or, in some cases, no selection standard at all.

When projected across our entire economy, this pressure to substitute numbers and the lowest common denominator standard for merit selection results in immense costs in lost efficiency, productivity, and quality.

It is also most curious to me that in this area of the law where we should be most sensitive to individual rights, affirmative action in the form of quotas results in elevating group rights to a status that is often totally insensitive to personal and individual considerations.

What the advocates of statistical parity and quota-based decisions forget is that each time there is a decision based on a race or sex preference, rather than merit, a very human drama is played out involving the beneficiary of the preference, the victim of the reverse discrimination, and the line manager who is responsible for the decision.

While simple to advocate as a concept, the proponents might view their arguments much differently if they were actually the actors in this drama.

Would the proponents, upon receiving a preferential promotion themselves, be willing to acknowledge and proclaim that they received the promotion not because they were the best but because they were black or female? Or would they not just simply feel embarrassed and totally deflated when they discovered that their merit and performance were not, after all, determinative?

On the other hand, would the preference advocates who sought a prize position truly be so tolerant if they were the victim who lost out to a quota beneficiary, or would they not also feel the same frustration and disillusionment which others, such as Brian Weber and Alan Bakke, felt?

If in the decisionmaker's role, would the preference advocates be willing to forthrightly tell blacks on a routine basis that although they were less-qualified than their coemployees, they were being selected because of their race in order to correct a statistical disparity?

What of the person of more merit who was passed over in favor of the quota beneficiary? Would the quota advocates be willing to face the exclamations of frustration and bitterness which such full candor would inevitably generate?

While the lofty justification for preferential treatment, such as given by the academicians, lawyers, and civil rights leaders in these hearings might have appeal for the very sophisticated, do these advocates really believe that they could make these rationale sufficiently understandable to satisfy the average lay employee?

In sum, no one is reluctant to proclaim a merit selection far and wide. In contrast, in a quota-based environment, the employer has no satisfactory alternative. Either it must acknowledge what is occurring and face an atmosphere of frustration, bitterness, distrust, and an inevitable fall-off in productivity or it must attempt to hide what is going on, even though it is axiomatic that nothing is more destructive of sound personnel relations than a failure to communicate candidly with employees.

VIII. THE NEED FOR BASIC REFORM IN THE ENFORCEMENT OF THE ANTIDISCRIMINATION LAWS

It is the thesis of my testimony that before anything can be done about the problems of quotas and preferences, basic reform in the enforcement of the antidiscrimination laws is needed.

A balanced approach to enforcement could cure the problem without the need for extensive statutory or constitutional amendments.

The administrative agencies, such as the EEOC, and the President, in enforcing the Executive order, should take the lead and act much more responsibly by amending existing rules, guidelines, and litigation positions to adopt a much more realistic and fair approach to EEO enforcement.

To this end, I have submitted in my written presentation a number of proposed substantive changes which I hope the committee will consider.

Moreover, because I believe there are fundamental constitutional legal issues as to the basic constitutionality of the Executive order and the legality of a number of positions taken by the OFCCP in administering that order, I have submitted to the subcommittee for its consideration a memorandum discussing many of these issues.

The Supreme Court's latest pronouncement on the subject matter of this hearing may best summarize my position.

In *Texas Department of Human Affairs* v. *Burdine,* the Court most recently stated:

> The Court's procedural rule harbors a substantive error. Title 7 prohibits all discrimination in employment based upon race, sex, and national origin.
>
> The broad, overriding interest and trustworthy workmanship assured through fair and neutral employment and personnel decisions.
>
> Title 7, however, does not demand that an employer give preferential treatment to minorities or women.
>
> The statute was not intended to diminish traditional management prerogatives. It does not require the employer to restructure his employment practices to maximize the number of minorities and women hired.
>
> The employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria.

Thank you for listening to my views.

Senator HATCH. Thank you, Mr. Warner.

I have a number of questions for you.

However, because I need to leave shortly, and I would like to hear the last two witnesses, I am going to put your full statement and the memorandum you mentioned in the record, and submit questions to you in writing.

Senator Thurmond has reserved the right to submit questions to all witnesses here today as well.

I am interested however in your discussing one issue in particular.

I understand that you have proposed a number of alternatives to affirmative action programs and policies. I would like you to elaborate on how they might work and whether they are likely to create employment opportunities for minority group members as an alternative to direct policies of racial preference. As you know, we have experienced a great deal of controversy on this issue. I have to admit that there are attractive emotional arguments on both sides. However, I do not believe that a good constitutional or public argument exists in favor of affirmative action.

I have a very difficult time perceiving how our society and country benefit from affirmative action programs particularly as interpreted by the EEOC, the OFCCP, the OCR and such.

I would appreciate your giving some consideration to these questions.

Thank you. You have put a lot of work into your outstanding prepared statement, and it has been very helpful today.

I might add that your statement is one of the best we have received, in my opinion, because you have discussed the law thoroughly. You expressed your position as well as offered a number of constructive suggestions that I deeply appreciate.

Thank you so much.

Mr. WARNER. Thank you.

[The prepared statement of Mr. Warner and additional material follow:]

PREPARED STATEMENT OF MICHAEL A. WARNER, ESQ.

I. INTRODUCTION

Mr. Chairman:

I very much appreciate the opportunity to present my views on the subject of affirmative action and equal protection before this Subcommittee, particularly because my views come, I believe, from a somewhat different perspective than many of the other witnesses who have appeared before you. I have been in the private practice of law for over 15 years and during the last 12 years I have actively represented employers in labor and personnel matters, with a heavy emphasis on employment discrimination.

Not only has this given me the opportunity to observe most immediately and specifically the development of the law and enforcement trends in this most controversial area, but it has also allowed me to observe at extremely close hand the actual day-to-day effects of the enforcement of the employment discrimination laws on numerous employers of all types and sizes, and in a variety of industries. Indeed, because my practice brings me into immediate and continual contact with line management decision makers and employees who experience the direct effect of these laws on a daily basis, my thinking on nondiscrimination and affirmative action tends to be from a more practical and empirical-oriented perspective. Thus, I hope I can give some practical day-to-day meaning to the moral and ethical issues which have been so ably debated by the academicians who have appeared before you. In so doing, I hope I can pursuade you to share my increasing disenchantment with the practical value of the numerical and statistical presumptions which are the staple of the sociologists and economists who have debated the issues before you.

At the risk of overgeneralization, I will attempt to summarize my overall conclusions with respect to the issue of "affirmative action" at the outset:

(1) Employers should expect nothing less than vigorous enforcement of the anti-discrimination laws, but this enforcement must be rational and realistic if it is to be truly effective and creditable.

(2) The awarding of relief to specifically identified victims of proven discrimination in the form of absolute rights to future vacancies is fully consistent with the anti-discrimination laws. While such awards might be characterized as quotas, they may and should be recognized as permissible legal remedies to place the victims of an employer's discrimination into their "rightful place" -- the positions they would have held "but for" the employer's discrimination.

(3) On the other hand, to disregard relative merit and to make employment decisions by granting preferential treatment on the basis of race, sex or other protected group status in order to change alleged statistical imbalances in the work force (i.e., the definition of "affirmative action" as used in these hearings) is, in my opinion, not only wrong legally, constitutionally and morally, but is of minimal practical utility and the adverse consequences flowing from such quota and preferentially-based decision making more than cancel out any benefits which may be derived.

(4) While "affirmative action" has in recent years come to be defined solely as a process of race and sex based preferential decision making without regard to merit, the original purpose of affirmative action -- to take affirmative steps to ensure "equal treatment" -- is a valid and important concept which should not be submerged under the now accepted practice to define affirmative action solely in the context of quotas and preferences.

II. THE HISTORY OF QUOTAS AND PREFERENCES IN ENFORCING EMPLOYMENT DISCRIMINATION LAWS

A. Quotas And Preferences As A Symptom Of Misguided Enforcement Choices

It is imperative to recognize at the outset that quotas and race and sex preferences are seldom the result of direct government fiat. Rather, they are a symptom of the way the nondiscrimination laws have come to be enforced. It is now common for the enforcement agencies to rely almost exclusively on the theory that discrimination will be presumed based solely upon a finding of a statistical underrepresentation of protected group members in a particular employer's work force, as compared to the percentage of protected group members in the labor force. But invariably these findings are made by failing to even consider the many factors other than employer discrimination which may explain the statistical disparity. Although the Supreme Court has warned the lower courts of the potential danger of an undue reliance on statistics, the enforcement agencies have paid little attention to these warnings and many courts, taking their cue from the enforcement agencies, continue to find discrimination based on statistical presumptions which are contrary to traditional legal notions on the reliability of statistics and which overlook direct evidence contrary to the statistical inference relied upon.

At the same time, rigid and unrealistic rules and guidelines have been established which unnecessarily undercut an employer's ability to rely upon traditional merit selection criteria in order to determine the most qualified applicants. The result is to put a premium on achieving statistical parity at all costs. Employment managers, in order to perfect their "bottom line" numbers, are pressured to abandon merit selection in favor of random selection or preferential selection based upon race, ethnic and sex quotas.

In sum, therefore, in focusing on the issue of "affirmative action," one must first focus on the manner in which the nondiscrimination laws have come to be enforced against employers. Without reform in the enforcement of these laws, I do not see any realistic possibility that the increasing trend towards the routine use of race and sex preferences, to the detriment of merit selection, can be halted.

B. The Rise Of Statistical Analysis In The Enforcement Of Title VII

In analyzing how we reached this state of enforcement, it should be recognized that Congress, in passing Title VII of the Civil Rights Act in 1964, sought in the most specific words possible to prohibit reliance on the statistical parity theory because it expressly forecasted that the inevitable effect of such an approach would be to require employers to hire on the basis of race. For example, Section 703(j) of Title VII (42 U.S.C. § 2000e-2(j)) expressly states that "[n]othing contained in this title shall be interpreted to require any employer ... to grant preferential treatment to any individual or to any group ... on account of an imbalance which may exist with respect to the total number or percentage of persons of any race ... employed by the employer ... in comparison with the total number or percentage of such race ... in any ... area ... or in the available work force in any ... area." (Emphasis added.) As this provision was explained in the legislative history:

> There is no requirement in Title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such balance may be, would involve a violation of Title VII because maintaining such balance would require an employer to hire or to refuse to hire on the basis of race.

Interpretative Memorandum of Title VII of H.R. 7152 Submitted Jointly by Senators Clark and Case. Floor Managers, 110 Cong. Rec. 7212, 7213 (1964).

How did it happen, therefore, that the achievement of statistical balance became so paramount? The original emphasis was, of course, on breaking down then-rigid barriers to minority and female employment and to eliminate overt bias from employment decision making. However, as enforcement progressed, the emphasis became centered on alleged "patterns" of discrimination and otherwise neutral "systems" which allegedly resulted in "discriminatory effects." The use of statistics as an analytical tool became increasingly important, although originally by no means a device supporting the proposition that race and sex preferences are justifiable.

Thus, for example, in the landmark case of Griggs v. Duke Power Company, 401 U.S. 424 (1971), the Supreme Court held that, based on an analysis of the adverse effect of high school education and testing requirements for entry level positions, a selection criteria may be illegal if it has a disparate effect on minorities and it "cannot be shown to be related to job performance." But it was clear that, in so ruling, the Court did not intend to suggest that relevant job-related merit criteria be eliminated solely to achieve statistical parity. On the contrary, the case was simply a mandate to eliminate artificial and arbitrary barriers so that true merit among the competing applicants would will out. Thus, for example, the Court, in explaining its decision, stated the objective of Title VII simply and succinctly as follows:

> In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

401 U.S. at 431. Then, for good measure, the Court added:

> Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant.

401 U.S. at 436.

The Supreme Court also suggested that statistics may be relevant circumstantial evidence in a discriminatory treatment case but cautioned that they could not be given determinative weight. Thus, in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Court stated:

> [S]tatistics ... may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern and practice of discrimination against blacks.

411 U.S. at 805. But the Court cautioned that while general determinations based on the racial composition of the employer's work force may be helpful, they "may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire." 411 U.S. at 805, n. 19.

The next significant statements by the Supreme Court on the role of statistics occurred in the case of Teamsters v. United States, 431 U.S. 324 (1977), which the statistical parity proponents often point to as supporting their heavy reliance on statistics. But, at most, that case only suggests that a "long lasting and gross disparity" might be a "telltale sign" of purposeful discrimination. The overall burden on the government to establish liability remains consistent with normal legal principles -- i.e., the government must show "by a preponderance of the evidence that racial discrimination was the company's standard operating procedure -- the regular rather than the unusual practice." 431 U.S. at 336. In addition, the Court expressly warned that "statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." 431 U.S. at 339-340. Moreover, in Teamsters, the statistical evidence was substantiated by testimony of individuals who recounted 40 specific instances of discrimination which "brought the cold numbers convincingly to life." Finally, the Court held that, although general injunctive relief may be granted if a discriminatory policy is proven, before relief can be awarded to the alleged "victims" of the policy, there must be a showing of injury "with respect to each specific individual, at remedial hearings conducted by the District Court."

Surely, there is nothing in this which would suggest that statistical parity is the basic objective of Title VII or that preferences for persons not shown to be victims of discrimination is either required or permitted. Despite these warnings, however, the EEOC, having been given the invitation, continues to press in Title VII cases the slogan that "figures speak and courts listen" and routinely issues administrative decisions based on little more than statistical presumptions of questionable validity and without any other supporting evidence. Moreover, unless the trial courts are particularly careful in their analysis, rather than to make a full and fair qualitative analysis of an employer's EEO posture, they often take the easiest way out and accept superficial statistical showings by the plaintiff as virtually determinative. In effect, this unfairly shifts the entire burden to the employer to prove its innocence, often a most expensive, time consuming and risky proposition. Thus, the message is sent loud and clear. If an employer wants to avoid enforcement based upon a perceived disparity in its numbers, it must do whatever is necessary to achieve statistical parity even if it means employing race and sex preferences to that end.

C. The Government Challenge To Traditional Merit Criteria

As noted, in Griggs v. Duke Power Company, 41 U.S. 424 (1971), the Supreme Court held that a selection procedure, even though neutral on its face and not implemented with an intent to discriminate, may be illegal if it has a disparate effect on minorities and it "cannot be shown to be related to job performance." As the result of unreasonable interpretations and unnecessarily rigid guidelines, the enforcement agencies have set compliance standards of what they will accept as sufficient evidence of "job relatedness" which are virtually impossible for employers to meet in most contexts. The inevitable result is to again force employers to abandon what might well be the most fair and valid merit selection criteria in favor of random or quota selection.

These government standards are principally embodied in the "Uniform Guidelines On Employee Selection Procedures" which were issued in their most recent form in 1978 by the Equal Employment Opportunity Commission, the U.S. Department of Labor, the Justice Department and the U.S. Civil Service Commission. The first difficulty with the Guidelines is that many of the potential statistical fallacies discussed in the proceeding section are incorporated in those sections dealing with the rules for determining adverse impact. Second, if a statistical disparity is shown, the Guidelines require that "job relatedness" be established through formal "validation studies" to be conducted according to very rigid standards.

Many experts in the field have criticized the Guidelines as overly rigid, based on false premises and, in many cases, impossible to meet. Moreover, because in most cases the requisite validation studies would require expensive empirical studies of large groups of employees, most employers, particularly small employers, find that to attempt to comply with the Guidelines is totally impractical or economically unjustifiable.

It is apparent that the Supreme Court never intended that the "job relatedness" standard should be so strictly applied. On the contrary, as noted, the thrust of Griggs was to make merit selection based on qualifications the paramount consideration. Thus, unless the Guidelines are amended to liberalize the concept of job relatedness to match more current expert opinion and to meet practical realities, the pressure to change "bottom line" numbers as the only alternative to avoid the risky, and often impossible, "validation" obligation will continue to provide momentum for race and sex preferences.

In addition to the foregoing challenge to traditional objective selection criteria, invariably employers in filling supervisory, managerial and other higher level jobs must employ selection criteria which can be characterized as "subjective." However, the enforcement agencies generally take the position that if the selectors are predominantly nonminority, the use of subjective criteria is *per se* illegal. The only apparent basis for this is the assumption that whites will *always* be biased against minorities. There are no studies which support such a *per se* test and, indeed, this type of reckless conclusion evidences the same type of racial stereotyping that the laws are intended to prevent.

The enforcement agencies have failed to recognize that decisions about hiring into managerial, supervisory and other high-level positions cannot realistically be made using objective standards alone and the use of subjective criteria should not be condemned *per se*. Instead, there should be positive evidence of intentional and purposeful discrimination before any finding of discrimination is permissible. In this regard, the agencies should, in good faith, give credit to employers who take affirmative action steps and adopt checks and balances systems to ensure against bias entering the selection system. Without such reforms, however, the inexorable pressure towards quotas and preferences will continue.

D. The Concentration On Numbers and Ratios In Enforcing The Executive Order

Although, as noted, enforcement under Title VII has accelerated the momentum towards numerically based preferences, the concentration upon numbers has become almost fanatical under Executive Order 11246 which prohibits employment discrimination and imposes affirmative action requirements on government contractors and subcontractors.

It should be recognized initially, however, that Executive Order 11246, itself, cannot be reasonably interpreted as authorizing race or sex conscious preferences. On the contrary, the Order's invocation of "affirmative action" is specifically linked to efforts to ensure nondiscrimination, not preferential treatment. In fact, the operable language in Section 202(1) of the Order specifically states that:

> [T]he contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take *affirmative action* to ensure that applicants are employed, and that employees are treated during employment, *without regard to their race, color, religion, sex, or national origin*. (Emphasis supplied.)

Thus, as originally conceived and implemented, affirmative action programs concentrated on affirmative steps to ensure equal treatment. This included such matters as affirmatively communicating to all employees the employer's commitment to equal employment, counselling and training supervisors on their EEO responsibilities and obligations, reviewing and changing policies and procedures which had an unnecessary adverse effect or might lead to biased decision making, affirmatively recruiting minorities and females to increase the selection pool, encouraging protected group members to seek out opportunities, and counselling minorities and females on the means for increasing their skills and abilities so as to enhance their advancement potential. All of these programs are consistent both with true nondiscrimination and merit selection because they are all designed to ensure that the protected groups develop their potential to the maximum and that when they compete for opportunities, impermissible considerations of race and sex will not interfere with a consideration of their merit.

Despite this honorable beginning to affirmative action, however, the program has now veered off its course and turned into a numbers game of dubious effect which is open to serious constitutional challenge. The Office of Federal Contract Compliance Programs' (OFCCP) rules and regulations require that each affirmative action plan must include a statistical "work force" and "utilization" analysis, and where the employer's utilization of minority groups are deficient, specific "goals and time tables," both on an annual and long-range basis, must be established to make up the deficiency. To make this analysis requires, among other things, a complicated, eight factor, availability analysis and any difference, no matter how minute or fractional, between availability and utilization in a job group must be accounted for. Moreover, the requirement for setting numerical goals is in no way preconditioned upon a finding of liability. Indeed, the goal is required irrespective of the cause of the disparity and without regard to the quality of the employer's EEO compliance program and to the inherent imprecision in availability statistics. Moreover, the agency has professed that they feel in no way bound by any restrictions on quotas and preferences established by Congress in Title VII.

For example, as early as 1971, Laurence H. Silberman, the Under Secretary of Labor, acknowledged to the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare that the OFCCP regulations included "most importantly, specific goals and timetables for the correction of the contractor's deficiencies. ... In effect, the contractor is developing the basis for a minority fair share of his work force." Hearings on S. 2515, etc., Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92nd Cong., 1st Sess. p. 77 (1971) (emphasis supplied).

In response to a question from Senator Taft of Ohio, Mr. Silberman explained:

> One of the things interesting about the affirmative action concept, it is not antidiscrimination. It goes beyond that. We every day put pressure on --well, let me say it slightly differently.
>
> We and the compliance agencies put pressure on contractors to come up with commitments even though those contractors are not guilty of any discrimination, but because we think they are required under the Executive order to go beyond, to provide affirmative action.

> Since they are not guilty of discrimination, it is not exactly the kind of situation where you can go to an enforcement posture, but rather you say to that contractor, you have to make an extra effort beyond what the civil rights laws are in this country and go beyond that in order to get a Government contract.

Hearings, p. 88 (emphasis supplied).

If the employer fails to meet its goals and time tables, it faces the threat of enforcement proceedings and possible debarment. As a practical matter, few excuses satisfy most compliance officers and the pressure to hire and promote to meet the numerical objective becomes intense. Thus, contractors must of necessity inform their line decision makers that they will be held accountable for a failure to meet the goals. While the government sometimes tries to draw a distinction between goals and quotas, it is not surprising that line supervisors, unsophisticated in the nuances and intricacies of the bureaucrat's jargon, have difficulty making the distinction. Too often it is easier and safer to succumb to the government's demands for preferential treatment than to antagonize a compliance officer and cause an expensive and protracted enforcement proceeding.

E. United Steelworkers v. Weber -- The Employer's High Tightrope Without A Net

All of the pressures towards racial and sex preferences by employers came to a head in United Steelworkers v. Weber, 99 S.Ct. 2721 (1979). Reacting to pressure from the OFCCP and others, in 1974, Kaiser Aluminum entered into an agreement with its union -- the United Steelworkers--which provided that one black was to be admitted for every white to a new in-plant training program for craft positions. Although seniority controlled as between members of the same group, relative seniority and merit were disregarded where necessary to achieve the one-for-one quota. Thus, there were a number of senior white employees, including Brian Weber, who were rejected for admission in favor of junior blacks.

Weber filed a class action claiming that the affirmative action program discriminated against him and other similarly situated white employees in violation of Title VII. Both the district court and the Fifth Circuit Court of Appeals, emphasizing that there had been no showing of past discrimination by the company or the union, held that the admission quota violated the basic prohibition of Title VII outlawing discrimination against any individual on the basis of race.

In the Supreme Court, the employer and the union, with support from the government and civil rights groups, contended that the quota was valid. In effect, it was argued that the quota was permissible because Title VII was enacted as a spur for employers and unions to take race conscious action to overcome the effects of past discrimination, even if the discrimination was by society in general rather than a particular employer. All such programs would cease, they argued, if employers and unions were first required to admit they are guilty of discrimination before taking voluntary affirmative action. The company pointed to pressure by the OFCCP and findings of discrimination at other of its plants to support its position.

Weber's argument was simple and straightforward. There had been no finding of discrimination so "in this case, we have a pure, out and out, racial preference" and "it is clear beyond cavil that the obligation imposed by Title VII is to provide equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force."

The Supreme Court held against Weber. Five of the seven justices participating in the decision held that the quota was not barred by the provisions of Title VII because Title VII's prohibition against racial discrimination "does not condemn all private, voluntary, race conscious affirmative action plans." Justice Brennan, joined by White, Marshall, Blackman and Stewart, cited the general legislative history of Title VII which they argued indicates that the general purpose of Congress was to improve the economic condition of blacks by promoting employment opportunities. Thus, they argued, it would be "ironic" if a law "triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had been excluded from the American dream for so long, constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy."

Justices Burger and Rehnquist, writing separate dissenting opinions, argued that Title VII is unequivocal in prohibiting all race conscious decisions. In particular, Justice Rehnquist detailed the numerous (and unanimous) views of every congressman who spoke on the issue during the Title VII debates which are directly contrary to the majority's holding.

No matter what one's views are on the legitimacy of the Weber holding as a matter of policy, in this commentator's opinion, the majority's opinion is unprecedented to the degree to which it does violence to traditional legal principles and conventional legal analysis. Despite the majority's protestations to the contrary, its decision endorsing racial quotas is directly contrary to the views expressed in the voluminous legislative history chronicled by the dissenters. Moreover, the decision is irreconcilable with numerous prior pronouncements by the Supreme Court itself. In short, the decision is "judicial legislation" and ought to be analyzed as such.

Analyzed as a piece of legislation, it is noteworthy that the decision is a victory for the establishment. A major employer, a major labor union, the organized civil rights movement and the Federal government were all unanimous in favoring the Kaiser quota. Thus, it is somewhat understandable that once the Court put on its legislator's hat, Weber had little chance of prevailing.

In this sense, Justice Blackman's concurring opinion probably tells best what was going on. Justice Blackman acknowledged the legitimacy of the dissenter's view that Congress did not, in drafting Title VII, intend the result he and the rest of the majority now uphold, but he joined the majority so that employers are not left on a "high tightrope without a net beneath them" -- _i.e._, threatened by lawsuits by blacks if they don't take affirmative action, while threatened by lawsuits by whites if that affirmative action is deemed too aggressive.

Given the essentially legislative nature of the _Weber_ holding, the future of affirmative action, I submit, will depend more on social, economic, cultural and political factors than upon finer interpretations of the words of the decision. Indeed, the decision itself provides little guidance for the future. To determine where affirmative action is going after Weber, therefore, requires (1) a much more accurate analysis of what the concept involves than given by the Supreme Court in Weber; (2) an analysis of the history of the concept for what its history may portend for the future; (3) a consideration of somewhat loftier legal principles than those considered by the Court in Weber; and, (4) a dash of common sense and elementary principles of fairness. This is what I perceive to be the purpose of these hearings and, hopefully, the result will be a long look at the "high wire" which employers are forced to tread and the development of a balanced and creditable enforcement approach which does not compel race and sex preferences.

III. QUOTAS AND PREFERENCES ARE CONTRARY TO SOUND PUBLIC POLICY

There is no question that the arguments of the advocates for the statistical parity theory and race and sex preferences have an initial intellectual appeal. Most thinking people, I believe, are committed to eliminating the vestiges of discrimination from our society and the sooner we can proclaim victory by pointing to statistics showing tangible evidence of full parity, the better. But the issue, of course, is whether this end is justified by any means, including a seeming violation of the very laws which initially triggered our resolve to make race and sex irrelevant in our decision making processes. Whenever I reflect beyond the initial appeal of arguments of the quota advocates, I must conclude from my experience that the "statistical parity" theory of enforcement and quota demands do not serve the interests of the groups which the laws are intended to protect, and are not justified in light of severe burdens and costs imposed on employers or the injuries suffered by the victims of the preferential treatment.*/

Among the most fundamental reasons why quotas and preferences are of such questionable validity is that they do not even purport to accomplish the objective of the civil rights laws. Not only do they sacrifice race and sex neutrality, but they are not intended as redress for a legal injury. Persons benefit not because they have personally shown that they have suffered from bias or prejudice at the hands of their employer, but only because they happen to be a member of a race or sex which at the particular time is statistically "underutilized" and the subject of a goal or quota. Or put another way, even if a statistical disparity may have been the product of the employer's or societal discrimination, the victims of that discrimination are in no way compensated simply because some other member of their race is preferentially promoted. On the other hand, that preferential promotion does create another victim of race discrimination -- the person who would have otherwise received the promotion if merit, rather than race, had been determinative.

Preference proponents also argue that affirmative action in the form of quotas and preferences should be encouraged because it works. Encouragingly, minorities and females have been making significant strides but I know of no proof that this is the result of preferences. Rather, my experience suggests that this has resulted primarily because of the elimination of race and sex barriers and affirmative action to promote equal treatment -- progress consistent with the objective of anti-discrimination laws as well as merit selection principles.

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*/ See, for example, H. Northrup, The Impact of the AT&T EEO Consent Decree (1979), a critical study by The Wharton School, Industrial Research Unit, of the re-results of the quota relief implemented by the 1973 AT&T consent decree with the government.

In any event, even if one might decipher some overall statistical progress as the result of quotas, the adverse consequences flowing from quotas far outweigh any such marginal gain in numbers.

The most basic difficulties which I have observed in my practice can be summarized rather simply and have been testified about rather extensively in earlier testimony. First, the emphasis on statistical parity and quotas is demeaning to the very groups that the law is intended to benefit by implying that the protected group members are not capable of competing on their own merit. This tends to institutionalize the very stereotype that the discrimination laws were intended to eliminate. Second, and most obviously, the morale of passed-over employees is severely undercut when protected group members are granted preferences for hiring and advancement so that the employer can achieve parity. Not only does this destroy legitimate expectations and the incentive of the passed-over employees, but tends to increase racial tensions by giving a justification for bias. Third, the incentive and ability of managers and supervisors to manage is threatened when random or quota selection replaces their right to evaluate and select employees based upon merit. Fourth, the statistical parity theory invariably results in the abandonment of the "most qualified" standard for the "basically qualified" or "lowest common denominator" standard or, in some cases, no selection standard at all. When projected across our entire economy, this pressure to substitute numbers and the "lowest common denominator" standard for merit selection results in immense costs in lost efficiency, productivity and quality.

In addition to the foregoing, however, it is most curious to me that in this area of the law where we should be most sensitive to individual rights, affirmative action in the form of quotas results in elevating group rights to a status that is often totally insensitive to personal and individual considerations.

What the advocates of statistical parity and quota-based decisions forget is that each time there is a decision based on a race or sex preference rather than merit, a very human drama is played out involving the beneficiary of the preference, the victim of the reverse discrimination, and the line manager who is responsible for the decision. But as a practical matter, the drama is often played out in secret because the decision maker simply cannot rationalize to either the beneficiary, the victim of reverse discrimination, or himself why the law which he was initially taught compels him to disregard race. Now, he is told, the law requires him to prefer employees because of their race. If affirmative action is such a lofty and defensible concept, however, why shouldn't the actors in this drama be forthright and honest with each other as to the true basis for the decision.

My answer is that, while simple to advocate as a concept, the proponents might view their arguments much differently if they were personally affected. Would the proponents, upon receiving a preferential promotion themselves, be willing to acknowledge and proclaim that they received the promotion not because they were the best, but because they were black or female? Or wouldn't they simply feel embarrassed and totally deflated when they discovered that their merit and performance were not, after all, determinative?

On the other hand, would the preference activists who sought a prized position truly be so tolerant if they were the victim who lost out to a quota beneficiary? Or wouldn't they also feel the same frustration and disillusionment which others such as Brian Weber and James Bakke felt?

I also challenge those who advocate preferences to place themselves in the decision maker's role and I ask them what they would be willing to tell the other two players in the drama. For example, would the preference advocates be willing to forthrightly tell blacks on a routine basis that, although they are less qualified than their co-employees, they are being selected because of their race in order to correct a statistical disparity? I submit that such candor would totally destroy the exhilaration and implicit acknowledgement of worth normally associated with advancement, and even the strongest advocates of preferences would be unwilling to be so honest and place such a stigma on the selectee.

And what of the person of more merit who is passed over in favor of the quota beneficiary? Would the quota advocate be willing to face the exclamations of frustration and bitterness which such full candor would inevitably generate? Would that decision maker be prepared to take the risk that his candor would result in the true reasons for the selection being spread throughout the work force? While the lofty justifications for preferential treatment such as given by the academicians, lawyers and civil rights leaders in these hearings might have appeal for the very sophisticated, do these advocates really believe that they could make these rationale sufficiently understandable to satisfy the average lay employee?

In sum, no one is reluctant to proclaim a merit selection far and wide. The selectee is justifiably proud and wants his peers to know of his recognition and the employer heralds a merit selection so as to encourage maximum productivity and initiative by others. In contrast, in a quota-based environment, the employer has no satistactory alternative. Either it must acknowledge what is occurring and face an atmosphere of frustration, bitterness, distrust and an inevitable fall off in productivity, or it must attempt to hide what is going on even though it is axiomatic that nothing is more destructive of sound personnel relations than a failure to communicate candidly with employees.

In sum, I ask the preference proponents to think through how their advocacy, if accepted, would actually affect the individuals involved. From my experience, in addition to the moral, ethical and legal considerations which militate against quotas, the adverse practical consequences on the persons actually affected and on society generally are very real and far outweigh the presumed advantages of race and sex preferences.

IV. SUMMARY OF PROPOSED REFORMS

It is the thesis of my testimony that before anything can be done about the problems of quotas and preferences, basic reform in the enforcement of the anti-discrimination laws is needed. As noted, although the Supreme Court has warned the lower courts and the agencies of the potential danger of an undue reliance on statistics, the enforcement agencies have paid little attention to these warnings and continue to make findings contrary to traditional legal notions on the reliability of statistics and which overlook direct evidence contrary to the statistical inferences relied upon.

A. Substantive Reform

A balanced approach to enforcement could cure the problem without the need for extensive statutory amendments. The administrative agencies such as the EEOC and the President in enforcing the Executive Order should take the lead and act much more responsibly by amending existing rules, guidelines and litigation positions to adopt a much more realistic and fair approach to EEO enforcement.

Among the guidelines which should be promulgated to guide the enforcement agencies in the use of statistics are the following:

(1) Statistics are at best only circumstantial evidence of discrimination and should only be given weight when the disparities are significant (according to sound statistical theory) and only when the statistical evidence is corroborated by actual evidence of discrimination against identified victims of discrimination.

(2) Statistics based simply on an analysis of an employer's current work force percentages (a "snapshot" or "profile" of the work force) are inherently unreliable because an employer's work force is formed over many years. Most of the transactions which make up such raw work force profiles occurred long before the charge at issue was filed and often before the laws against discrimination were even passed. Thus, the only relevant analysis is an examination of the "flow" of protected group members into the

position at issue during the relevant time period covered by the charge of discrimination at issue.

(3) In determining whether there is statistical disparity in the flow of minorities into the positions at issue, the statistical comparison should be based on a realistic assessment of the number of qualified protected group members in the applicable pool. Thus, if there is evidence that the positions at issue requires specific qualifications which are not possessed by the populace generally, the burden should be placed on the government or the plaintiff to show the percentage of protected group members with the requisite qualifications in the work force generally before any statistical presumption can be made.

(4) In determining the availability pool, the statistical analysis should be made only in the geographic area from which the employer actually draws its employees. Thus, for example, the practice of the government in relying upon artificial statistical areas used by the census bureau, such as the Standard Metropolitan Statistical Area, should be eliminated when the evidence shows that the employer actually draws from a smaller or a larger area.

(5) It should also be recognized that simply because there is a statistical disparity, it does not necessarily follow that there are victims of discrimination entitled to back pay and other relief. Such relief should only be demanded and awarded when actual victims of discrimination are specifically identified and proven. The propensity of the enforcement agencies to take a broad brush approach and insist on back pay for large groups of employees without proof that individual members of the group were discriminated against (or, indeed, were even interested in or qualified for the positions at issue) provides only an unjustified windfall for the recipient and does nothing to serve the objectives of the law. On the other hand, such undeserved windfalls raise severe resentment among the nonrecipients and such demands severely inhibit the prospect of amicable settlement and are the principal cause of long and wasteful litigation.

In addition to the foregoing, a reanalysis and total overhaul of the "Uniform Guidelines On Employee Selection

Procedures" is necessary. More current expert opinion on the underlying premises for the Guidelines must be brought to bear and a more realistic appraisal of the Guidelines' effects on employers must be made. Similarly, the agencies must discontinue presuming discrimination simply because discretionary or subjective factors may have to be considered. High level decision making can never be made so precise and objective that subjectivity does not play a role. But where the employer has adopted sound checks and balances to ensure against bias and there are no apparent victims of the decision making process who have come forward, the process should be presumed valid.

B. Executive Order Reform

Extensive procedural reform is also long overdue under the Executive Order. First of all, there are fundamental constitutional and legal issues as to the basic constitutionality of the Order and the legality of a number of the positions taken by the OFCCP in administering the Order. Thus, I have submitted to the Subcommittee for its consideration a Memorandum entitled: "Issues Raised By Executive Order No. 11246" in which the following issues, among others, are discussed:

(1) The questionable Constitutional Authority for issuance of the Order in the first instance.

(2) Even if the Order is valid, the lack of authority for extending the Order beyond facilities and employers directly engaged in government business.

(3) The lack of authority for race and sex conscious goals in the procurement statutes which are relied upon as the statutory authority for the Order.

(4) The absence of authority in the Order itself for race or sex conscious goals.

(5) The inherent conflict between Title VII and the Executive Order as a result of the OFCCP contention that the Title VII prohibition on goals and quotas is not binding on the OFCCP.

(6) The OFCCP's refusal to be bound by the Title VII protection for bona fide seniority systems.

(7) The absence of authority for seeking back pay against employers.

(8) The redundancy and unnecessary duplication between Title VII and the Executive Order.

When the foregoing fundamental deficiencies in the Order are recognized, it becomes inconceivable that Congress ever intended for government contractors to become enslaved by the expensive, hypertechnical requirements of the current OFCCP framework with its near maniacal emphasis on numbers and percentages and statistics. In the past 10 or 12 years, this fascination with form over substance has become so pervasive in the agency that it has eclipsed the true purpose of the program: to ensure nondiscrimination. A recent study by the Equal Employment Advisory Council found that the cost to a major corporation for a single compliance review usually exceeds $20,000. The report also indicted that contract compliance activities cost the Fortune 500 companies approximately $942 million per year -- nearly a billion dollars. And yet, OFCCP's Fiscal Year 1982 budget justification report stated that in the previous fiscal year it found actual discrimination in only 4 percent of the 2,632 compliance reviews conducted. We can safely assume, based on our clients' numerous experiences, that the other 96 percent of the reviews was devoted to nitpicking -- to arguing over availability rates, job groupings, the language of affirmative action programs an other such trivia.

The simple fact is that most federal contractors know that it's unlawful to discriminate in their employment practices and further that it's bad business and bad personnel practice. They don't need a sledge hammer pounding on their heads to remind them of this. But, unfortunately, the bludgeon approach has been in vogue at the OFCCP. And because most contractors cannot afford to spend large sums on legal fees, they typically acquiesce in compliance officers' demands for artificially high availability rates and goals, for questionable back pay settlements, and for impractical job groupings. The bureaucrats have taken a program with an originally laudable aim and turned it into a numbers game of dubious effect that is open to serious constitutional challenge.

Moreover, as noted, there are serious questions as to whether the contract compliance program can reach contractors' facilities that are not directly engaged in performing under a government contract, and whether goals and time tables can be required absent some showing of discrimination. These issues now must be given serious consideration by, first, the Executive Branch, and if it does act with meaningful reform, by Congress.

In addition, the means by which the agency seeks to justify its persistent efforts to obtain back pay -- a measure that is not even mentioned in the Executive Order and was not addressed in regulations until 1978 -- are also a significant broadening of Title VII principles. In fact, it is quite doubtful that the agency has any authority for seeking back pay. The Executive Order program should be prospective in operation, concerning itself not with punitive or remedial measures (which are the province of the

EEOC under Title VII) but with efforts to promote nondiscrimination in employment.

Finally, the most disturbing aspect of Weber and the many pronouncements of proponents of preferential treatment is that they equate "affirmative action" exclusively with preferences. I submit, however, that affirmative action should be redefined to exclude preferences and to include only affirmative action to promote equal treatment. Most sophisticated employers fully recognize that they must move affirmatively to ensure compliance with the nondiscrimination laws. But increasingly these valuable personnel programs are being neglected, in favor of a narrow focus on the numbers.

Among these programs which should be encouraged are the following:

(1) the continued communication to all members of the organization of the employer's commitment to equal employment opportunity;

(2) the sensitizing and training of managers in fair selection and evaluation techniques;

(3) specialized training of personnel specialists in preventing discrimination and promoting minority and female advancement;

(4) periodic review of policies and procedures to eliminate those which have a discriminatory effect or which are in need of restructuring to minimize the risk of bias going unchecked;

(5) affirmative recruitment of outside applicants to increase the pool of qualified minorities and females for consideration for hire (this does not mean different standards must be applied once the pool is created);

(6) developing a skills and experience inventory of existing promotable minority employees so as to ensure that all qualified minorities are given advancement consideration.

(7) active encouragement of qualified minorities to seek out advancement opportunities to

increase the pool of qualified applicants; and

(8) advising and counseling of minorities on the means for developing additional skills and education to enhance their advancement potential.

While it is fashionable by some to denigrate the importance and effectiveness of the foregoing, it is submitted that these provisions still provide the backbone of a fair and effective affirmative action program.

V. CONCLUSION

Perhaps it is a symptom of the "accordian-like effect" of the Supreme Court pronouncements in this area, or perhaps the Court intends to send a final definitive signal; whatever, the Supreme Court's latest pronouncement on the subject matter of this hearing may best summarize my position. In Texas Department of Human Affairs v. Burdine, 101 S.Ct. 1089, 1096 (1981), the Court stated:

> The court's procedural rule harbors a substantive error. Title VII prohibits all discrimination in employment based upon race, sex and national origin. "The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and ... neutral employment and personnel decisions." McDonnel Douglas, supra, at 801, 93 S.Ct., at 1823. Title VII, however, does not demand that an employer give preferential treatment to minorities or women. 42 U.S.C. § 2000e-2(j). See Steelworkers v. Weber, 443 U.S. 193, 205-206 99 S.Ct. 2721, 2728-2729, 61 L.Ed.2d 480 (1979). The statute was not intended to "diminish traditional management prerogatives." Id. at 207, 99 S.Ct., at 2729. It does not require the employer to restructure his employment practices to maximize the number of minorities and women hired. Furnco Construction Co. v. Waters, 438 U.S., at 577-578, 98 S.Ct., at 2949-2950.
>
> * * *
>
> [T]he employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria.

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WRITER'S DIRECT DIAL (202) ____________

June 9, 1981

ISSUES RAISED BY
EXECUTIVE ORDER NO. 11,246

1. *Presidents Kennedy and Johnson lacked the authority to issue executive orders regulating the employment practices of federal contractors.*

Every assertion of power by the Executive, to be valid, must be founded upon either a grant of authority directly from the Constitution or from congressional legislation. "The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."[1/]

The need to ascertain the precise basis for presidential action is particularly important where the action involves highly visible, controversial policy questions, such as those raised by Executive Order No. 11,246:

[1/] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). *See also*, Comment, *Executive Order No. 11,246: Presidential Power to Regulate Employment Discrimination*, 43 Mo. L. Rev. 451, 476-77 (1978), and *OFCCP and Federal Contract Compliance* 10-16 (D. Copus and L. Rosenzweig, eds., 1981).

> Some constitutional or statutory authority must be found . . . or an Executive Order is of no legal effect.
>
> . . . .
>
> Policy-makers in the first instance, and courts reviewing their work, should be sensitive to the need for presidential action to be based on some identifiable constitutional or statutory power.
>
> Executive Order No. 11,246 illustrates the close questions of authority surrounding issuance of an Executive Order and what for the most part has been an insensitivity on the part of the courts in dealing with such questions.[2]

The Supreme Court has, however, recently recognized the need for caution and has avoided an endorsement of the underpinnings (whether constitutional or statutory) of Executive Order No. 11,246. In Chrysler Corp. v. Brown, the Court observed that "[t]he origins of the congressional authority for Executive Order 11,246 are somewhat obscure and have been roundly debated by commentators and courts."[3]

This debate over the possible constitutional and/or statutory foundations of Executive Order No. 11,246 has raised more doubts than it has put to rest.

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[2] Morgan, Achieving National Goals Through Federal Contracts: Giving Form To An Unconstrained Administrative Process, 1974 Wis. L. Rev. 301, 308-10.

[3] 441 U.S. 281, 304 (1979). See also, Liberty Mutual Insurance Co. v. Friedman, 639 F.2d 164 (4th Cir. 1981).

Three theories have been advanced in support of the President's constitutional authority independent of Congress for issuance of the series of equal employment executive orders. None of these theories offers any reasonable foundation for Executive Order No. 11,246.

(1) The equal protection theory asserts that the Fifth Amendment to the Constitution requires the Executive to make nondiscrimination a condition of doing business with the government, and that to allow recipients of federal contract funds to discriminate in their employment practices would amount to discriminatory state action in violation of the Due Process Clause.

This theory, while at one time perhaps plausible, is now clearly without merit. At least since the Supreme Court's 1972 decision in Moose Lodge v. Irvis, federal involvement in private business has not invoked the limitations of the Due Process Clause except in those rare cases in which the federal government was a "joint venturer" and "significantly involved itself with invidious discriminations."[4/] No constitutional obligation is imposed on the federal government for the

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[4/] 407 U.S. 163, 173 (1972), quoting Reitman v. Mulkey, 387 U.S. 369, 380 (1967).

actions of private business, unless the government's involvement in the specific action challenged is so great that "the action of the [company] may be fairly treated as that of the [government] itself."[5] It is now well settled that contracting with the federal government does not invoke any constitutional requirements of due process and that the federal government is under no constitutional obligation to refrain from contracting with businesses which may discriminate.[6]

(2) The second theory rests on the Constitution's directive that the President "faithfully execute" the law.[7] This argument is also wholly lacking in merit. The constitutional mandate to "execute" laws manifestly does not include the power to "make" the laws. That power has been vested exclusively in Congress:

> The language of the Constitution is not ambiguous or qualified. It places not some legislative

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[5] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974).

[6] Graphic Arts International Union, Local 290 v. NLRB, 596 F.2d 904 (9th Cir. 1979); Martin v. Pacific Northwest Bell Telephone Co., 441 F.2d 1116 (9th Cir.), cert. denied, 404 U.S. 873 (1971); Marentette v. Michigan Host Inc., 506 F. Supp. 909 (E.D. Mich. 1980); Lestrange v. Consolidated Rail Corp., 501 F. Supp. 964 (M.D. Pa. 1980).

[7] U.S. Const., art. II, § 3.

> power in the Congress; Article 1, Section 1 says 'all legislative powers herein granted shall be vested in a Congress of the United States . . . .[8/]

Conversely, the President enforces the laws rather than makes them: "The duty of the President to see that the laws be faithfully executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave in his power."[9/]

As Mr. Justice Black wrote in the Youngstown case:

> [T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be lawmaker. The Constitution limits his function in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.[10/]

(3) The Perkins v. Lukens Steel Co.[11/] approach states that the government may contract with whomever it wishes and

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[8/] Youngstown Sheet & Tube Co., 343 U.S. at 630 (Douglas, J., concurring).

[9/] Myers v. United States, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting) (emphasis added).

[10/] 343 U.S. at 587. See also, Speck, Enforcement of Nondiscrimination Requirements for Government Contract Work, 63 Colum. L. Rev. 243, 246-47 (1963), and Note, Doing Good the Wrong Way: The Case for Delimiting Presidential Power Under Executive Order No. 11,246, 33 Vand. L. Rev. 921, 927-30 (1980).

[11/] 310 U.S. 113 (1940).

may impose whatever contractual conditions it wishes. This fortyyear-old decision is entirely inapposite because the governmental power referred to was the power of *Congress*, not the President. *Perkins* offers no support whatever for the exercise of *executive* power over federal contracts:

> [T]he authority of the executive to determine contractual conditions was not at issue in *Perkins*. Rather, the case presented a challenge to executive action taken pursuant to a congressional enactment and not an executive order.[12]

In summary, it is extremely doubtful that the President, under any of these three theories, had the constitutional power, independent of the Congress, to issue Executive Order No. 11,246.

Having rejected the Constitution as a source of authority, we must now turn to congressional enactments to determine if there has been a valid legislative delegation of power to the Executive as a basis for the Order.

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[12] *AFL-CIO v. Kahn*, 472 F. Supp. 88, 100 (D.D.C.), *reversed on other grounds*, 618 F.2d 784 (D.C. Cir. 1979) (*en banc*). "As it was used in the opinion, the term 'Government' referred to Congress and not to the President. The power of the President to fix contract terms was not before the Court in *Perkins*." 43 Mo. L. Rev. at 481. *See also*, Brody, *Congress, The President, and Federal Equal Employment Policy Making: A Problem in Separation of Powers*, 60 Bos. U. L. Rev. 239, 291 n.221 (1980).

The Order itself does not recite any specific statute as its basis, nor does any statute explictly grant the President the authority to regulate the employment practices of federal contractors. However, the source of authority most generally discussed by the courts has been The Federal Property and Administrative Services Act of 1949 ("Procurement Act").[13/] Ten years ago, the Third Circuit, in Contractors' Association of Eastern Pennsylvania v. Secretary of Labor,[14/] concluded that the Executive Order was validly based upon the Procurement Act's delegation to the President of the authority to "prescribe policies and directives" to further the purposes of the Act.[15/] A number of other decisions have parroted this same reasoning.[16/] These courts held that the Procurement Act's promotion of an "economic and efficient" procurement system was sufficient support for the Executive Order's prohibition of employment discrimination, reasoning that steps to insure that minorities were not excluded from federal contractors'

[13/] 40 U.S.C. § 471 et seq.

[14/] 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971).

[15/] 40 U.S.C. § 486(a).

[16/] See, e.g., United States v. New Orleans Public Service, Inc., 553 F.2d 459 (5th Cir. 1977), vacated on other grounds, 436 U.S. 942 (1978); Farkas v. Texas Instruments, Inc., 375 F.2d 629 (5th Cir.), cert. denied, 389 U.S. 977 (1967).

labor pools would increase the number of available qualified workers and reduce contract costs for the government.

Recently, however, both courts and commentators have given more careful attention to the breadth of power to be implied from the Procurement Act,[17] and substantial doubt now exists as to the correctness of the earlier decisions endorsing the view that the Executive Order is authorized by the Procurement Act. Any examination of the issue must begin with a central and obvious fact: "[N]owhere in the [Procurement] Act is there a specific reference to employment discrimination."[18] Thus, the power to issue the Executive Order, if it exists at all, must be implied.

A careful reading of Supreme Court decisions indicates, however, that such authority cannot be implied, for at least three reasons. First, as a general matter of statutory construction, the authority to impose conditions through the contracting power will rarely if ever be implied. Second, the Procurement Act's mandate to the President to develop a cost-efficient contracting system does not include the power to regulate the equal employment practices of contactors, since there is a lack of a "close nexus" between those employment practices and the cost of government contracts. Third, the twelve-year gap between the passage of the Procurement Act and President Kennedy's apparent reliance upon it in issuing his Executive Order is strong evidence that Congress, when it passed the Act in 1949, in no way contemplated the broad government authority claimed by Kennedy. These questions are discussed in some detail below.

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[17] For example, the U.S. Court of Appeals for the Fourth Circuit has recently rejected the broad holdings of the Third Circuit Contractors decision and its progeny. Liberty Mutual, 639 F.2d at 171. Moreover, the line of cases emanating from Contractors has been heavily criticized in various legal journals. See, e.g., Fleishman and Aufres, Law and Orders: The Problem of Presidential Legislation, 40 Law & Contemp. Prob. 1, 21-23; and 43 Mo. L. Rev. at 478-79, 483-89.

[18] Chrysler Corp. v. Brown, 441 U.S. at 305 n.34.

(1) Whatever willingness the lower courts may have exhibited several years ago to imply presidential authority over the employment practices of federal contractors, a very recent Supreme Court decision indicates that such power must be implied very, very cautiously, if at all. In Pennhurst State School and Hospital v. Halderman,[19/] the Supreme Court held that obligations cannot be attached to federal contracts or grants unless Congress speaks "with a clear voice." According to the Court, "if Congress intends to impose a

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19/ 49 U.S.L.W. 4363 (April 20, 1981).

condition on the grant of federal moneys, it must do so unambiguously."[20]

At issue in Pennhurst was whether the Disabled Assistance and Bill of Rights Act[21] conditioned the receipt of federal funds to state mental hospitals on the states' agreement to house mental patients in the "least restrictive" environment. Although the Act expressly declared such minimal confinement to be a strong national policy, it did not expressly condition receipt of funding upon an agreement to satisfy that policy. The Supreme Court refused to imply that obligation because such an implication would violate a basic "rule of statutory construction . . ., that Congress must express clearly its intent to impose conditions on the grant of federal funds . . . ."[22]

Obviously, the Procurement Act does not speak "with a clear voice" on the employment practices of federal contractors; and since the Act does not "express clearly its intent to impose conditions" on federal contractors vis-a-vis those employment practices, Pennhurst precludes their imposition.

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[20] 49 U.S.L.W. at 4367. The Court's decision specifically equates federal grants and federal contracts since both are authorized by the Constitution's delegation of the "Spending Power" to the Congress.

[21] 424 U.S.C. $ 6000 et seq.

[22] 49 U.S.L.W. at 4369.

Furthermore, the Pennhurst decision refused to imply conditions because "[w]hen Congress intended to impose conditions . . . it proved capable of doing so in clear terms."[23] As the attached Exhibit A indicates, on at least 37 separate occasions Congress has expressly imposed obligations on federal contractors through the procurement process. Congress's failure to expressly regulate contractors' equal employment practices strongly militates against implying such intent.

(2) Not only should presidential authority over the equal employment matters of contractors not be implied as a general matter, but, in particular, such authority cannot be implied from the language of the Procurement Act. Presaging perhaps the decision in Pennhurst, two recent appellate cases specifically involving the Procurement Act took their cue from the Supreme Court's earlier stricture in Chrysler Corp. v. Brown that the Executive Branch must "establish a nexus" between the employment requirements imposed on federal contractors by presidential mandate and "some delegation of

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[23] Ibid.

requisite legislative authority."[24] In both cases, the Courts required the Executive Branch to show a "close nexus" between the mandated obligations and the "efficiency and economy criteria" of the Procurement Act.[25] In one of the cases, Liberty Mutual Insurance Co. v. Friedman, where the government failed to show such a "close nexus," the President's efforts to regulate employment practices by Executive Order No. 11,246 were struck down.[26]

In the context of Executive Order No. 11,246, the Executive Branch would be exceedingly hard pressed to demonstrate the requisite "close nexus" to the purposes of the Procurement Act. While no Supreme Court case has specifically interpreted the "cost and efficiency" mandate of the Procurement Act, the Court has ruled that a similar statute does not authorize the Executive Branch to regulate the equal employment practices of employers. In NAACP v. Federal Power

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[24] 441 U.S. at 304.

[25] AFL-CIO v. Kahn, supra; Liberty Mutual, supra.

[26] This result is consistent with the Supreme Court's decision striking down the Department of Labor's disclosure regulations under Executive Order No. 11,246 because the "thread between these regulations and any grant of authority by the Congress is so strained that it would do violence to established principles of separation of powers to [uphold them]." Chrysler Corp. v. Brown, 441 U.S. at 307-08.

Commission,[27] the Court held that the legislative delegation of authority to the Federal Power Commission to promote the "economy and efficiency" of public utilities did not authorize the Executive Branch to regulate the employment practices of the utility industry. At mort, the Procurement Act authorizes the President to issue an order excluding court-ordered back pay and attorneys' fee awards from government contract costs.

In fact, the court held that the only action relating to employment discrimination the Executive Branch can take under an "economy and efficiency" mandate is to disallow "as an unnecessary cost" any back pay or attorneys' fees which are awarded after an adjudication of discrimination by "judicial decree or the final actions of an administrative agency charged with consideration of such matters." The "economy and efficiency" authority of the Federal Power Act, however, did not constitute a grant of that power of adjudication to the FPC which was authorized to act on the costs of discrimination only after a properly constituted judgment had been entered elsewhere.[28]

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[27] 425 U.S. 662, 669-71 (1976).

[28] 425 U.S. at 668.

A similar conclusion regarding the Procurement Act seems compelled. Not only does the cost and efficiency standard of the Procurement Act not support Executive Order No. 11,246, but experience has shown that the operation of the federal contract compliance program has probably increased the cost of doing business with the government.[29/] And there is no reliable data that would indicate the Order has had a particularly beneficial impact on the numbers of women or minorities employed by contractors. In fact, in 1977 an internal Department of Labor task force concluded that "there is no precise evidence to support a conclusion that OFCCP has brought about a substantial change in the employment conditions of minorities and women."[30/]

In addition, a good case can be made that "the President issued the order solely to achieve employment equality, rather than to increase the available labor force or to cut government procurement costs."[31/] If so, the Order cannot be

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[29/] 1 Report of the Commission on Government Procurement 112 (1972); Walker, The Exorbitant Cost of Redistributing Injustice: United Steelworkers of America v. Weber, 21 Bos. Col. L. Rev. 1, 75-78 (1979); 40 Law & Contemp. Prob. at 22.

[30/] Preliminary Report on the Revitalization of the Federal Contract Compliance Program 17 (1977).

[31/] 33 Vand. L. Rev. at 930-31; 1974 Wis. L. Rev. at 312.

said to validly rest upon a delegation of congressional authority in the Procurement Act.

(3) One of the factors considered by courts in weighing the deference to be given an agency's regulations or interpretations is whether the agency's pronouncement is contemporaneous with the issuance of the underlying authority. It is well-settled that courts owe no deference to such late-blooming interpretations as those of the OFCCP.[32]

Apart from the Procurement Act, one other basis has been suggested as authorizing a possible delegation of congressional authority to support the Order. From time to time, the Department of Labor has claimed that Congress, by foregoing alteration of the contract compliance program when it enacted Title VII of the Civil Rights Act of 1964 and the Equal Employment Opportunity Act in 1972, implicitly gave its blessing to the program. Significant policy grounds, however, militate against such a conclusion.

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[32] General Electric Co. v. Gilbert, 429 U.S. 125, 141-43 (1976); Chrysler Corp., 441 U.S. at 315, quoting Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977) (an agency's "timing and consistency" is an important factor in considering amount of deference due by courts). See also, Cerro Metal Products v. Marshall, 620 F.2d 964 (3d Cir. 1980), and Daughters of Miriam Center for the Aged v. Mathews, 590 F.2d 1250, 1258 (3d Cir. 1978).

> [T]here are strong policy reasons for rejecting ratification by inaction in the legislative context. The legislative process is designed to protect the notions of open and accountable procedures and majority rule as the foundation of democracy. For this reason the legislative process places the burden of passing bills by majority vote on the proponents of the particular piece of legislation. Under the theory of ratification by inaction, however, any unsuccessful attempt to defeat or modify the Executive Order Program would be tantamount to an imprimatur of that Program. Such a reading improperly shifts the burden of amassing a majority from the proponents to the opponents of the legislation. It may also cause serious opponents to refrain from open opposition if the result of unsuccessful opposition is ratification of a Presidential program.33/

In the only case to consider the issue at any length, the Fourth Circuit recently rejected this "negative authorization" approach, specifically in the context of Executive Order No. 11,246:

> Even if 'ratification' by such a process might in some circumstances be properly found -- a matter of some general dubiety when its potential effect upon the dynamics of the legislative process is carefully considered -- we do not think it can properly be found here.34/

33/ 33 Vand. L. Rev. at 946.

34/ Liberty Mutual, 639 F.2d at 172; 60 Bos. U. L. Rev. at 297-304; 43 Mo. L. Rev. at 480-481; 21 Bos. Col. L. Rev. at 31-33.

2. At most, the authority exercised by Presidents Kennedy and Johnson extends only to facilities and employers directly engaged in the provision of goods or services to the government.

If we assume, for the purposes of this discussion, that the Procurement Act constitutes a delegation of authority to the President to regulate the employment practices of federal contractors, that power probably cannot be extended beyond those employers and facilities that directly participate in the provision of goods or services for which the government has contracted. Because Executive Order No. 11,246 reaches far beyond those facilities, it is, at least to that extent, clearly beyond the power delegated by Congress.

Prior to the issuance of 11,246, the executive orders' discrimination requirement applied only "in connection with the performance of the work under the contract."[35] This was extended by President Johnson in 1964 in Executive Order No. 11,246 to all work performed at any of the employer's facilities during the period of the contract. The current Order also applies to subcontractors, and ostensibly to all their employees and facilities.

35/ Exec. Order No. 10,925, § 202; 26 Fed. Reg. 1977 (1961).

This all-inclusive approach to executive order coverage is highly suspect for three reasons. First, the application of the Executive Order was not extended to non-contracting facilities until 16 years after the passage of the Procurement Act, and this long delay in the exercise of the arguably delegated power is strong evidence against implying its delegation. Second, application of the Executive Order to non-contracting facilities could not possibly pass the "close nexus" test. Third, in every case in which Congress has expressly imposed social or economic conditions on federal contractors, it has limited their application to contracting facilities.[36/]

Only one court has considered the broad sweep of the current Executive Order, and that Court rejected its ubiquitous application to all facilities of contractors and subcontractors. In Liberty Mutual, utilizing the "close nexus" test discussed above, the Fourth Circuit refused to extend the reach of the Order to companies which supply worker's compensation coverage to employers with federal contracts. The court found that even though Liberty Mutual was a "subcontractor" ostensibly covered by Executive Order No. 11,246, it was unreasonable to expect that Congress

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36/ See Exhibit A.

intended for the Executive Order to reach so far as to include providers of insurance with no real connection to the government's procurement process.[37/] In fact, the court found that none of "the possible statutory sources of congressional authorization for Executive Order No. 11,246 . . . reasonably contemplates" the extension of its coverage to the company.[38/] It is also most unlikely that the added administrative expense associated with implemention of affirmative action plans at those facilities not involved in actual government contract performance contributes to the Procurement Act's objectives of "efficiency and economy."

Further, as Exhibit A confirms, every other current political or socio-economic requirement placed upon government contractors by statute is limited in application to the government contract work actually performed. Congress has thus repeatedly expressed its desire to limit the obligations imposed through the federal contracting system. No rational or legal basis exists for assuming that in 1949 Congress silently granted future President Johnson the authority to extend Executive Order No. 11,246's coverage beyond the

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[37/] 639 F.2d at 172.

[38/] 639 F.2d at 169.

facilities or employees who are actually performing federal work.[39]

3. The authority, if any, exercised by Presidents Kennedy and Johnson does not support the imposition of race- or sex-conscious goals.

The Procurement Act was passed by Congress in 1949. After several executive orders, many regulations and the passage of nineteen years, the OFCCP in 1968 decided to use the contract compliance program as a vehicle to impose race- and gender-conscious goals[40] -- not as a remedy for employment discrimination, but as a condition of doing business with the government.

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[39] The OFCCP's definition of "contract" also includes those agreements in which the government is the seller. It is doubtful that there is any basis for extension of the order to cover those firms which buy from the government. 43 Mo. L. Rev. at 459-60 (1978); *cf.*, *Crown Central Petroleum Corp. v. Kleppe*, 424 F. Supp. 744 (D. Md. 1976).

[40] The terms "goals" and "quotas" are, for all practical purposes, identical. As the Fifth Circuit has observed, "[a]ttempts to distinguish a numerical goal from a quota have proved illusory, and most such goals suggested by the OFCCP can fairly be characterized as quotas." *Weber v. Kaiser Aluminum and Chemical Corp.*, 563 F.2d 216 (5th Cir. 1977), *rev'd on other grounds sub nom. Steelworkers v. Weber*, 443 U.S. 193 (1979). *See also*, *United States v. Miami*, 614 F.2d 1322, n.26 (5th Cir. 1980) ("[w]e refuse to engage in any semantic dispute over the

[Footnote 40 cont'd on p. 21.]

The Procurement Act, whatever it may have authorized the President to do to promote efficiency and economy, clearly does not provide a foundation for the imposition of race- and gender-conscious goals. Such preferential classifications are always suspect and may be used under the Constitution only in those extremely rare cases where a drastic remedy for proven discrimination is necessary.[41/] (See discussion in Sections 5 and 6, below.) In light of the drastic nature of quota devices, it must be assumed that, had Congress intended to authorize their use in the procurement context, it would have included specific language to that effect in the statute itself. Since no such authorization is present, any attempt to squeeze quota approval from the Act is unfounded and ill-advised. As the Supreme Court recently cautioned in Pennhurst, "[i]t defies common sense . . . to suppose that Congress imposed this massive obligation" absent a clear

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[Footnote 40 cont'd from p. 20.]

difference in meaning between 'goals' and 'targets' on the one hand and 'quotas' on the other"); Regents of University of California v. Bakke, 438 U.S. 265, 289 (1978) ("Whether . . . described as a quota or a goal, it is a line drawn on the basis of race and ethnic status"), as quoted in Sledge v. J. P. Stevens & Co., 585 F.2d 625, 644 n.29 (4th Cir. 1976).

[41/] Fullilove v. Klutznick, 100 S.Ct. 2758, 2784 (1980) (Powell, J., concurring).

expression of specific intent to do so.[42] When the OFCCP chose to impose quotas in 1968, it obviously leaped over the bounds of the Procurement Act's authorization. There is a great deal of difference between the passage of a rather simple, general "housekeeping" statute designed to standardize and economize the federal procurement effort, and the OFCCP's insistence upon race and sex balancing in a contractor's workforce.

> A congressional grant of legislative authority need not be specific in order to sustain the validity of regulations promulgated pursuant to the grant, but a court must 'reasonably be able to conclude that the grant of authority contemplates the regulations issued.'[43]

In simple terms, the substance of an agency's regulations must be with the scope of the statutory grant of authority. It seems almost ludicrous for the OFCCP to suggest that its efforts to impose quotas are validly based upon an authorization in the provisions of the 1949 Procurement Act.

In addition, when there is an unexplained delay of great length between the enabling legislation and the President's promulgation or interpretation by executive order, the Executive action is weakened and courts are inclined to give it little deference.[44] The fact that the Procurement Act had been in existence for nineteen years and the "affirmative action" language for seven years before quota requirements appeared in the OFCCP regulations, casts great doubt on the validity of the new requirement.

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[42] 49 U.S.L.W. at 4369.

[43] Liberty Mutual, 639 F.2d at 169, quoting Chrysler Corp., 441 U.S. at 308.

4. Executive Order No. 11,246 does not authorize the imposition of race- or sex-conscious goals.

Executive Order No. 11,246 cannot be reasonably interpreted as authorizing the President to impose race- or sex-conscious goals for several reasons. First, and most obviously, the Order itself is void of any authorization, either direct or indirect, for such preferential treatment. The Order makes no mention of race- or gender-conscious policies.

Second, and more importantly, the imposition of race- or sex-conscious goals violates the explicit mandate of the Order itself. The Order's invocation of "affirmative action" is specifically linked to efforts to ensure nondiscrimination, not preferential treatment. In fact, section 202(1) of the Order specifically requires that:

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[44] *See* authorities cited in footnote 32, *supra*.

> [T]he contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin.45/

Thus, the "affirmative action" required by the Order was to ensure nondiscrimination in general, for all employees and applicants of federal contractors. There is no evidence that it was directed toward the institutionalization of preferential treatment in the federal procurement process.

Third, when the phrase "affirmative action" was first added to the Order's nondiscrimination requirement by President Kennedy in 1961, there was no indication that the phrase encompassed goals or quotas. Moreover, the President's Committee on Equal Employment Opportunity established by the 1961 Order never defined "affirmative action." "The meaning of 'affirmative action' to those who coined the term is thus

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45/ Executive Order No. 11,246, as amended, § 202(1) (emphasis added); *see also* 41 C.F.R. §§ 60-1.4(a) and 60-1.20(a), the OFCCP regulations which reiterate this language.

strictly a matter of conjecture."[46] Indeed, when Johnson issued Executive Order No. 11,246 in 1965 he did not define "affirmative action" and it was not until 1968 that the Department of Labor first interpreted the phrase as requiring numerical quotas.[47] Not only does the seven-year lapse between the imposition of an "affirmative action" obligation and its interpretation as requiring racial quotas militate against that interpretation, but the actual implementation of President Kennedy's Order in the early 1960's clearly demonstrates that the Administration did not contemplate quotas.

For example, shortly after President Kennedy issued Executive Order No. 10,925, Vice President Johnson, Chairman of the President's Committee on Equal Employment Opportunity, announced "Plans for Progress," a program of voluntary affirmative action. The first major company to embrace Plans for Progress was Lockheed Aircraft Corporation in June 1961. Its widely publicized agreement mandated three types of affirmative action, including specialized recruiting, but did not contain any reference to quotas. And yet Vice President

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[46] Note, Executive Order 11246: Anti-Discrimination Obligations in Government Contracts, 44 N.Y.U. L. Rev. 590, 593 (1969).

[47] 33 Fed. Reg. 7804, 7811 (1968).

Johnson hailed Plans for Progress as going "above and beyond" the requirements of the Executive Order.[48/]

> Thus, although 'Plans for Progress' actually may have involved some 'steps above and beyond' those required by the Executive Order, it is at least clear from the very limited scope of the plans what 'affirmative action' as originally conceived, did not mean. It did not mean preferential treatment of minorities and it did not require employers to strive for preconceived numerical breakdowns in their workforce.[49/]

Almost all scholars who have studied the social context of the early 1960's have concluded that no one contemplated that "affirmative action" meant racial quotas.[50/]

Indeed, the Department of Labor has itself acknowledged that when it imposed quotas in 1968 it was exercising "political pragmatism" and pushing "harder than Congress -- and skeptical public opinion -- might allow . . . ."[51/]

[48/] 44 N.Y.U. L. Rev. at 593-94.

[49/] 21 Bos. Col. L. Rev. at 6.

[50/] *See, e.g.*, 44 N.Y.U. L. Rev. at 593-95; 43 Mo. L. Rev. at 464; 21 Bos. Col. L. Rev. at 4-12.

[51/] *Preliminary Report* at 68.

5. Executive Order No. 11,246 cannot authorize the imposition of race- or sex-conscious goals, absent a finding of discrimination, without violating Title VII of the Civil Rights Act of 1964 and the Fifth Amendment of the Constitution.

The imposition of goals and timetables presupposes classifications based on race. Such classifications imposed by the federal government are inherently suspect and subject to strict scrutiny by the courts. As the Supreme Court has often noted, "[r]acial classifications must be assessed under the most stringent level of review because immutable characteristics, which bear no relation to individual merit or need, are irrelevant to almost every governmental decision."[52/] Similarly, "[w]hen a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as suspect."[53/]

Of course, there may be authority under Title VII of the Civil Rights Act of 1964 and other legislative enactments for the very limited use of preferential devices as remedies for proven discrimination. But the Department of Labor has

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[52/] Fullilove, 100 U.S. at 2784.

[53/] Bakke, 438 U.S. at 305.

interpreted the Executive Order as requiring race- and sex-conscious goals without regard to whether any discrimination is or has been present; rather, it has officially linked the requirement of goals to the concept of racial and sexual balance. That is, whenever the percentages of women and minorities in a contractor's workforce (by job groupings) fall below availability rates or parity, quotas must be set. The OFCCP openly proclaims that "[t]he goals and timetables element [of the Executive Order program] operates independently of a finding of discrimination."[54] In fact, the OFCCP has admitted that "goals and timetables are not necessarily administered as a remedy for persons who may be the victims of discriminatory employment practices."[55]

In light of the non-remedial nature of this view of "affirmative action," the Department of Labor's requirement of the maintenance of a race and sex balance violates both Title VII and the Constitution.

The Title VII-Department of Labor conflict pits Congress' unequivocal prohibition of any governmentally imposed requirement of preferential treatment to remedy a percentage "imbalance,"[56] against the Department of Labor's insistence on the use of goals and timetables, without a prior finding of discrimination, to achieve and maintain exact race and sex parity.

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[54] *Preliminary Report* at p. 15.

[55] *Id*. at pp. 66, 74.

In section 703(j) of Title VII, Congress expressly prohibited governmentally imposed quotas to attain racial balance:

> Nothing contained in this title shall be interpreted as requiring any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area.

This plain, unequivocal language, as well as the legislative history[57] of section 703(j), clearly prohibits the government from requiring the type of racial and sexual balance quotas quotas embodied in the Department of Labor's interpretation of the Executive Order.[58]

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[56] 42 U.S.C. § 2000-2(j).

[57] The legislative history is ably summarized in Mr. Justice Rehnquist's dissent in Weber. 443 U.S. at 219-255.

[58] 44 N.Y.U. L. Rev. at 596-600; 43 Mo. L. Rev. at 483-84.

Such conflicts between the Executive Order and the Congress inevitably raise constitutional questions in the separation of powers area. The premier case on this issue is Youngstown Sheet & Tube Co., in which the Supreme Court opined:

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.[59]

Whenever a subject has been the focus of Congressional attention with resultant comprehensive legislation, the Executive is thereafter constitutionally estopped from further sorties in the area.[60] Applying this fundamental principle in the context of Executive Order goals, the Fifth Circuit has stated that "[i]f Executive Order 11,246 mandates a racial quota . . ., in the absence of any prior hiring or promotion discrimination, the executive order must fall before this direct congressional prohibition."[61]

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[59] 343 U.S. at 638.

[60] 60 Bos. U. L. Rev. at 286-304; 33 Vand. L. Rev. at 921.

Because Congress has specifically chosen not to allow the government to impose quotas triggered solely by racial or sexual "imbalances," the Department of Labor's contrary insistence upon such preferences is without authority.

With regard to the equal protection/due process issue, the Supreme Court has very carefully refrained from endorsing any governmentally imposed preferential treatment not preceded by a finding of discrimination. The Court recently cautioned against "the deleterious effects of even benign racial or ethnic classifications when they stray from narrow remedial justifications."[62]

As Mr. Justice Powell's opinion in Bakke points out:

> The Courts of Appeals have fashioned various types of racial preferences as remedies for constitutional or statutory violations resulting in identified, race-based injuries to individuals held entitled to the preferences. Such preferences

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[61] Weber, 563 F.2d at 227 (emphasis in original). Although the Supreme Court subsequently upheld the validity of the race-conscious preference in Weber, it did so on the basis of the voluntary implementation of the quota by the employer; the Court did not reach the issue of the congressional-executive conflict. Steelworkers v. Weber, 443 U.S. 193 (1979).

[62] Fullilove, 100 S. Ct. at 2779 (emphasis added).

> have also been upheld where a legislative or administrative body charged with the responsibility made determinations of past discrimination by the industries affected, and fashioned remedies deemed appropriate to rectify the discrimination. But we have never approved preferential classifications in the absence of proven constitutional or statutory violations.[63]

In the specific context of executive order enforcement, the opinion further states that "[e]very decision upholding the requirement of preferential hiring under the authority of Executive Order No. 11,246 . . . has emphasized the existence of previous discrimination as a predicate for the imposing of a preferential remedy."[64]

Under this rather pointed language, it seems unlikely that the Department of Labor's imposition of preferential treatment to maintain a race or gender balance would be approved by the Supreme Court.

Two recent cases which support this view are Central Alabama Paving, Inc. v. James,[65] and Perini Corp. v. Massachusetts Bay Transportation Authority.[66] In Central

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[63] 438 U.S. at 301-2 (citations omitted) (emphasis added).

[64] 438 U.S. at 302 n.40 (citations omitted).

[65] 499 F. Supp. 629 (M.D. Ala. 1980).

[66] No. 77-2340-MC (D. Mass. Sept. 22, 1980).

Alabama, the court vacated a Department of Transportation requirement that specific percentages of federally funded state highway contracts be awarded to minority- or female-owned businesses. Relying on the Supreme Court's analysis in Fullilove, the court vacated the regulations because they were not founded upon an express Congressional empowerment and because they sought to implement race- and sex-conscious preferences without a finding of past discrimination.[67/]

The Perini court invalidated similar minority construction regulations because of the governmental agency's failure to make any underlying findings either of discrimination or of the availability of minority businesses, prior to establishing a percentage set-aside figure.

(For a more detailed discussion of the problems associated with the Department of Labor's mandate of preferential treatment, see copies of "The Legality of Preferential Treatment after Weber," and Book Review, "What Is 'Affirmative Action'," 58 Tex. L. Rev. 845 (1980), annexed hereto as Exhibits B and C, respectively.)

67/ 499 F. Supp. at 636.

6. The imposition of race- or sex-conscious goals by executive order, absent findings of discrimination, is contrary to public policy.

"In the history of [the Supreme] Court and this country, few questions have been more divisive than those arising from governmental action taken on the basis of race."[68]

Because of the discord engendered by race- and sex-conscious mechanisms, preferential classifications based upon race and sex have always been constitutionally suspect. As Mr. Justice Rehnquist stated in his dissent in Weber:

> [T]here is perhaps no device more destructive to the notion of equality than the numerus clausus — the quota. Whether described as "benign discrimination" or "affirmative action," the racial quota is nonetheless a creator of castes, a two-edged sword that must demean one in order to prefer another.[69]

This is not to say that quotas are always inappropriate as a remedial tool to provide relief for specific discriminatees. However, the Department of Labor's across-the-board application of preferential treatment goes far beyond that limited use. The Department's requirement of race and gender balances in contractors' workforces is truly violative of American public policy; it is highly destructive in a host of ways. It foments resentment and racial animosity and polarizes members of opposite sexes and different race/ethnic groups. "Supervisors, shop stewards, personnel officers, labor lawyers and all who have any significant contact with rank and file workers can attest that this expectation currently is being fulfilled."[70/] Other negative results of non-remedial preferential treatment include "'balkanization' of the country" and "the devaluation of accomplishment" that results when success is attributed to sex or skin color, rather than competence.[71/]

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[68] Fullilove, 100 S. Ct. at 2794.

[69] 443 U.S. at 254.

7. Executive Order No. 11,246 cannot prohibit employment practices which are lawful under Title VII of the Civil Rights Act of 1964.

The Department of Labor has broadened the definition of discrimination, and the circumstances under which it demands remedies for such discrimination, far beyond those that Congress specified in Title VII of the Civil Rights Act of 1964. For example, the OFCCP has refused to abandon the

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70/ 21 Bos. Col. L. Rev. at 69.

71/ *Id*. at 71.

"present effects of past discrimination" theory which was vitiated by the Supreme Court in the Title VII cases of Teamsters v. United States,[72] and United Airlines v. Evans.[73] The Department of Labor continues to demand relief for alleged discrimination which took place years ago, even prior to the enactment of Title VII. As its Compliance Manual indicates:

> An affected class of employees can also exist without a finding of current underrepresentation, adverse impact, or concentration. It is not sufficient for a contractor to merely stop discriminating. It must correct the effects of that discrimination. Otherwise neutral employment procedures can perpetuate prior discrimination against an affected class of covered employees, which was created by systemic discrimination which has since ceased; an appropriate remedy must then be obtained, unless the contractor can show that the policy which perpetuates past discrimination is required by business necessity.[74]

Congress has specifically rejected this approach by establishing a very short statute of limitations in Title VII.

The Department also has refused to accept Congress' specific insulation of bona fide seniority systems from attack.[75]

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[72] 431 U.S. 324 (1977).

[73] 431 U.S. 553 (1977).

[74] Federal Contract Compliance Manual, § 7-30.5, p. 7-6.

[75] 42 U.S.C. § 2000e-2(h).

The Labor Department continues to seek relief which would transgress valid seniority system rules, despite clear indications from the courts that Title VII's mandate on this issue must be obeyed. "Such an interpretation of the Executive Order [that it may invalidate bona fide seniority systems] would run afoul of the statutory construction of Title VII and legislative intent of Congress as pronounced by the Supreme Court, and as such would violate the holding of Teamsters."[76/] The Department of Labor's position on this issue "cannot be accepted because Congress has declared for a policy that a bona fide seniority system shall be lawful. The Executive may not, in defiance of such policy, make unlawful -- or penalize -- a bona fide seniority system."[77/]

As the courts have indicated, the persistence of the Department of Labor in its efforts to do under color of the Executive Order what Congress has forbidden in Title VII raises a serious constitutional issue relative to separation of powers. "[A]n order of the Executive has the force of

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[76/] United States v. Trucking Management, Inc., 20 Fair Empl. Prac. Cases 342, 348-49 (D.D.C. 1979).

[77/] United States v. East Texas Motor Freight System, 564 F.2d 179, 185 (5th Cir. 1977).

law only 'if it is not in conflict with an express statutory provision'."[78]

8. Executive Order No. 11,246 cannot require federal contractors to provide specific, individual relief to victims of alleged discrimination.

No provision of the Executive Order explicitly authorizes any type of individual relief, including back pay. This plain lack of authorization would seem to invalidate the OFCCP's position that it can seek monetary and injunctive relief for individuals. At least one federal appellate court has suggested as much, albeit in dictum. "[N]othing in the Order suggests an authority to direct . . . benefit[s] to third party discriminatees."[79]

The section of the Order that sets forth the sanctions available to the Secretary of Labor contains only prospective provisions; it is void of any suggestion of compensatory or other individual remedies. "[I]t is unlikely that the President would have failed to mention a sanction or remedy as significant as back pay awards and left that matter instead for implication from general language."[80/]

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[78] East Texas Motor Freight, 564 F.2d at 185, quoting United States v. New Orleans Public Service, Inc., 553 F.2d 459, 465 (5th Cir. 1977), vacated on other grounds, 436 U.S. 942 (1978).

[79] East Texas Motor Freight, 564 F.2d at 184.

It is interesting that the agency itself did not espouse its possession of any authority for back pay until the early 1970's. In fact, the first official mention of such relief came with the publication of proposed guidelines in 1975.[81/] However, it was not until 1977 (more than a decade after the Order's issuance), that any form of individual relief authority was officially claimed by the OFCCP.[82/] Strangely, the OFCCP in issuing those regulations, stated not that back pay was authorized by the Order, but that it was "consistent" with its principles.

Of course, the extensive lapse of time between the issuance of the Order and the promulgation of the regulations authorizing back pay recovery raises further doubts about their validity under the "contemporaneous" doctrine discussed above.

Although the OFCCP reports that it has obtained back pay relief in excess of $61 million,[83/] only a single federal

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[80/] 43 Mo. L. Rev. at 489.

[81/] 40 Fed. Reg. 13,311 (1975).

[82/] 42 Fed. Reg. 3454 (1977). See 41 C.F.R. §§ 60-1.1 through 1.32.

[83/] See 44 Fed. Reg. 77,000 (1979).

district court has dealt with the concept of individual monetary relief in the entire history of the Executive Order.[84] However, in that case the court upheld the Department of Justice's authority to institute "appropriate proceedings," *i.e.*, back pay actions, under section 209(a)(2), a right not granted the OFCCP in the Order. No court has ever indicated the OFCCP has the authority to compel contractors to provide individual relief such as back pay.

It is important also to remember that the Order's recognized foundation is in federal procurement law. Its primary purpose is to increase the pool of available workers for federal contracts by eliminating employment discrimination. The provision of specific relief to individual discriminatees does not contribute to the ultimate objective of the statute underlying the Order: to increase economy and efficiency in federal procurement.

(A more comprehensive discussion of the back pay issue is contained in "Contractor Obligations under Executive Order 11246 to Provide Financial Relief," attached hereto as Exhibit D.)

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[84] United States v. Duquesne Light Co., 423 F. Supp. 507 (W.D. Pa. 1976).

9. Presidents Kennedy and Johnson lacked the authority to impose the debarment penalty for violation of the Executive Order.

Debarment is the most potent weapon in the procurement process and has not been routinely authorized by Congress. Indeed, Congress has explicitly rejected its use in affirmative action contexts.

No one can doubt that the "economic coercion" of the debarment process can have a devastating effect on contractors.[85] "Disqualification from bidding or contracting . . . directs the power and prestige of the government at a particular person and . . . may have a serious economic impact on that person . . . ."[86] Over 40 years ago the government conceded that "the penalty of blacklisting is so severe that its imposition may destroy a growing business."[87]

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[85] Steadman, "Banned in Boston -- and Birmingham and Boise and . . . ": Due Process in the Debarment and Suspension of Government Contractors, 27 Hastings L. J. 793, 793-95 (1976).

[86] Gonzalez v. Freeman, 334 F.2d 570, 578 (D.C. Cir. 1964).

[87] Report of the Attorney General's Committee on Administrative Procedure in Government Agencies, S. Doc. No. 10, 77th Cong., 1st Sess., pt. 1, at 2-3 (1941), quoted at 44 N.Y.U. L. Rev. at 592 n.13. See also Morgan, 1974 Wis. L. Rev. at 305 ("[I]t is easy enough to say that a contractor or grantee can refuse the

[Footnote 87 cont'd on p. 42.]

Because of the enormous power inherent in the debarment sanction, Congress has refused to approve its use for violation of most social and economic policy contract clauses, even where those clauses have been expressly imposed by Congress itself. Of the 37 Congressionally mandated clauses, only seven carry the sanction of debarment.[88/]

Furthermore, nothing in the Procurement Act implies that Congress authorized Presidents Kennedy or Johnson to invoke the debarment sanction for violation of the EEO clauses. Given Congress's general reluctance to authorize debarment, this ommission is highly significant. Indeed, the power to debar for such violations was not even asserted until 1961, twelve years after the passage of the Procurement Act. This long gap reflects just the type of non-contemporaneous interpretation which courts routinely reject. Compounding the problem of an untimely interpretation is the untimely

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[Footnote 87 cont'd from p. 41.]

> government's money if he does not like its terms but the reality of today's economy is such that many colleges, firms and governmental units are addicted to federal support. While the withdrawal pains of a funding cut off might not kill them, the agony is terrifying to contemplate. It is simply no longer true, if it ever was, that the terms of government grants and contracts are mere 'housekeeping' details of concern only to the government".)

[88/] *See* Exhibit A.

application of the debarment power even after it was claimed. The Department of Labor failed to invoke the debarment sanction for many years. In short, the 1949 Procurement Act appears to be a dubious source for the debarment power first asserted in 1961 and not used until much later.

Even if, by some leap of implication, the Procurement Act may be interpreted as authorizing the specialized sanction of debarment, in 1964 Congress expressly rejected its use in affirmative action contexts and specifically prohibited the cut-off of federal funds under Title VI of the Civil Rights Act of 1964 to federal contractors accused of violating the equal employment rights of women or minorities.[89/] Although Title VI prohibits several types of discrimination in federally assisted programs, Congress pointedly exempted employment discrimination as a basis for contract cancellation, preferring instead to rely on the enforcement mechanisms of Title VII as the sole remedy. This Congressional action clearly supports the exclusivity, or at least the supremacy, of Title VII's application in employment situations.

> Since the Executive Order Program has in effect extended the [debarment] provisions of Title VI to employment, the Program is in conflict with Title VI. The Civil Rights Act of 1964

[89/] 42 U.S.C. § 2000d-3.

> confined employment discrimination claims largely to the realm of private enforcement and explicitly withdrew from the federal arsenal the use of the funds cutoff technique in employment discrimination cases. Focusing on the structure of the Civil Rights Act -- distinguishing the scope of coverage and the method of enforcement of Titles VI and VII -- clearly demonstrates the basic incompatibility of the Executive Order Program with the Civil Rights Act. Consequently, the Executive Order conflicts with existing legislation and is therefore an improper exercise of executive power.[90]

Serious questions, therefore, cloud the use of debarment as a santion for violating Executive Order No. 11,246, and Presidents Kennedy and Johnson may well have exceeded their authority by asserting the power to debar for such violations.

10. At best, the permissible scope of Executive Order No. 11,246 does not exceed that of Title VII of the Civil Rights Act of 1964, and the order is, therefore, redundant and unnecessary.

The discussion above suggests that to the extent the Executive Order program conflicts with or goes beyond the coverage of Title VII, it is legally invalid and unenforceable. The logical corollary to that conclusion is that if the contract compliance program cannot exceed the limits of Title VII, it must coincide with the statute's scope and is, therefore, duplicative and unnecessary. Several observers, having reached the same conclusion, have recommended the consolidation of the program with the Equal Employment Opportunity Commission. As the 1977 OFCCP Task Force summarized:

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[90] 33 Vand. L. Rev. at 948.

> Most of the major studies prepared for or by the U.S. Commission on Civil Rights have recommended the merger of OFCCP and EEOC . . . . The recommendations of the GAO survey initiated in 1976 and expanded in 1977 have preliminarily concluded that a merger is necessary to eliminate duplication and inefficiency.[91]

Moreover, the most recent GAO study recommends the merger of EEOC's systemic program with the OFCCP's contract compliance efforts.[92]

The Department of Labor has claimed that the Executive Order program should not be consolidated into the EEOC for three reasons:[93] (1) the Executive Order Program has the authority to initiate compliance investigations independently of discrimination charges; (2) the Executive Order imposes on federal contractors obligations which are substantially greater than those imposed by Title VII of the Civil Rights Act; and (3) the Executive Order is promptly enforced through administrative hearings rather than delayed through lengthy judicial proceedings.

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[91] Preliminary Report at 18.

[92] "Report to the Congress: Further Improvements Needed in EEOC Enforcement Activities," Comp. Gen. Rept., pp. iii, 32, 35, 38 (April 9, 1981). See also Blumrosen, The Bottom Line Concept in Equal Employment Opportunity Law, 12 N.C. Cent. Law. J. 1, 19-20 (1980), in which the author concludes that "it makes more sense for the Department of Labor to focus its enforcement efforts in situations where it can establish a violation of *both* Title VII and the Order . . . ." (emphasis in original.)

[93] Preliminary Report, at 13-17.

Obviously the second reason begs the question. To the extent that the Executive Order cannot properly impose burdens beyond the limits of Title VII, support for the program must be found in the other two arguments. Neither will withstand scrutiny.

The ability of the Department of Labor to audit contractors without a charge having been filed is purely ephemeral. Title VII authorizes EEOC Commissioners to issue charges and to the extent that the OFCCP identifies employers who should be audited, the EEOC could simply issue a Commissioner's charge on the same basis. In fact, the EEOC's entire "systemic discrimination" program has always been based on Commission-initiated charges. The OFCCP holds no monopoly on self-starting.

Nor does the OFCCP's administrative process provide significantly more speedy resolution of disputes than Title VII.

The current Harris Trust[94] case illustrates the situation well. The Harris Trust audit began in 1974, an administrative complaint was filed in 1978, and the trial has just been completed, seven years after the audit began. Still remaining are appeals to the Secretary of Labor and the federal courts. No one familiar with the Department of Labor's administrative process could realistically claim that it can resolve disputes significantly faster than the EEOC. Indeed, the opposite may well be true.

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[94] United States Department of the Treasury v. Harris Trust and Savings Bank, Case No. 78-OFCCP-2 (Jan. 30, 1981).

EXHIBIT A

CONTRACT CLAUSES IMPOSING SOCIO-ECONOMIC OR POLITICAL REQUIREMENTS ON GOVERNMENT CONTRACTORS BY STATUTE

CLAUSE	AUTHORITY	APPLICATION	DEBARMENT SANCTION
1. Affirmative Action for Disabled Veterans and Veterans of the Vietnam Era	Vietnam Era Veteran's Readjustment Assistance Act of 1972, as amended, 38 U.S.C. § 2012 (Executive Order 11701 (January 24, 1973))	Applies to employment "under such contracts."	None.
2. Affirmative Action for Handicapped Workers	Rehabilitation Act of 1973, as amended, 29 U.S.C. § 793 (Executive Order 11758 (January 15, 1974))	Applies "in employing persons to carry out such contract."	None.
3. Buy America	Buy America Act, 41 U.S.C. § 10a-d	Applies to the government contract only.	Violation may result in contractor debarment for three years.
4. Preference for Domestic Specialty Metals	Defense Appropriations Act of 1973	Applies to the government contract only.	None.

	CLAUSE	AUTHORITY	APPLICATION	DEBARMENT SANCTION
5.	Preference for Certain Domestic Commodities	Defense Appropriations Act of 1973	Applies to the government contract only.	None.
6.	Preference for United States Flag Vessels	46 U.S.C. § 1241(b)	Applies to the materials, equipment and commodities of the government contract only.	None.
7.	Required Source for Jewel Bearings and Related Items	Defense Production Act of 1950, 50 U.S.C. App. § 2061 et seq.	Applies to the government contract only.	None.
8.	Required Source for Miniature and Instrument Ball Bearings	Defense Production Act of 1950, 50 U.S.C. App. § 2061 et seq.	Applies to the government contract only.	None.
9.	Required Sources for Precision Components for Mechanical Time Devices	Defense Production Act of 1950, 50 U.S.C. App. § 2061 et seq.	Applies to the government contract only.	None.

	CLAUSE	AUTHORITY	APPLICATION	DEBARMENT SANCTION
10.	Preference for United States Flag Air Carrier	49 U.S.C. § 1517	Applies to the government contract only.	None.
11.	U.S. End Product Certification for Purchases in Implementation of a Military Assistance Program	Foreign Assistance Act of 1968, 22 U.S.C. § 2354(a) (Executive Order 10973 (November 3, 1961))	Applies to the government contract only.	None.
12.	United States Products and Services Requirement for Balance of Payments Program	Foreign Assistance Act of 1968, 22 U.S.C. § 2354(a)	Applies to the government contract only.	None.
13.	Domestic Wool Preference	Defense Appropriations Act of 1968 (P.L 90-500) and of 1972 (P.L. 92-570).	Applies to the government contract only.	None.
14.	Acquisition of Foreign Buses	Defense Appropriations Act of 1968 (P.L 90-500) and of 1972 (P.L. 92-570).	Applies to the government contract only.	None.
15.	Restriction on Research and Development Contracting with Foreign Sources	Defense Appropriations Act of 1968 (P.L 90-500) and of 1972 (P.L. 92-570).	Applies to the government contract only.	None.

	CLAUSE	AUTHORITY	APPLICATION	DEBARMENT SANCTION
16.	Service Contract Act	Service Contract Act of 1965, 41 U.S.C. § 351	Applies to the employees performing the government contract only.	Violation may result in a three-year debarment for the contractor and for the entities in which the contractor has a substantial interest.
17.	Davis Bacon Act	Davis Bacon Act, 40 U.S.C. §§ 276a-277a	Applies to the employees performing the government contract only.	Violation may result in a three-year debarment for the contractor and for the entities in which the contractor has an interest.
18.	Walsh-Healey Public Contracts Act	Walsh-Healey Act, 41 U.S.C. §§ 35-45	Applies to the employees performing the government contract only.	Violation may result in a three-year debarment for the contractor and for the entities in which the contractor has a controlling interest.
19.	Contract Work Hours and Safety Standards Act - Overtime Compensation, Safety and Health	Contract Work Hours and Safety Standards Act 40 U.S.C. §§ 327-333	Applies to the employees performing the government contract only.	Violation may result in a three-year debarment for the contractor and for the entities in which contractor has a substantial interest.
20.	Compliance with Copeland Regulations	Anti-Kickback Act, 18 U.S.C. § 874;	Applies to the government contract only.	None.

	CLAUSE	AUTHORITY	APPLICATION	DEPARTMENT SANCTION
21.	Workmen's Compensation and War Risk Hazards Insurance Overseas	Defense Base Act, as amended, 42 U.S.C. § 1651; War Hazards Compensation Act, as amended, 42 U.S.C. § 1701	Applies to employees working for contractors at U.S. military facilities abroad.	None.
22.	Clean Air and Water	Clean Air Act, 42 U.S.C. § 7606; Federal Water Pollution Control Act, 33 U.S. § 1368 (Executive Order 11738)	Applies to facilities in which contract is performed or which are involved in the program.	Violation may render facility ineligible for further government contracts.
23.	Notice of Radioactive Material	Atomic Energy Act of 1954, 42 U.S.C. § 2051	Applies to the government contract only.	None.
24.	Hazardous Material Identification and Material Safety Data	Occupational Safety and Health Act of 1970 29 U.S.C. § 654	Applies to hazardous material delivered pursuant to the government contract.	None.
25.	Recovered Material	Solid Waste Disposal Act, 42 U.S.C. § 3251 as amended, Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6962	Applies to the government contract only.	None.

	CLAUSE	AUTHORITY	APPLICATION	DEBARMENT SANCTION
26.	Care of Laboratory Animals	Animal Welfare Act of 1979	Applies to the government contract only.	None.
27.	Utilization of Small Business and Small Disadvantaged Business Concerns	Small Business Act, 15 U.S.C. § 637(d)	Applies to the government contract only	None, but failure to formulate subcontracting plan makes contractor ineligible for award; prior compliance on other contracts is one factor determining responsibility for contract award.
28.	Utilization of Labor Surplus Area Concerns	Small Business Act, 15 U.S.C. § 631	Applies to the government contract only.	None.
29.	Convict Labor	18 U.S.C. § 436, 4082(c)(2) (Executive Order 11755 (December 29, 1973))	Applies to the government contract only.	None.
30.	Use of Excess and Near-Excess Currency	31 U.S.C. § 938	Applies to the government contract only.	None.
31.	U.S. Owned Foreign Currency For Payment	Foreign Assistance Act of 1968, 22 U.S.C. § 2354	Applies to the government contract only.	None.

	CLAUSE	AUTHORITY	APPLICATION	DEBARMENT SANCTION
32.	Limitation on Sales Commissions and Fees for Foreign Governments	Arms Export Control Act, 22 U.S.C. §§ 2751, et seq.	Applies to the government contract only.	None.
33.	Exclusionary Policies and Practices of Foreign Governments	Arms Export Control Act, 22 U.S.C. § 2755 (b)	Applies to the government contract only.	None.
34.	Certain Communist Areas	Foreign Assistance Act of 1973, 22 U.S.C. §§ 2151, et seq.	Applies to the government contract only.	None.
35.	Privacy Act	Privacy Act of 1974, 5 U.S.C. § 552a	Applies to the government contract only.	None.
36.	Geographic Distribution of Defense Subcontract Dollars	10 U.S.C. § 2304 (1977)	Applies to the government contract only.	None.
37.	Officials Not to Benefit	41 U.S.C. § 22	Applies to the government contract only.	None.

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The Legality of Preferential Treatment after *Weber*

By C. Daniel Karnes[*]

Preferential treatment, a term of art in the equal employment context, usually translates in actual practice to some form of goals, timetables, or quotas.[1]

Preferential Treatment

The use of preferential treatment in the employment setting may generate claims of reverse discrimination. Allegations of reverse discrimination and illegality usually surface when: (1) preferential treatment is intentionally given to members of a particular group (in most cases minorities or women); and (2) such preferential treatment negatively affects the employment opportunities or conditions of persons who are not members of the preferred group.

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[1] As the Fifth Circuit commented recently: "We refuse to engage in any semantic dispute over the difference in meaning between 'goals' and 'targets' on the one hand and 'quotas' on the other." United States v. City of Miami, 614 F.2d 1322 n.26 (5th Cir. 1980).

Preferential treatment may occur in one of five situations:

1. When preferential treatment is ordered by a court as a specific remedial measure after a finding of current or prior actionable discrimination.[2] Cases of this type usually involve the imposition of a hiring, promotion, or other form of quota to remedy prior exclusionary employment practices. The remedy is generally tailored to a specific factual situation and is almost always temporary in nature.
2. When preferential treatment, usually in the form of goals and timetables, is required by a governmental unit as a condition of participating in government contracts or receiving government assistance.[3] The goals and timetables imposed upon federal service and supply contractors by the Office of Federal Contract Compliance Programs ("OFCCP") are an example of this form of preferential treatment.
3. When preferential treatment is a part of a governmental equal employment policy implemented by an executive or legislative body.[4]
4. When an employment decision has been influenced by a race/sex/ethnic factor in the absence of any formal policy or plan, either private, governmental, or court-induced.[5]
5. When a voluntary affirmative action program is implemented by a private party or parties to achieve equal employment opportunity. This type of preferential treat-

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[2] *See, e.g.*, United States v. Elevator Constructors, Local 5, 538 F.2d 1012 (3d Cir. 1976); EEOC v. Sheet Metal Workers, 532 F.2d 821 (2d Cir. 1977).

[3] Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

[4] Price v. Civil Serv. Comm'n of Sacramento County, 26 C.3d 257, 21 Fair Empl. Prac. Cas. 1512 (Cal. S. Ct. 1980); Detroit Police Officers Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979).

[5] *Cf.* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

ment was addressed by the Supreme Court in *United Steelworkers v. Weber.*[6]

THE OFCCP AND PREFERENTIAL TREATMENT

Each federal service and supply contractor[7] is required by the Office of Federal Contract Compliance Programs to perform a "utilization analysis" for each of its major job groups to determine whether minorities or women are "under-utilized."[8] If such underutilization exists, then the contractor is required to set goals and timetables to correct the imbalance. These goals and timetables, of course, are a form of preferential treatment, the implementation of which may lead to claims of reverse discrimination from nonpreferred individuals.

For some time it has been clear that *courts* could impose goals and timetables, pursuant to section 706(g) of Title VII, to remedy prior employment discrimination. In addition, the Supreme Court has extended the legitimacy of race-conscious goals to the private sector, *if* they are part of a voluntary affirmative

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6. 443 U.S. 193, 99 S. Ct. 2721 (1979).
7. The limitations on the applicability of affirmative action obligations to contractors are set forth at 41 C.F.R. § 60-1.5. That section, for example, exempts contractors and subcontractors from compliance with the equal opportunity clause of the executive order if their annual aggregate of government contracts is less than $10,000.
8. The OFCCP regulations define underutilization as "having fewer minorities or women in a particular job group than would reasonably be expected by their availability." 41 C.F.R. § 60-2.11(b). The OFCCP's current interpretation of this provision, however, requires a contractor to declare underutilization whenever there is *any* difference, even fractional, between the availability rate for minorities or women and their respective representation percentage in a job group. Whether the agency's rigid position on this issue will ultimately be upheld by the courts is questionable. *See, e.g.*, the Administrative Law Judge's Recommended Decision in Department of Labor v. The Firestone Tire & Rubber Co., No. 80-OFCCP-15 (May 29, 1980), [1980] Daily Lab. Rep. (BNA) D-1 (June 4, 1980), in which the OFCCP's interpretation was held not to be the exclusive view under 41 C.F.R. § 60-2.11(b), and not to be mandatory since the agency had not complied with the requisite rulemaking procedures of the Administrative Procedure Act.

action plan and within certain limitations discussed below.[9]

The question left still unanswered after *Weber* is whether the race- and sex-conscious preferential treatment required of contractors by the OFCCP passes muster under either Title VII or the Constitution.[10]

Preliminarily it may be argued that *Weber* has no application to the federal contract compliance program at all, since the Supreme Court specifically limited its scope to private, voluntary affirmative action programs.

The OFCCP's argument, of course, is that participation in the federal procurement program is voluntary and that contractors are free to decline to bid on federal projects if they find the conditions unpalatable.

If, for the purposes of discussion, it is assumed that the OFCCP-imposed affirmative action requirements are voluntary, a determination must still be made as to whether the other *Weber* limitations are met.

Requirements of the OFCCP

It is important at this point to understand the OFCCP's position on goals-related issues. First, the agency considers the existence of past or present discrimination to be irrelevant to the requirement of goals and timetables. (Of course, if any such discrimination is suspected or uncovered during a compliance review or complaint investigation, the agency may likely initiate "enforcement" proceedings.) But the OFCCP's requirement of preferential treatment for underutilized groups is essentially an *in vacuo* rule, which is not influenced by any consideration of discrimination, compliance status, or overall EEO progress by the contractor.

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[9] United Steelworkers v. Weber, *supra* note 6.

[10] There may also be some question as to the propriety of preferential treatment under the executive order itself; that is, whether the order forbids such race- and sex-conscious preferences in the absence of prior discrimination. *See, e.g.*, § 202(1) of the order, incorporated into 41 C.F.R. § 60-1.4(a), which prohibits discrimination because of race, sex, etc., and which requires the contractor to "take affirmative action to ensure that applicants . . . and employees are treated . . . without regard to their race, color, religion, sex or national origin." This theory has been rejected by at least one court. Uniroyal v. Secretary of Labor, 20 Empl. Prac. Dec. ¶ 30107 (D.C. Cir. 1979).

Second, the OFCCP requires the setting of ultimate goals when there is *any* difference, however minute or fractional, between availability and utilization in a job group. In addition, if the difference translates to at least one person, annual percentage and numerical goals must be set. No import is attached to the degree of disparity, the size of the job group, the built-in imprecision of availability rates, or the history of equal employment progress at the facility. The existence of *any* numerical or percentage disparity is the sole, inflexible standard.

Third, a contractor is required to maintain full utilization of minorities and women in each job group indefinitely. If the percentage of minorities or women falls at all below parity (*i.e.*, availability) in any job group, the contractor's next affirmative action plan must redeclare underutilization and reestablish goals. In other words, the OFCCP demands the continued maintenance of at least a specific minimum percentage of minorities and women in each job group.

How do these OFCCP requirements measure up under *Weber?* In order to answer that question, a brief analysis of the Supreme Court's decision is necessary.

Analysis of *Weber*

The preferential treatment involved in *Weber* took the form of a 50-percent quota for the admission of blacks into a craft training program. This one-black-for-one-white selection mechanism, which was negotiated between the employer (Kaiser) and the union (Steelworkers), replaced the traditional standard of selection—seniority. Plaintiff Weber, a white male employee, unsuccessfully argued that this portion of the company's affirmative action program was "reverse discrimination" prohibited by Title VII of the Civil Rights Act of 1964.[11]

The Supreme Court had previously indicated in *Regents of*

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[11] 42 U.S.C. § 2000e *et seq.*

the University of California v. Bakke that preferential treatment was permissible only as a remedy, after a finding of discrimination: "[W]e have never approved preferential classifications in the absence of proved constitutional or statutory violations."[12] Similarly:

> We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals *in the absence of judicial, legislative or administrative findings of constitutional or statutory violations.*[13]

Although not an employment discrimination case, *Bakke* was seen by some as an indication that in *Weber* the Court would echo the Fifth Circuit's disapproval of the Kaiser-Steelworkers quota. Instead, the Court chose to break new ground in the field of employment discrimination law.

Critics have complained that the five-to-two *Weber* decision, with four separate opinions, with two justices not participating, and with a scholarly and scathing dissent from Mr. Justice Rehnquist, offers little guidance as to what is permissible in the way of voluntary affirmative action. Although such criticism may be just, lessons may still be gleaned from a careful reading of the decision.

LIMITED SCOPE OF HOLDING

Any analysis of the *Weber* opinion must note the limited scope of the holding. Mr. Justice Brennan's majority opinion makes it quite clear that the Court intends the decision to have narrow application. The decision emphasizes, for example, that the potential constitutional issue is not appropriate for discussion, since no state action was involved in the affirmative action plan implemented by Kaiser and the Steelworkers. Furthermore, the

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[12] 438 U.S. 265, 302 (1978).

[13] *Id.* at 307 (emphasis added).

Court specifically refrains from addressing what preferential treatment might be judicially ordered for remedial purposes under Title VII.

> The only question before us is the narrow statutory issue of whether Title VII *forbids* private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences in the manner and for the purpose provided in the Kaiser-USWA Plan.[14] (emphasis in original)

The majority opinion emphasizes repeatedly the narrowness of its ruling. It specifically discusses the *voluntariness* of the affirmative action plan in question, the *temporary* nature of the plan, the *private* (nongovernmental) nature of the plan, and the obvious historical pattern of *racial segregation* which the plan is designed to remedy.

The Court goes to some length to explain its conclusion that the operation of the Kaiser affirmative action plan does not constitute actionable reverse discrimination:

> [T]he plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hires. . . . Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance. Preferential selection of craft trainees at the Gramercy plant will end as soon as the percentage of black skilled craft workers in the Gramercy plant approximates the percentage of blacks in the local labor force.[14a]

In light of the Court's repeated emphasis upon the narrowness of its decision and its insistence upon limiting the application of preferential treatment to remedial situations (albeit voluntarily imposed and absent a formal finding of discrimination), it seems entirely possible that the OFCCP's scheme of race- and sex-conscious goals and timetables (at least as currently espoused by the agency) would not be acceptable under *Weber.*

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[14] United Steelworkers v. Weber, *supra* note 6, 99 S. Ct. at 2726.
[14a] 99 S. Ct. at 2730.

CONFLICT WITH THE OFCCP

Perhaps most significantly, the OFCCP's insistence upon the imposition of preferential treatment for *any* deviation from parity clearly contradicts the Supreme Court's warning that such plans must not be "intended to maintain racial balance," but instead should be used "to eliminate a *manifest* racial imbalance."[15] The Court, for example, specifically noted that the 50 percent black selection ratio at Kaiser would be abandoned whenever the percentage of black participants "*approximate[d]*" the availability rate.[16] By refusing to relax its interpretation of underutilization, which triggers goal-setting, the OFCCP appears to be ignoring the guidance of *Weber* on this point.

In addition, the agency's requirement of continuing calibration of a contractor's work force with the relevant availability rate fails to meet the condition of temporary operation of the plan as set forth in *Weber.* While the Court seems willing to approve goals enacted for a term certain, this open-ended requirement of the OFCCP is not in conformance to the condition.

Finally, it is doubtful that the refusal of the OFCCP to take into consideration past discrimination or a lack thereof complies with *Weber.* Although there were no findings of discrimination in the case, the Court took judicial notice of the fact that blacks have traditionally been excluded from the ranks of craft workers and pointed out the absence of black craftsmen at the Kaiser facility at the time the preferential selection program was inaugurated. The OFCCP, on the other hand, apparently deems irrelevant (at least in the utilization analysis process) the degree of prior exclusion or discrimination and insists that contractors use only "numerical disparity" as a trigger for the imposition of goals.

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[15] *Id.* (emphasis added).

[16] *Id.*

Perhaps the only *Weber* criterion that the OFCCP's position may meet (and even this is questionable) is the Court's concern that preferential treatment programs not "unnecessarily trammel the interests" of nonminority employees. Courts have consistently recognized that some negative effect upon the employment expectations of "majority" workers may be necessary to eliminate the effects of discrimination suffered by minorities or women. However, such decisions have been preceded by a finding of discrimination and have required that the relief be carefully tailored to the circumstances of the case. Although *Weber* departs slightly from these cases in that it involves the voluntary adoption of goals, the Court still requires as a condition to the imposition of such preferential treatment the existence of at least a "conspicuous racial imbalance."[17]

The goals and timetables required by the OFCCP are not premised upon a "conspicuous" disparity. However, it is reasonable to assume that at least some situations in which the OFCCP demands goals would meet the criteria for the use of race or sex preferences under *Weber*; in such cases the goals may be reasonable and may not "unnecessarily trammel" the rights or expectations of nonpreferred persons.

In summary, the *Weber* decision offers little support for the imposition of goals and timetables in the manner that the OFCCP currently requires.

The agency could perhaps overcome the *Weber*-related problems associated with its mandatory preferences by changes in its regulations and Compliance Manual—for instance, if it abandoned the numerical disparity test of underutilization in favor of a more flexible method (especially in light of the imprecision of availability estimates) and if it demanded goals and timetables only in situations of "conspicuous" or "manifest" imbalances.

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[17] 99 S. Ct. at 2725.

THE CONSTITUTIONAL ISSUE

But what about the constitutional issue? Does the OFCCP's requirement of preferential treatment violate the due process and equal protection guarantees of the fifth and fourteenth amendments?

This discussion of the constitutional issue presupposes that the OFCCP's insistence upon race- and sex-conscious preference is state action requiring the classification of persons on the basis of race, sex, and/or ethnicity. This is really the obverse of the *Weber* coin. If the agency-mandated goals are "voluntarily" accepted by the contractor, then the strictures of *Weber* should apply; if they are involuntary, government-imposed classifications, then the constitutional issue must be faced.

The Bakke *Case*

Guidance was offered by the Supreme Court on the constitutionality of racial preferences in its decision in *Regents of the University of California v. Bakke.*[18] In *Bakke*, a white male medical school applicant challenged the admissions program of the U.C.-Davis Medical School that reserved a specific percentage of its first-year class openings for "disadvantaged" minorities. The Supreme Court held that the university's particular preferential admissions program was unlawful, but that it was *not* necessarily unlawful for a university to consider race as one of several factors in making admissions decisions. Mr. Justice Powell's opinion confirmed that, at least in the higher education area, a governmental body could take race into account in order to correct past discrimination *or* to provide an atmosphere of racial diversity in the learning environment.[19]

Even though *Bakke* involved the admissions practices of a public university, Mr. Justice Powell's opinion addresses at some length the issue of preferential treatment in the employment context:

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[18] 438 U.S. 265 (1978).

[19] *Id.* at 307, 311-12.

Book Reviews

What Is "Affirmative Action"?

FAIR GAME? INEQUALITY AND AFFIRMATIVE ACTION. By John C. Livingston.† San Francisco: W.H. Freeman and Company, 1979. Pp. xvi, 281. $12.95.

Reviewed by Carl Cohen*

Moral and legal disputes in the sphere of affirmative action, often between parties equally honorable and equally passionate, are intensified by mutual misunderstanding. The ambiguities of that pervasive phrase, "affirmative action," contribute to these misunderstandings. My object in this essay is three-fold: I aim first to explicate the concept of affirmative action, sorting out notions that have been unhappily conflated. I will then illustrate the intellectual confusion resulting from this conflation by examining the account of affirmative action given by John C. Livingston in a new book, *Fair Game? Inequality and Affirmative Action*.[1] Finally, I will explore the underlying errors, sociological and moral, that promote widespread theoretical jumble in this arena.

The quest for justice is advanced by greater precision in the use of categories, and by greater refinement in the formulation of principles. Difficult issues may thus become somewhat more tractable; unresolved conflicts may at least then be better understood.

I.

A concept of "race consciousness" that is acceptable to the moral sensibilities of all parties is a good place to begin. If American society were to become color-blind, permanently and resolutely, in matters of public policy, most would think that splendid. But that cannot be, now, because of the historical legacy of racial oppression. Great and prolonged injury has been done on the basis of race. In our own lifetimes, yesterday and even today, Americans have been injured because they are black, or yellow, or brown. When the race of the victim has been the ground of the injury, some consciousness of race seems an inescapable necessity in providing redress to those victims. In this sense race consciousness is essential for justice; without it we are unable to do what is right because we are blinded to what has been done wrong.

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[1] J. LIVINGSTON, FAIR GAME? INEQUALITY AND AFFIRMATIVE ACTION (1979) [hereinafter cited by page number only].

II.

Does race *consciousness*, in this morally unobjectionable spirit, necessarily involve racial *preference*? Here the seeds of ambiguity are sown. "Yes and no," one is tempted to reply. We may be obliged (morally or legally) to give preference to a certain class of persons that must be defined, partly even if not wholly, by race. In that sense our answer will be yes; race consciousness leads to racial preference. On the other hand, every such obligation (moral or legal) stems from some damage done to real persons; the consequent obligatory preference to those damaged is not preference given them *because* of their race. It is an instrument of redress for injury, the proper recipients of that redress being identified partly by race because the injury in question was triggered by race, but identified also and more fundamentally as the persons injured in such-and-such ways. The preference today is a moral consequence of the injury yesterday; there is and should be no preference because of *race*. In this sense our answer must be no; race consciousness is not racial preference, and certainly does not entail preference *on the basis of* race.

This distinction between race consciousness and racial preference, whatever words we choose to express it, is profoundly important. The failure to make it lies at the root of much sore confusion about the nature of affirmative action, and therefore about what is and what is not justly done under that rubric. The distinction has been drawn very carefully by some federal courts. In *Chance v. Board of Examiners*,[2] for example, an affirmative action plan, devised to give remedy to school employees within a school system that had previously discriminated on grounds of race, was thoughtfully upheld. The court held, however, that the justice of that remedy depended critically upon the nature and source of the earlier injury that had required it. A minority worker may be entitled to preferential treatment now in view of the damage his employers have earlier done, *"not because he is Black, but because, and*

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[2] 534 F.2d 993 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977).

only to the extent that, he has been discriminated against."[3]

The same point is made in *Franks v. Bowman Transportation Co.*,[4] in which the known victims of racial discrimination by a firm in the private sector were held entitled, as a remedy, to the places in the seniority lists of that company that would have been theirs if they had not been so victimized. Only in that way could they be made whole, and the group that bears the burden of the race conscious remedy loses no more than advantages they were not entitled to in the first place. The distinction is put eloquently in a decision of the United States Court of Appeals for the Fifth Circuit:

> If employees who have been arbitrarily favored are deprived of benefits capriciously conferred on them in order that those who were arbitrarily deprived may receive what they should, in fairness, have had to begin with, no law is violated. This is so even if both the class whose rights are restored and the class required to "move over" are defined by race—if the original arbitrariness was defined in that manner. And the reason is that no one is being favored or disfavored, advantaged or injured, under these circumstances *because* of race; rather, those who have been unjustly deprived receive their due and those who have been arbitrarily favored surrender some of the largesse capriciously conferred on them. That these consequences end by race is a mere incident of the fact that they began that way.[5]

The law to which the appellate court here refers is Title VII of the Civil Rights Act, which declares it unlawful for any employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's race, color, religion, sex, or national origin*."[6] Much more than technical legal judgments are involved here. The Civil Rights Act sought to make precise and explicit the universal demand for equal treatment under law. When the appellate court goes on to distinguish between race conscious *remedy* (as described above) which is consistent with this demand, and bald racial *preference* which is not, it explicates not merely the sense of the law, but a very widely shared sense of justice.

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[3] *Id.* at 999 (emphasis added).

[4] 424 U.S. 747 (1976).

[5] Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 225 (5th Cir. 1977) (Gee, J.) (emphasis in original), *rev'd sub nom.* United Steelworkers v. Weber, 443 U.S. 193 (1979). The rationale of Justice Brennan's opinion reversing the circuit and district courts was explicitly narrow: "We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans. It suffices to hold that the challenged Kaiser-USWA affirmative action plan falls on the permissible side of the line." 443 U.S. at 208. The majority opinion makes no reference to Judge Gee's language as quoted above in the text; its only square holding was that "Title VII's prohibition . . . against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans." *Id.* Arguably, then, the opinion does not undercut this key distinction.

[6] 42 U.S.C. § 2000e-2(a)(1) (1976) (emphasis added).

When does a race conscious practice go beyond permissible remedy to impermissible favoritism? When it gives some deliberate advantage to a class of persons who had not been injured by the racial discrimination the practice in question was designed to remedy. The remedial device then misfires; it gives advantage to some sheerly "on the basis of race," *because* these persons happen to be of the same racial or ethnic group as were some others who were injured in times past. This, indeed, is "racial preference," and that phrase is wisely reserved for cases of this kind—for if we use that expression loosely, applying it also to clearly justifiable remedies, we sacrifice the verbal tools needed to distinguish the just from the unjust introduction of race consciousness.

To the question asked above (does race consciousness necessarily involve racial preference?) the correct answer is therefore not "yes and no" but simply "no." Morally appropriate race conscious practices do not entail preference by race in the strict sense—and it is precisely this strict sense of racial preference that is our target when we condemn racial "discrimination." We do not use this word meaning that racial differences must never be discriminated; clearly they must be in just those circumstances in which race appropriately figures in the definition of the class of beneficiaries of justified redress. We do mean by this word that no individual should get less (or more) than he would otherwise get, of goods or opportunities, only because of his race.

In forbidding favoritism to members of one sex over the other simply on the basis of sex, the Supreme Court in *City of Los Angeles v. Manhart*[7] emphasized the same point. Any questionable practice may be put to "the simple test of whether the evidence shows 'treatment of a person in a manner which but for the person's sex would be different.' "[8] Any practice that does not pass this test (unless specifically exempted by the Equal Pay Act[9]) "constitutes discrimination and is unlawful."[10] The *Manhart* Court went on to the core of the matter:

> The statute [Title VII of the Civil Rights Act] makes it unlawful "to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national

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[7] 435 U.S. 702 (1978).

[8] *Id.* at 711 (quoting *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1170 (1971)).

[9] 29 U.S.C. § 206(d) (1976).

[10] 435 U.S. at 711.

> origin." The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. . . . Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.[11]

In sum: Any individual who is disadvantaged (or advantaged) simply because of his membership in any such class is the victim (or the beneficiary) of precisely the sort of discrimination we condemn and forbid. Programs that implement racial preference, in the strict sense of that term as described above, have precisely that result.

III.

Now we can return to "affirmative action." Clearly, this phrase can be used to refer to practices that do, and to practices that do not, involve racial preference in the strict sense. This helps to account for the fact that while affirmative action programs had a very honorable genesis, they now have a very bad aroma in some contexts. In government, in private employment, and in higher education, affirmative action programs were initiated by just and sensitive persons who saw that a long history of racially discriminatory conduct must have consequences that will not soon be eliminated if all consciousness of race is suddenly erased. *Equal treatment* is the right principle. But the refined application of that principle requires the equal treatment *of equals*. Those who have suffered the damage of racial discrimination in education or employment are not the equals of those who have not, for the purpose of determining equal treatment in those spheres. We must treat equals equally, to be sure. We must also take deliberate steps, affirmative steps, to ensure that unequals are treated unequally, to adjust our practices so that they are fair in the light of the real circumstances of those upon whom the practices bear. We are rightly called upon, therefore, not simply to give equal opportunities to all, regardless of their race, but to take *affirmative action* to ensure that persons deserving special attention receive that attention. Affirmative action to remedy injury done by racial discrimination is *compensatory* in spirit, and justly so.[12]

Affirmative steps, deliberate attention, may be needed not only to provide deserved remedy, but to ensure that treatment intended to be fully equal is genuinely so. Where institutional practices—in recruitment, promotion, and the like—have long been racially discriminatory, it will not be enough to eliminate the intention to discriminate against minorities or women. Institutional machinery built in that discriminatory spirit must be reexamined, cleansed of elements—procedures, criteria, emphases—that were long ago introduced with discriminatory intent (or with knowledge of discriminatory effects) and whose retention has continuing discriminatory results. This variety of affirmative action is *corrective* in spirit, not compensatory, and is the proper business of affirmative action officers in universities, corporate structures, or any institutions whose long-entrenched ways of doing things may need adjustment to meet the demand of fair treatment for all. This corrective type of affirmative action entails no preference—even in the weaker sense.

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[11] *Id.* at 708 (citation omitted) (emphasis in original).

[12] This is exactly the sense in which the phrase "affirmative action" is used in the Civil Rights Act. The statute carefully provides that a court, after having found some practice to be unlawful discrimination, may enjoin it and also may "order such affirmative action as may be appropriate." 42 U.S.C. § 2000e-5(g) (1976).

Both varieties of affirmative action just described are morally right. Both are aimed, in different ways, at the same target: equal treatment for equals. Neither of these varieties of affirmative action involves any racial preference in the strict sense. Both are sensitive to the historical impact of racial discrimination and are to that extent race conscious. But there is an enormous moral difference between race consciousness introduced to achieve genuinely equal treatment for persons regardless of their race, and racial preference designed to yield certain numerical results, even at the cost of imposing that very discriminatory inequality of treatment we now strive to eliminate.

IV.

The failure to respect this distinction has given affirmative action its questionable reputation. Well-meaning people, anxious to do justice, have sometimes pursued the ideal of racial equality with instruments so blunt, so ill-designed in their distributive impact, that they damage many persons, including some whom they were intended to assist. By awarding to some, on purely racial grounds, what is taken from others on the same grounds, racially preferential programs—under the good name of affirmative action—do exactly what affirmative action was instituted to undo.

Consider, as an example, the following account of affirmative action by one of its advocates, Professor John C. Livingston, who tells us that "[a]ffirmative action [means] preference on the basis of race, or it [means] nothing,"[13] and who holds that any defense of it (like that I have given above) which treats it as an instrument to *end* racial discrimination is evasive and manipulative. Take the bull by the horns! Silence the wishy-washy liberals with the forthright admission—nay, *insistence*—that it has now become essential to use plain racial discrimination for the achievement of desired ends.

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[13] P. 11.

> The manipulative defense of affirmative action had sought to evade both the adverse effect on white interests and the ideological and moral issues involved. Even the label attached to the programs—affirmative action—reflects the approach of the image-makers. A transparent euphemism for preferential treatment, it seeks to conceal the fact of preference, as well as the hard and obvious truth that nonwhites can be treated preferentially only at the expense of whites. And when the opponents of affirmative action invented the phrase "reverse discrimination" to describe that truth, its supporters sought to conjure it away by inventing a distinction between quotas and goals.
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> The ostensible basis of all this phrase making appears to have been the belief that the moral case for racial preference, however sound it might be in principle, would not sell . . . .[14]

Professor Livingston's book is an extreme but instructive illustration of the consequences of failing to make the distinctions drawn above. Livingston has no patience whatsoever with the effort to design redress in light of the damage actually done. Such refinement—in his eyes and in the eyes of many similar enthusiasts—is nothing but gameplaying, "intellectual sleight of hand in the highest judicial places."[15] Justice, he is convinced, "requires ethnic preference." To achieve it, he would cut through all the pseudo-sophisticated analyses of the courts and use simple racial categories to achieve simple racial results.

Livingston is a zealot, and, like zealots in every sphere, he is intolerant of any who will not go with him all the way. For him, as for many of similarly blunt minds, any who object to plain racial preference must be insisting upon total "color-blindness." That one might be sensitively conscious of race, yet carefully refrain from giving flat preference by race, is a possibility he does not even acknowledge. His thinking is illustrative of that dichotomous spirit so injurious to the realization of social justice. All who reject deliberate racial preference are committed (he insists), explicitly or implicitly, to "meritocracy," against which he rages. "American society is meritocratic"[16] through and through, in his view, and "[m]eritocracy is racist."[17] That the distribution of some opportunities or goods might rightly involve demonstrated effort or attainment, while at the same time not be wholly determined by such factors, is not considered. That a just system for distributing scarce goods in society may incorporate factors other than merit—need, character, capacity to contribute, past achievements, skill, energies, earlier deprivation, and so on—and can thus be humane, fair, and still free of irrelevant racial classification, is a view to which his mind is closed.

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[14] P. 12.
[15] P. 15.
[16] P. 153.
[17] *Id.*

Hence for Livingston, as for many zealots who have not his courage to say what they truly believe, the only alternative to crude meritocracy is crude apportionment by ethnic category, and any critic of "true" affirmative action (meaning deliberate preference by race flatly) must be morally degenerate and, to be plain, a racist. When "affirmative action" falls into hands like his it is no wonder that it gets, even comes to deserve, a very bad name.

V.

Identifying the mistakes that lead to such crude views of affirmative action will help us to avoid them. From the recognition of the need for race conscious remedies, some honorably motivated persons leap to a defense of racial preference. Why? They are motivated by a sense of moral urgency. They want justice done, not just talked about. They want results. This far, all may rightly join them. But what *are* results and how are they to be *measured*? Here the going gets sticky.

Preferencialists commonly rely upon a straightforward numerical assessment of results to determine whether justice has been done. To justify that reliance they tacitly invoke an assumption that is false, yet one whose plausibility is protected by its tacit use and its consequent insulation from scrutiny. That implicit assumption, if brought to the surface, might be formulated like this: "If no racial discrimination had infected the distribution of goods in society, we should now find those goods distributed randomly among the ethnic groups of which society is composed; wherever more and less goods appear in ethnic patterns, that is because and only because of ethnic oppression." Assuming this to be true, preferencialists conclude that no set of race conscious remedies, refined as described above, will do the trick. After the repeated application of such remedies, they point out, jobs and housing and educational attainments remain clustered by ethnic category. It therefore must be, they infer, that the discriminatory infection is so deeply set that normal medicine cannot uproot it. What can? Only a frontal attack upon the manifestations of racial discrimination—the ethnic clustering itself. "Never mind [say they in effect] who or what was responsible for present racial imbalances; never mind whether there was injury done for which redress is justified. Racial imbalance is injury in itself, and the only meaningful corrective is one that moves toward, and ultimately requires, the establishment of numerical ratios that would have been achieved if the original distribution of goods had been random."

How much justice has been done, for the preferencialist, thus becomes a matter quantitatively measurable. The question is simply the closeness with which the outcome of any distributive policy approximates ethnic proportionality. Perfect proportionality may never be attainable, but it remains the standard of justice by which public policy is to be judged.

For those guided by this vision of a society ideally homogenized, the task of uprooting institutionalized racial discrimination is transformed, concretely, into the task of achieving certain numerical outcomes—in employment categories, professional schools, juries, everywhere. Some versions of this position explicitly abandon the ideal of equal *treatment*, replacing it by the demand for equal *results*—that is, results equal in their impact on ethnic groups. Livingston takes precisely this stance. For him the "doctrine of equal opportunity" has "crippled the capacity for critical thought";[18] under it "competitive elitism" has become the "definition of democracy" and meritocracy has become "a synonym for equality."[19] In place of all this he puts the new ideal bluntly. Race conscious remedies for those who have been denied individual rights simply do not suffice. "Affirmative action goes further."[20] It insists "on equality of group results."[21]

More subtle versions of this view do not openly confess the abandonment of the ideal of equal opportunity. Equal opportunity (it is argued) remains the underlying principle defended, but wherever numerical racial imbalance appears or reappears we may infer conclusively that equal opportunities have not been given. Equality of group results thus becomes—because it is supposed a necessary concomitant of equal opportunity—the standard by which the approach to the ideal of equal opportunity can best be measured.

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[18] P. 151.
[19] *Id.*
[20] P. 182.
[21] *Id.*

VI.

The sociological supposition upon which this entire approach is grounded—that truly equal opportunities would inevitably yield equality of group results—is naive and seriously mistaken. It is simply not the case that, when racial and other ethnic discrimination is eliminated, employment patterns, educational patterns, and distributive patterns for other important social characteristics will be random across ethnic groups, yielding numerical proportionality in each sphere. Long experience around the globe confirms the falsity of that assumption. Decades of historical and sociological inquiry by leading scholars, recognizing and carefully discounting actual discriminatory practices, leave the matter in very little doubt. The evidence is overwhelming.[22]

[22] Here follow just a few illustrations. The "degree of enclosure" of an ethnic group has been shown sharply distinguishable in many contexts from the "relative social status" of that group. *See* R. Schermerhorn, Comparative Ethnic Relations: A Framework for Theory and Research (1970). In examining ethnic stratification, Marie Haug draws a similar distinction, concluding that ethnic stratification cannot be accounted for by *any* single factor. The real plurality of ethnic groups introduces a "special condition of diversity which varies widely in degrees across societies." Haug, *Social and Cultural Pluralism as a Concept in Social System Analysis*, 73 Am. J. Soc. 294, 303 (1967).

Talcott Parsons reports what he calls the "notable confirmation" of an important general feature of ethnic identification: that it is in large degree "optional and voluntary" and, at least in the United States, will often be maintained by a group even when doing so runs *counter* to the striving for upward mobility. Parsons, *Some Theoretical Considerations on the Nature and Trends of Change of Ethnicity*, in Ethnicity: Theory and Experience at 53, 64 (N. Glazer & D. Moynihan eds. 1975).

Many anthropologists have argued that the causes of ethnic patterns and ethnic differentiation are essentially *economic*. Pursuing this theoretical approach, Gunnar Haaland accounts for the maintenance of sharp ethnic boundaries between major ethnic groups in the Western Sudan, while at the same time explaining some erosion of these boundaries in response to varying geographical and climatic circumstances. The underlying determinants of the actually resulting pattern, he concludes, are a combination of "specific economic structures" and the given "ecological setting." Haaland, *Economic Determinants in Ethnic Processes*, in Ethnic Groups and Boundaries: The Social Organization of Cultural Difference at 58, 71 (F. Barth ed. 1969). Henning Siverts takes a similar approach in explaining the relatively rigid retention of ethnic boundaries and hierarchies in southern Mexico. Individuals in the several ethnic groups repeatedly face, for reasons having nothing to do with racial discrimination, "similar dilemmas of allocation of labour and capital to which the repertoire of responses is limited and stereotyped." Siverts, *Ethnic Stability and Boundary Dynamics in Southern Mexico*, in Ethnic Groups and Boundaries, *supra*, at 101, 102.

The importance of *political* factors in dividing ethnic groups, causing distinct patterns in their activities and reinforcing cohesion within each group, is emphasized by Daniel Bell. He concludes that the "very nature of interest-group rivalry, where the plural groups are evidently distinct, makes it certain that the political arena becomes the most salient in the competition for the chief values of the society." Bell, *Ethnicity and Social Change*, in Ethnicity: Theory and Experience, *supra*, at 141, 161.

One of the most influential of all studies of ethnic groups, published almost two decades ago by Nathan Glazer and Daniel Moynihan, explored the patterns and relations among ethnic groups in New York City. This work, Beyond the Melting Pot: The Negroes, Puerto Ricans, Jews, Italians, and Irish of New York City (N. Glazer & D. Moynihan eds. 1963), demonstrated that elements of society long thought of as marginal and in the process of absorption were solid and central. Ethnicity, in the years since, has come to be recognized as a healthy

Ethnic groups exhibit characteristics and preferences that, in one way or another, result in employment and residential patterns, in clustering of many different sorts. The cultural pluralism to which lip service is so widely given is not purely the outcome of discriminatory manipulation; racial and ethnic "imbalance" is not merely the product of an oppressive majority. Anthropological data astutely refined, confirmed by the evidence of everyday experience, establishes the point: the demand for numerical ethnic "balance" in social distribution is the product of a romantic misconception.

To be sure, some substantial part of the ethnic disproportions in some spheres *are* the result of discrimination, overt and covert. To assert that invidious maltreatment by race had no role in creating present ethnic clusters would be as wrong-headed as to insist that discrimination alone explains observed clustering. In matters of such complexity and delicacy, what could be clumsier, more obtuse, than social programs built on the assumption of a single causal factor? Yet that is what the preferencialists—meaning to do good, of course—generally promote. They may not see that so sweeping a view of social causation has been assumed. But their arguments do rely essentially upon some such assumption. Without that implicit assumption they could never plausibly contend that only with the achievement of "equality of group results" is justice done.

Ironically—this entire sphere of social policy is beset with ironies—the demand for racial and ethnic "balance" has consequences the very reverse of those intended. Seeking justice, its advocates do injustice; seeking to eliminate racial discrimination, they impose it to attain

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feature of American society, though it results in patterns of distribution very far from that random distribution idealized in "the melting pot." With Glazer and Moynihan's massive recent publication, ETHNICITY: THEORY AND EXPERIENCE, *supra*, that understanding has deepened. Elsewhere, Glazer has compiled masses of evidence to establish beyond reasonable doubt that concentrations of blacks and other minorities in America in housing, education, and jobs is simply not to be accounted for by deliberate discriminatory behavior. The use of racial and ethnic categories to force distribution in accord with an idealized pattern inconsistent with reality, he concludes, arises from

> a radical misunderstanding of how we in the United States have attempted to deal with the problems of a multiracial and multiethnic society. The pattern we have developed is not easily summed up in slogans—which is perhaps its defect—for we have decided against both the forcible assimilation of all groups into one mold and the legal recognition of each group for the establishment of a formal parity between them. It is a pattern that has emerged from the complex interplay of constitutional principles, political institutions, [and] American culture . . . .

N. GLAZER, AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY 220 (1975).

One could go on and on. In sum, cultural homogeneity is not now a reality, in America or in any other complex society, and is not likely ever to become a reality. When a distinguished Englishwoman once announced to Thomas Carlyle that she accepted the universe, he replied that she had better.

the numerical ratios they believe ideal; seeking to eliminate racial tension and disharmony, they create and exacerbate it.

VII.

The leap from race consciousness to the demand for racial preference is grounded, I have argued, on false beliefs about the relations and conduct of ethnic groups and on an inappropriate vision of society homogenized. These sociological mistakes are compounded by a moral mistake about the ways in which, when there *has* been racial discrimination, redress is justly given. Put summarily, the moral error is that of treating groups, ethnic and racial groups especially, as the bearers of rights and liabilities and the appropriate recipients of compensatory satisfaction. This common but serious blunder magnifies the damage done by the underlying false vision. That vision distorts the assessment of the nature and extent of injuries actually done; it obscures the real injuries by viewing every ethnic cluster as a sign of evil. Yet there has been much evil in this arena. It is compounded by lumping the innocent with the guilty and exacting redress from members of racial groups to whom no wrong can be sensibly ascribed, then lumping the damaged with the undamaged and distributing largesse to members of racial groups by virtue of their race without regard to genuine entitlements.[23] Moral analysis of this kind exhibits serious deficiencies.

The issue of group responsibility and group entitlement is critically important in drawing the just limits of affirmative action. The distinction drawn earlier between appropriate consciousness of race and inappropriate preference by race must be borne in mind. Groups are commonly involved, clearly. When persons have been injured because they are black, or brown—that is, because they are members of a certain ethnic group—it makes sense to use membership in that group in delineating the class to be compensated. Because this discriminatory injury characteristically has been hidden, or partly hidden, by institutional policies that may not have been explicit (or if explicit may not have been written down and so cannot be documented), it is not reasonable to expect that every member of such a group who has been so injured prove the specific damage that he or she has suffered. If every discriminatory injury could be remedied only by litigation focused exclusively on that case, there will be redress of very few injuries.

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[23] Even morally sensitive legal scholars commit the blunder. Here, for example, is the view of the former Dean of the University of Michigan Law School:

> The essence of affirmative action is an effort to achieve justice among *groups*; in ordinary circumstances the essence of morality and law alike is justice among *individuals*. The Appalachian white or the white ethnic from a ghetto may, personally, be far more disadvantaged by his background than the third-generation offspring of a professional black family, and yet it is the latter who will be favored under the usual affirmative action plan. I justify this, not without misgivings, on the ground we are dealing with no ordinary situation but with a national problem of staggering dimensions. A group wrong has been perpetrated, for generation upon generation, and the wounds are deep, pervasive, and persistent. Heroic measures are called for in the treatment—specifically, a group remedy to cure this group wrong.

T. St. Antoine, National Labor Policy: Reflections and Distortions of Social Justice 21 (Fifteenth Annual Pope John XXIII Lecture at the Catholic University of America School of Law, November 9, 1979) (emphasis in original) (copy on file with this reviewer at the University of Michigan).

But to affirm that racial groupings may be rationally introduced is not to affirm that racial grouping is the factor of sole or even primary significance in giving compensatory redress. Not just blacks (or other identifiable minorities) alone have suffered employment discrimination or educational deprivation (and the like), and not every member of each such minority has thus been damaged. Therefore, it surely does not follow from the fact that a given set of persons were injured because they were blacks, or Jews, or orientals, that blacks generally, or Jews or orientals generally, are entitled to the redress that damage calls for. Just that fallacious step, however, is the implicit linchpin of arguments for racial preference. The injury to be redressed is seen as one attributable to group membership, whereupon the remedy is baldly assigned to the group as a whole. The group, rather than the individuals who compose it, is treated as the moral agent and bearer of rights.

What underlies group-think of this character? Partly it arises from the failure to see that the injured class is defined by more than ethnicity alone, as noted above. But partly, also, it stems from intellectual confusion over the ways in which groups can be injured, and thus may deserve recompense. It is possible, after all, to damage—not merely offend, but damage—a group by injuring one or a few of its members. Group injury of this description, however, can occur only if the group is so organized that it has distinct institutional interests, with each of its members sharing those interests by virtue of his role in the organization of that group. A football team may be injured as a team, and thus be entitled to remedy as a team, when a few of its members have been unfairly kept from playing; a company of actors may, as a company, be entitled to redress for the damage done to it when some of its members have been unfairly injured or detained. To exhibit the legitimacy of such group claims, however, we must show the organic linkage between the group as a whole and those of its members who were injured.[24] Not every collection of persons are so linked; racial and ethnic groups are certainly not so linked. It is a painful blunder to treat a race, or a religion, as though it were a team or other corporate body.

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[24] A very sophisticated treatment of the limitations on group responsibility is to be found in A. GOLDMAN, JUSTICE AND REVERSE DISCRIMINATION 65-140 (1979) (ch. 3, *Compensation and the Past*).

The blunder is partly obscured by the fact that injuries done to some of the members of an ethnic group (because they are members of that group) do give offense to other members of the same group, and do threaten them. Righteous indignation, even furious anger, is not a surprising reaction. But though I may be rightfully indignant, or furious, when as a Jew I learn of blatant antisemitism practiced against other Jews just because they are Jews, I am surely not, by virtue of my being a Jew, entitled to the redress properly due to those who were so injured. It is not foolish to say that all Jews are hurt by such practices, but putting it so is a kind of deliberate hyperbole: One thus alludes to the generally offensive character of antisemitism and to the dangers (to which Jews are understandably very sensitive) that it may spread, as in the past it often has. Yet by such "hurt" all Jews are not therefore entitled to material compensation.

Consider, as another illustration, the injuries done by the unjust confiscation of the property of American citizens, because they are Americans, by the government of some distant country. By hypothesis, the rightful owners of that property have suffered substantial injury. Americans generally, learning of this damaging and unfair expropriation, are angered and offended. As Americans they may be distressed and threatened by the injustice inflicted on their fellow citizens. But though they share precisely that characteristic which led, in the hypothetical case, to the unjust injury abroad, members of the general citizenry of the United States have no claim based on their citizenship to the remedy deserved by those relatively few citizens whose property has been taken.

VIII.

The matter is more complicated by far than advocates of racial preference commonly recognize. Suppose *arguendo* (what is in fact false) that a compensatory debt is owed by our society to all members of certain ethnic groups simply because of their membership in those groups. Surely it would not be the case, even then, that the debt to each group member would be the same. Surely it would be essential, in paying the many debts owed, to make some appraisal of the nature and degree of the injuries suffered and to give redress with instruments that at least *aim* to match the remedy to the wrong. Such proportionality of response must be completely ignored by any policy—in employment, or education, or elsewhere—that gives special but equal favor to all members of a given ethnic group. Worse than that, instruments that confer preferences by race for jobs or schooling opportunities are generally applied in contexts requiring (for the preference to have effect) a fairly high minimum level of attainment or promise. The common result, as wide experience shows, is that the beneficiaries of racial preference are those members of the minority whose injury (assuming some injury at all) has been least damaging, while those whose injury was most damaging, most seriously affecting their present ability to perform on the job or in school, receive no benefit whatever from the purportedly compensatory program. No doubt, it would be impossible to devise instruments that could apportion redress to injury with perfect or near perfect proportionality; expectations must be reasonable, of course. But instruments whose sphere of applicability is one in which proportionality is not only ignored, but in fact *reversed*, are surely the wrong ones with which to approach the task of compensatory remediation.

IX.

This points to a yet deeper problem, inherent in any system of compensatory redress that favors persons simply because of their ethnic membership. The beneficiaries of this favor—putting the problem of proportionality aside—will inevitably be a few fortunate members of the ethnic group in question. But that—as Robert Simon has eloquently pointed out[25]—is very unlikely to be a just compensatory response if the debt is in fact owed to the group as a whole. To justify preference to members of one ethnic group in any competitive context, one needs not only the supposition (previously rejected) that the group deserves collective compensation, but some additional premises that specify "the relation between collective compensation to groups and distribution of that compensation of individual members. For it does not follow from the fact that some group members are compensated that the group is compensated."[26]

The additional premises thus needed to defend a general racial preference are not to be found; if manufactured, they could hardly be defended. Yet the need for them itself is commonly unappreciated. The justice of benefitting a few to pay a debt to many, usually rewarding those few to whom the least is owed, is simply taken for granted by advocates of flat racial preference—and that on top of the supposition that the group as a whole, rather than damaged individuals regardless of their ethnic group, is the appropriate claimant.

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[25] Simon, *Preferential Hiring: A Reply to Judith Jarvis Thomson*, 3 PHIL. & PUB. AFF. 312 (1974).

[26] *Id.* at 314.

X.

Moral obligations are not weakened in any way by a refined analysis of the injuries from which they arise and of the instruments appropriate for the redress of those injuries. The wrongs done to blacks and others have been grievous; they cry for remedy. Affirmative action carefully tailored to give just remedy and to insure that the habits and devices of discrimination are thoroughly eliminated is a moral—and often a legal—duty. The fulfillment of that duty is hindered, even undermined, by those who treat affirmative action loosely, who use its good name to advance ill-designed remedial policies. Excess of zeal will prove not only unjust, but counterproductive; it will confuse and erode the moral convictions upon which healthy affirmative action depends.

Justice to all parties requires that we design, imaginatively and firmly, yet precisely and with restraint, programs of affirmative action in both public and private sectors. Affirmative action entails both compensatory and prophylactic programs, to give redress to those injured and to keep like injuries from being done to others. Affirmative action does not entail, and must be carefully distinguished from, preference simply on the basis of ethnic identification.

EXHIBIT D

4

Contractor Obligations under Executive Order 11246 to Provide Financial Relief

By David A. Copus and Linda E. Rosenzweig[*]

The OFCCP recognizes two major kinds of "affected classes" of women and minorities for whom financial relief may be required: (1) rejected applicants and (2) incumbent employees. Chapter 2 discussed the process for identifying an affected class of rejected applicants. This chapter deals with problems of incumbent employee affected classes and subsequently analyzes the legal authority for OFCCP back pay claims for both types of affected classes.

Affected Class

The OFCCP defines an "affected class" of incumbent employees as a group of workers who continue to suffer the present effects of past discrimination. According to this definition, *no current violation need be shown and no individual victims of specific acts of discrimination need be identified.* The OFCCP claims that any current practice that perpetuates prior discrimination is a violation of Executive Order 11246. Normally, the "original" discrimination being perpetuated involved hiring and assignment policies.

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[*] *See* About the Editors, p. 233.

The "perpetuation-of-past-discrimination" theory was developed years ago under Title VII of the Civil Rights Act of 1964. A vast body of Title VII law exists on that theory and its application to a wide variety of factual situations. Ironically, just after the OFCCP began to apply the theory under Executive Order 11246, the Supreme Court declared that the theory was not a valid interpretation of Title VII.

On May 31, 1977, in *Teamsters v. United States*[1] and *United Air Lines v. Evans*,[2] the Supreme Court categorically struck down the perpetuation-of-past-discrimination theory under Title VII. After *Teamsters* and *United Air Lines*, in order to prevail under Title VII, *a plaintiff must show that he or she has been specifically victimized by a currently active discriminatory policy*. Generally this means that each affected class member must show that he or she applied for a traditionally white or male job and was turned down within the statute of limitations period.

It seems clear that the reasons that led the Supreme Court to reject the perpetuation-of-past-discrimination theory under Title VII would lead to the same result under the executive order. Nevertheless, the OFCCP has interpreted *Teamsters* and *United Air Lines* as restricted to Title VII, and the agency continues to insist on applying the perpetuation-of-past-discrimination theory. Many contractors have chosen to receive show cause notices rather than conform to the OFCCP's demands. In the two court cases decided to date, the contractors have prevailed.[3] Despite these losses, however, the OFCCP persists in its position.

The agency generally finds an affected class of incumbent employees where women or minorities are concentrated in low-paying jobs or in jobs where working conditions are poor or where there is less opportunity for skill development and advancement, so-called "focus job titles" (or "focus job areas").

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[1] 431 U.S. 324 (1977).

[2] 431 U.S. 553 (1977).

[3] United States v. East Tex. Motor Freight Sys. Inc., 564 F.2d 179 (5th Cir. 1977); United States v. Trucking Mgt., Inc., 20 Empl. Prac. Dec. ¶ 30171, 20 Fair Empl. Prac. Cas. 343 (D.D.C. 1979).

The OFCCP does not require affected class members to have applied for any other job. It assumes that all affected class members would have applied for better jobs but would have been turned down.

According to the OFCCP, the identification of an affected class is basically a six-step process[4]:

1. identifying concentrations of minorities and women;
2. determining the present effects of past discrimination;
3. identifying the scope of the affected class;
4. eliminating the lack of seniority and ability as possible reasons for concentrations;
5. identifying policies which perpetuate past discrimination; and
6. determining affected class relief.

STEP 1: IDENTIFYING CONCENTRATIONS

The OFCCP's affected class analysis treats white-collar clerical, white-collar nonclerical, and blue-collar workers separately. Therefore, to identify concentrations of women or minorities according to the OFCCP procedure, the contractor should first determine the following:

1. percentage of women among all its white-collar clerical workers;
2. percentage of minorities among all its white-collar clerical employees;

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[4] The Federal Contract Compliance Manual lists the following *ten* steps for conducting an affected class analysis: (1) determine appropriate units of analysis (*i.e.*, job areas); (2) perform five basic types of analyses: JAAR, IRA, salary distribution, frequency distribution, and preliminary cohort; (3) formulate hypotheses of systemic discrimination and identify needed additional data; (4) test hypotheses; (5) eliminate seniority or job-related qualifications as explanations for concentrations; (6) verify conclusions through records sample; (7) formulate conclusions; (8) identify membership in the affected class; (9) provide anecdotal and documentary evidence supporting affected class determination; and (10) identify adverse impact in rejections for hire and/or in terminations.

3. percentage of women among all its white-collar nonclerical employees;
4. percentage of minorities among all its white-collar nonclerical employees;
5. percentage of women among its blue-collar employees; and
6. percentage of minorities among its blue-collar workers.

Then, using the work force analysis, the contractor should compare the percentage of women and minorities among all of its white-collar clerical employees with the percentage of women or minorities in various large white-collar clerical job titles, lines of progression, and departments. The same process should then be followed using data on the contractor's white-collar nonclerical and blue-collar workers.

The OFCCP assumes that the contractor's female and minority white-collar clerical workers should be more or less randomly distributed among all white-collar clerical jobs, lines of progression, and departments. The agency makes the same random distribution assumption about a contractor's minority and female white-collar nonclerical and blue-collar employees. For example, assume the following figures are a hypothetical employer's work force statistics:

- Percentage of females in white-collar clerical jobs—16 percent.
- Percentage of minorities in white-collar clerical jobs—3 percent.

The next step is to compare the percentage of females and minorities in various white-collar clerical job titles, lines of progression, and departments to the overall white-collar percentages.

For the purpose of illustration, assume that a review of the job titles, lines of progression, and departments in the hypothetical employer's white-collar clerical sector reveals the following statistics:

- In secretarial jobs, virtually all employees are female. Other white-collar clerical job titles are virtually all male.
- In each major white-collar clerical job title, line of progression, and department, the minority employment is close to 3 percent.

The next major step is to separate out "focus job titles," lines of progression or departments where females or minorities are concentrated (possible affected classes): in this example, there is no white-collar clerical concentration of minorities, but there is a distinct concentration of female white-collar clerical workers in secretarial jobs.

Where the OFCCP finds a possible affected class, the agency will also identify possible "target" jobs, *i.e.*, job titles, lines of progression, or departments from which women or minorities have been excluded. In the example above, the "target" jobs from which female white-collar clerical workers have been "excluded" are all white-collar clerical nonsecretarial jobs. There are no "target" jobs for minority white-collar clerical workers since there were no white-collar clerical concentrations of minorities.

To determine whether a given concentration of women or minorities is substantial enough to warrant further analysis, OFCCP will probably apply the Job Area Acceptance Range ("JAAR") formula,[5] which is a rough measure allowing for a twenty percent "reasonable" deviation from the expected distribution of workers.

For example, since 16 percent of the hypothetical employer's white-collar clerical workers are female, the OFCCP would expect, in a "perfect" world, no more than 16 percent of the workers in any major white-collar clerical job title, line of progression, or department to be female. Since even the OFCCP concedes the world is never "perfect," it allows for some deviation from the "expected" percentage and uses the JAAR to determine the acceptable range of deviation.

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[5] A more precise measure, a standard deviation analysis, was suggested in 1977 by the Supreme Court in Hazelwood School District v. United States, 433 U.S. 299. The October 18, 1978, Draft Federal Contract Compliance Manual specifically approved the use of the standard deviation analysis as well as a somewhat less precise set of Standardized Tables for Determination of Focus Job Areas. The final Manual is silent on this issue.

Applying the JAAR formula to the hypothetical employer's white-collar clerical work force (which is 16 percent female)—16 percent times 20 percent equals 3.2 percent—the OFCCP would expect no white-collar clerical job title, line of progression or department to have *more* than 19.2 percent female (16 percent plus 3.2 percent). If 90 percent of the secretaries are female, secretaries are clearly a possible affected class (as would be females in any white collar clerical job title, line of progression, or department employing more than 19.2 percent females).

To identify possible white-collar clerical "target jobs," the same formula should be applied, except in reverse. For example, since 16 percent of the hypothetical employer's white-collar clerical force is female, the OFCCP would expect approximately 16 percent of the stock clerks (or any major white-collar clerical job title) to be female. Assume, however, that 3 percent of the thirty stock clerks are female. The identification of the stock clerk job title as a possible target job depends on whether the difference between 3 percent (actual employment level) and 16 percent (expected employment level) is significant. Applying the JAAR formula—16 percent times 20 percent equals 3.2 percent— the OFCCP would find that a deviation as great as 3.2 percentage points *below* 16 percent is acceptable, *i.e.*, employment of females in a major white-collar clerical job would be acceptable within a range from 12.8 percent to 16 percent. Since the 3 percent employment rate of females in stock clerk positions is far below the 12.8 percent minimum level as determined by the JAAR, the OFCCP would identify the stock clerk position as a "target job."

STEP 2: IDENTIFYING "PRESENT EFFECTS OF PAST DISCRIMINATION"

As stated above, the OFCCP applies the pre-*Teamsters/United Air Lines* Title VII standard to determine perpetuation of past discrimination. Once significant concentrations of women or minorities and the corresponding "target jobs" have been identified, the OFCCP will compare wage rates and job conditions of the jobs in the areas of concentration with those of the "target jobs" to determine if the "target jobs" are more desirable. If the target jobs are more desirable in terms of wages, working conditions, or opportunities for promotion, all females or minorities employed in the areas of concentration are potentially affected class members according to the OFCCP.

STEP 3: IDENTIFYING CLASS MEMBERS

If the OFCCP determines that any female or minority white- or blue-collar workers are unreasonably concentrated in certain jobs, lines of progression, or departments, that statistical imbalance raises as an almost irrefutable inference that the concentrations are the results of past discriminatory hiring or placement practices. Therefore, after determining the existence of unreasonable concentrations, the OFCCP will investigate (usually on-site) the contractor's past hiring and selection practices to confirm the presumption of past discrimination.

This part of the affected class analysis is important since, according to the OFCCP definition of affected class, only those women or minorities hired during the existence of allegedly discriminatory hiring and assignment practices can qualify as affected class members. If the employer at some time in the past revised its employment practices so as to be nondiscriminatory, women or minorities hired after the change in policy should be excluded from any further affected class analysis. The change in policy, however, does not excuse the past discrimination.

All women or minorities hired prior to the cessation of the allegedly unlawful hiring practices and currently employed in an area of "unreasonable" concentration are presumptively the victims of past discrimination and are, by OFCCP's definition, members of an affected class. According to the October 1978 Draft Federal Contract Compliance Manual, "[a]ffected-class members need not have applied for promotions or transfer to be eligible for remedies." Although the final manual does not so specify, the OFCCP has not changed its position. This broad definition of affected class, of course, is at odds with the Supreme Court's decision in *Teamsters*, which limits relief to specifically identifiable victims.

STEP 4: ELIMINATING SENIORITY AND ABILITY AS POSSIBLE REASONS FOR CONCENTRATIONS

If the OFCCP concludes that minorities and females are unreasonably concentrated in less desirable white-collar or blue-collar job areas, the contractor may, of course, come forward with evidence that employment opportunities have been equal for all employees. The OFCCP concedes that there are two, but only two, acceptable explanations for unreasonable concentrations of women or minorities in less desirable positions:

1. lack of seniority;
2. lack of ability on the part of the alleged class members (this involves comparing qualifications of various groups at the time of hire).

If substantial minority/nonminority or female/male differences in seniority or qualifications do not completely explain away the concentrations of women or minorities in the less desirable jobs, the OFCCP will find all such persons hired prior to the cessation of the original discriminatory policy to be affected class members.

STEP 5: IDENTIFYING POLICIES THAT PERPETUATE PAST DISCRIMINATION

"Where possible," the October 1978 Draft Federal Contract Compliance Manual required compliance officers to identify "the factor perpetuating the effects of past discrimination." The new OFCCP manual retains this requirement, which is important to the OFCCP's perpetuation-of-past-discrimination theory because the OFCCP must prove that some *present*[6] policy of the company reinforces past discrimination. Normally, the present policy will be one that the OFCCP believes *inhibits the transfer or promotion* of female or minority affected class members.

In many cases, a departmental seniority system contained in the contractor's collective bargaining agreement will *in fact* tend to perpetuate past discrimination against women or minorities by requiring them to forfeit all seniority upon transfer or promotion into traditionally male/white departments.

Although the *Teamsters* decision specifically exempted bona fide seniority systems from Title VII, and even though two lower courts have exempted bona fide seniority systems under Executive Order 11246 the OFCCP has continued to interpret the executive order as banning seniority plans, whether bona fide or not, if they perpetuate prior discrimination. The October 1978 Draft Federal Contract Compliance Manual states that with rare exceptions, seniority systems that perpetuate past discrimination are not bona fide, even using the *Teamsters* standards. The final Manual does not specifically address this issue.

Moreover, even if a compliance officer cannot identify policies which perpetuate past discrimination, the OFCCP's October 1978 Draft Compliance Manual stated that "the burden is . . . on the contractor to prove that practices such as those listed below are not inhibiting class members from transferring to more desirable job areas." Although this statement has been deleted from the final OFCCP Manual, the agency has not changed its position on this matter. Among the practices which the contractor must disprove are "attitudes" of supervisors, "hostility" of employees, and the actual race/sex/ethnic composition of jobs.

Most contractors in the past have attempted to shoulder this almost impossible burden by surveying employees alleged to be in the affected class to verify their lack of interest in other jobs. The OFCCP will not accept this defense in the future, according to the October 1978 Compliance Manual.

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[6] The October 1978 Draft Federal Contract Compliance Manual indicated that by "present" policy, the OFCCP means any policy which was in existence at any time during the last six years. The 1978 Manual asserted that the OFCCP can reach back six years under the general six-year statute of limitations for breach of federal contracts. 18 U.S.C. § 2415. The new OFCCP Manual is silent on the statute of limitations issue.

> Expression by affected-class members of current lack of interest in or unwillingness to transfer into job areas from which they have been excluded will not be used as a basis for excluding them from class membership, or for determining that no affected class exists.

The final Manual does not contain this policy statement but the OFCCP apparently has not changed its position.

STEP 6: DETERMINING AFFECTED CLASS RELIEF

Once the OFCCP concludes that an affected class exists, it will demand the following standard remedies for the affected class: unrestricted transfer and promotion rights, opportunity to return to original job without penalty, selection based on validated qualifications, retention of wage rate upon transfer, special training, back pay, and front pay.

The process by which the OFCCP calculates the amount of back pay to an affected class of incumbent employees is also based upon pre-*Teamsters*, pre-*United Air Lines* decisions under Title VII. Those pre-1977 decisions did not require affected class members to have applied for a traditionally white or traditionally male job in order to recover. The burden was on the *employer* to prove that a particular affected class member was not *qualified* for, or would not have accepted, a promotion to a better job. This burden, in practice, was virtually impossible to sustain.

The courts, therefore, in the absence of specifically identified openings and rejected applicants, adopted prior to 1977 a variety of general *formulas* to calculate back pay. For example, a classic approach was simply to calculate the average salaries of equally senior blacks and whites and award blacks the difference for the statutory period of limitations.[7]

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[7] *See, e.g.*, Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 259 (5th Cir. 1974).

These formula approaches under Title VII were effectively precluded by the Supreme Court's decisions in *Teamsters* and *United Air Lines*. For example, on the basis of *Teamsters*, the Sixth Circuit reversed a district court formula back pay award.[8]

> On remand, the District Court must determine the application for a job asserted by each individual class member. It will have the guidance of the Supreme Court's extensive discussion [in *Teamsters*] of the manner in which class members' burdens must be carried.

Nevertheless, the OFCCP Compliance Manual, in section 7-130, provides for the use of a formula approach. The practical consequences of the OFCCP approach are staggering. For example, a bank employing 300 women might well be found by the OFCCP to owe women tellers a total of three or four million dollars using the formula approach to compare average teller salaries with those of male bank officers. On the other hand, an approach that limits back pay liability only to those female tellers who have applied for and been denied officer positions during the last three years would produce very little financial liability.

Many compliance officers are demanding back pay according to the pre-*Teamsters* theories and many contractors are negotiating settlements based upon those theories. Many others, however, are denying the OFCCP's authority to use formula back pay theories and have risked receiving show cause notices rather than agree to substantial back pay relief. To date, only three major OFCCP enforcement actions involving back pay issues have been commenced. None have yet reached the courts.

Counsel advising employers undergoing an OFCCP affected class analysis will need to evaluate carefully the legal basis for the OFCCP's imposition of liability. And, equally important, counsel should consider carefully the authority of the OFCCP to demand back pay under any theory. The remainder of this chapter addresses that question.

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[8] Mitchell v. Mid-Continent Spring Co., 583 F.2d 275, 284 (1978).

Legal Authority for Back Pay

Although the executive order does not expressly authorize individual relief such as back pay, the OFCCP's authority to require such relief has not met significant legal challenge. According to the agency, it has entered into "hundreds" of conciliation agreements providing for back pay awards in excess of $61 million.[9] Many federal contractors faced with OFCCP demands for back pay have readily acceded to those demands to avoid jeopardizing their eligibility for future as well as present government contracts.

This section considers the OFCCP's authority to demand back pay and other individual relief as a condition of federal contract compliance.

The Executive Order as a Possible Source

No provision of Executive Order 11246 explicitly authorizes the OFCCP to obtain back pay, or any other type of individual relief. The lack of express authorization for the OFCCP's back pay claims is the most persuasive reason to deny such authority and the Fifth Circuit, in strong dictum, has stated that, in the absence of a provision in the executive order suggesting the availability of individual relief, such relief could not be recovered.[10] Nevertheless, the OFCCP continues to press its back pay claims.

Unfortunately, the OFCCP has not been consistent in its approach to back pay and has, at one time or another, suggested a total of three possible sections of the executive order that might support its back pay authority: sections 209(a), 201, and 202. We first review the contractual basis and underlying rationale of the executive order.

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[9] *See* 44 Fed. Reg. 77,000 (Dec. 28, 1979).

[10] United States v. East Tex. Motor Freight Sys., 564 F.2d 179, 184 (5th Cir. 1977).

CONTRACTUAL BASIS AND RATIONALE

The contractual basis of the executive order, as well as its underlying purpose, militates against the OFCCP's claimed back pay authority. The order is designed to benefit the government, *not* contractors' employees; back pay awards are not essential to achieving the objectives of the order.

The source of the OFCCP's right to require a company's compliance with the executive order is contractual. Unlike Title VII of the Civil Rights Act of 1964, the executive order applies only to employers that have federal contracts of $10,000 or more.[11]

The executive order by its terms[12] directs federal agencies to include in their contracts seven provisions requiring nondiscrimination and imposing an obligation on contractors to take affirmative action to employ and advance minorities and women during the performance of the government contract. The only duty *directly* imposed by the executive order, like that of the Rehabilitation Act of 1973, "is imposed upon federal departments and agencies, *not* upon contractors" (emphasis supplied).[13] Indeed, the duty on federal agencies is so clear that employees may sue the OFCCP to compel the agency's adherence to its duty to enforce the executive order.[14]

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[11] *But see* United States v. New Orleans Public Serv. Inc., 553 F.2d 459 (5th Cir. 1977), *vacated on other grounds*, 436 U.S. 942 (1978); and Liberty Mut. Ins. Co. v. Friedman, 21 Fair Empl. Prac. Cas. 1016 (D. Md. 1979). In *New Orleans Pub. Serv.*, the Fifth Circuit held that a public utility that had no written contractual relationship with the federal government was a government contractor within the meaning of the executive order. In the *Liberty Mutual* case, an insurance company was held subject to the executive order even though it had no direct government contracts and had not entered into any subcontracts that referred to the executive order. Executive order coverage was based on the fact that the company provided workmen's compensation insurance to a government contractor.

Traditional contract law would negate any right to restitution, absent unjust enrichment and the unenforceability of the contract. RESTATEMENT OF CONTRACTS §145 at 173 (1932). *See* United States v. Duquesne Light Co., 423 F. Supp. 507, 510 n.5, (W.D. Pa. 1976) (discussed *infra*), where the court held that the government's action to enforce the company's contractual obligations was not a breach of contract action, but "an attempt to enforce a statutorily authorized administrative program." Therefore, said the court, the available remedies "should not be limited to those discernible by reference to ordinary principles of contract law." Apparently in order to avoid contract law limitations, the OFCCP has never officially invoked the six-year federal statute of limitations governing breach of contract actions. 28 U.S.C. § 2415. The OFCCP has proposed to invoke that statute, but has never officially done so. *Cf.* 40 Fed. Reg. 13,311, 13,313 (March 26, 1975), and the Draft OFCCP Compliance Manual §7-30.6 (Oct. 18, 1978).

[12] Section 202 provides, in part, that "all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions. . . ."

Because the Rehabilitation Act's duty is imposed on *federal agencies*, according to the Fifth Circuit in *Frito-Lay*, the act is *not* primarily intended to benefit the employees of federal contractors and such employees have no right to sue contractors for violations of the act. The rationale of *Frito-Lay* would mandate identical results under the executive order, and, in fact, the courts have uniformly held that the executive order does not give employees the right to sue federal contractors for violations of the order.[15]

In *Farmer v. Philadelphia Electric Co.*[16] the Third Circuit stated:

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[13] Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1079 (5th Cir. 1980). This case involved section 503 of the Rehabilitation Act of 1973, which contains essentially the same language as the executive order.

[14] Legal Aid Soc'y of Alameda County v. Brennan, 608 F.2d 1319 (9th Cir. 1979).

[15] Bradford v. Peoples Natural Gas Co., Inc., 60 F.R.D. 432, (W.D. Pa. 1973); Jackson v. University of Pittsburgh, 11 Fair Empl. Prac. Cas. 1233, 1236 (W.D. Pa. 1975); Racklin v. University of Pa., 386 F. Supp. 992, 1008 (E.D. Pa. 1974); Lewis v. FMC Corp., 11 Fair Empl. Prac. Cas. 31, 34 (N.D. Calif. 1975); Droughn v. FMC Corp., 74 F.R.D. 639 (E.D. Pa. 1977); Traylor v. Safeway Stores, Inc., 402 F. Supp. 871 (N.D. Cal. 1975); Gorman v. University of Miami, 414 F. Supp. 1022 (S.D. Fla. 1976). *Cf.* Farkas v. Texas Instruments, Inc., 375 F.2d 629, 673 (5th Cir. 1967), *cert. denied*, 389 U.S. 977 (1967); Farmer v. Philadelphia Elec. Co., 329 F.2d 3, 8 (3d Cir. 1964). *See also* Taylor v. Brighton Co., 8 O.S.H.R. 1010 (BNA) (6th Cir. 1980) (no private right of action under section 11(c) of OSHA).

[16] 329 F.2d 3,8 (3d Cir. 1964). The court considered whether a private remedy was available under Executive Order 10925, which was issued by President John F. Kennedy in 1961 and was the predecessor of Executive Order 11246.

> No statute in terms confers a private remedy. Plainly the executive orders do not expressly provide for one. Nor do they, in our opinion, do so by implication. . . . We know of no announced overriding federal common law permitting a right of action by an employee against his employer for the latter's nondiscrimination provision in a government contract.
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The *Farmer* court also noted that the "history of the orders, the rules and regulations made pursuant to them and the actual practice in the enforcement of the nondiscrimination provisions are all strong persuasive evidence that . . . the threat of a private civil action was not contemplated by the orders" to deter contractors from failing to comply.[17]

If employees are not the intended prime beneficiaries of the executive order, individual relief, such as back pay, may not be necessary to effectuate the purposes of the order. While those purposes and the underlying authority for the executive order are far from clear,[18] the most frequently articulated purpose is the government's "vital interest in assuring that the largest possible pool of qualified manpower be available for the accomplishment of its projects" because the "exclusion from the available labor pool [of qualified women and minorities] is likely to have an adverse effect upon the cost and completion of government contracts."[19]

Those purposes would *directly* support only current or *prospective* actions to increase minority and female employment and would *not directly* support the OFCCP's claimed authority to order back pay. Given the rationale of *Contractors Association,*

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17. 329 F.2d 9.

18. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 304 (1979). ("The origins of the congressional authority for Executive Order 11246 are somewhat obscure and have been roundly debated by commentators and Courts.")

19. Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159, 175 (3d Cir. 1971), *cert. denied,* 404 U.S. 854 (1971). The *Contractors Ass'n* decision relied in large part on the President's authority under the Federal Property and Administrative Services Act, 40 U.S.C. § 486(a). The Supreme Court, however, in Chrysler Corp. v. Brown, *supra* note 18, at 304 n.33, has at least questioned that assumption.

"it can be argued that back pay has no bearing upon the enlargement of a manpower pool to perform government contracts."[20]

On the other hand, potential back pay liability can be a powerful incentive for companies to eliminate restrictive employment practices, as the Supreme Court has held in a landmark Title VII case:

> If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a back pay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-418 (1975).[21]

Thus, although the executive order may not have a "make whole" purpose,[22] the awards of back pay to remedy violations of order would, arguably, serve the executive order's purposes as articulated by *Contractors Association.*

The relevance of this argument to the executive order can easily be overstated. First, potential liability under Title VII ought to be incentive enough for employers. The possibility of facing the same liability under the executive order probably adds little *in terrorem* effect. Second, and perhaps more significantly, cancellation, suspension, and debarment are *far* more significant risks for most government contractors than dollar liability in the form of back pay.

> The present regulations authorize the Secretary to withhold contract payments, cancel the contract, and disbar a contractor. The possibility of . . . liability for [individual] damages would be of minimal value to

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[20] Employment Discrimination Law, 749 (Schlei & Grossman eds. 1976).

[21] United States v. N.L. Indus., 479 F.2d 354, 379 (8th Cir. 1973).

[22] "It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination." Albemarle Paper Co. v. Moody, 422 U.S. 405, 418.

> motivate a contractor to comply with affirmative action requirements when such [individual] liability is compared with the [contract] sanctions which the Secretary can impose.[23]

On balance, the OFCCP's back pay threats, in and of themselves, probably have at best only minimal therapeutic value.

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Section 209 (a)

The OFCCP rests its back pay claims on three separate sections of the executive order—Sections 209(a), 201, and 202(1) and (6).

The power of the OFCCP to deal with noncomplying contractors is found in Subpart D of the executive order, entitled "Sanctions and Penalties." Section 209(a)[24] of that subpart enumerates the sanctions that the Secretary of Labor may impose against an employer who has breached the contractual provisions relating to nondiscrimination and affirmative action.

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[23] Anderson v. Erie Lackawana Ry. Co., 468 F. Supp. 934, 939 (N.D. Ohio 1979).

[24] Section 209(a) provides that the Secretary of Labor may:

> (1) Publish, or cause to be published, the names of contractors or unions which it has concluded have complied or have failed to comply with the provisions of this Order or of the rules, regulations, and orders of the Secretary of Labor.
>
> (2) Recommend to the Department of Justice that, in cases in which there is substantial or material violation or the threat of substantial or material violation of the contractual provisions set forth in Section 202 of this Order, appropriate proceedings be brought to enforce those provisions, including the enjoining, within the limitations of applicable law, of organizations, individuals, or groups who prevent directly or indirectly, or seek to prevent directly or indirectly, compliance with the provisions of this order.
>
> (3) Recommend to the Equal Employment Opportunity Commission or the Department of Justice that appropriate proceedings be instituted under Title VII of the Civil Rights Act of 1964.
>
> (4) Recommend to the Department of Justice that criminal proceedings be brought for the furnishing of false information to any contracting agency or to the Secretary of Labor as the case may be.
>
> (5) Cancel, terminate, suspend, or cause to be cancelled, terminated or suspended, any contract, or any portion or portions thereof, for failure of the contractor or subcontractor to comply with the nondiscrimination provisions of the contract.

The OFCCP first formally asserted section 209(a) as a possible basis for its back pay authority in the preface to the December 28, 1979, amendments to its regulations:

> The Order also provides that a contractor may be debarred if it discriminates in employment [202(6), *209(a)(6)*] and have its contracts cancelled, terminated or suspended [206(a), *209(a)(5)*]. A contractor must satisfy the Secretary of Labor that it has brought itself into compliance with the Executive Order before it can be reinstated as an eligible bidder on Government contractors [sic]. [*209(a)(b)*]. *Failure to provide back pay relief would preclude the contractor from being reinstated.*
>
> *Therefore, the requirement that back pay where appropriate must be provided for in a conciliation agreement is clearly consistent with Executive Order 11246.*[25]

At first blush—and after careful thought as well—the OFCCP's reliance on section 209(a)(5) and (6) as support for its back pay claims appears to be a non sequitur. Those sections

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Contracts may be cancelled, terminated, or suspended absolutely or continuance of contracts may be conditioned upon a program for future compliance approved by the contracting agency.

(6) Provide that any contracting agency shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary of Labor that such contractor has established and will carry out personnel and employment policies in compliance with the provisions of this Order.

[25] 44 Fed. Reg. 77,000 (Dec. 28, 1979) (emphasis added). Curiously, the OFCCP claimed only that back pay was "consistent" with the executive order but did not claim it was *authorized.* Although the 1979 amendments constitute the first formal assertion that section 209(a) is a basis for back pay claims, the earliest internal Department of Labor memorandum on back pay, a July 17, 1972, memorandum from Labor's Associate Solicitor to the Solicitor of Labor, recommended that back pay be available as a sanction under section 209(a).

merely specify the sanctions and penalties that can be imposed for violations of the executive order. They do not in any way define what constitutes a violation and certainly do not remotely indicate that "[f]ailure to provide back pay relief" would constitute a violation of the order for which sanctions or penalties may be imposed.

The sanctions and penalties of sections 209(a)(5) and (6) are of three types: (1) those which are contractual in nature, *e.g.*, termination, cancellation, or suspension of the contract and debarment from future contracts; (2) declaratory action, *e.g.*, publication of a list with the names of noncomplying contractors; and (3) referral of cases to other government agencies with a recommendation that those agencies institute their own enforcement actions. Nothing in section 209(a)(5) or (6) remotely suggests the availability of monetary relief as a sanction for noncompliance.[26]

Unlike the remedial provisions of Title VII of the Civil Rights Act[27] and the National Labor Relations Act,[28] section 209 does not contain a catchall phrase authorizing the OFCCP to fashion sanctions other than those provided for.[29]

In addition, back pay is a qualitatively different type of sanction from any of those delineated in section 209(a)(5) and (6). Contract termination, suspension, or cancellation and debarment of contractors are prospective in operation and intended to vindicate a public right; in contrast, back pay relief provides a private remedy to the victims of the contractor's past transgressions.

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[26] In Gnotta v. United States, 415 F.2d 1271 (8th Cir. 1969), *cert. denied*, 397 U.S. 934 (1970), a plaintiff sought monetary relief against the United States under Executive Order 11246, alleging that he had been denied promotions during his 11 years of service with the Corps of Engineers because of his Italian ancestry. The Court, speaking through Judge Blackmun, now an Associate Justice of the Supreme Court, stated that "none of the Executive Order's language speaks in terms of money damages or of a money claim against the United States." 415 F.2d at 1278. Although the case involved the issue of waiver of the government's sovereign immunity, the above language not only applies to back pay recovery from the federal government, but from all employers covered by the Executive Order.

But see Chambers v. United States, 451 F.2d 1045 (Ct. Cl. 1971), in which the Court of Claims, critical of the *Gnotta* opinion, held that an applicant for federal employment was entitled to back pay under the executive order despite the absence of language expressly authorizing that remedy.

[27] 42 U.S.C. § 2000e-5(g).

[28] 29 U.S.C. § 160.

[29] *But see* § 202(6) of the order, discussed *infra*.

If back pay is viewed as a *sanction*, section 209(a)(5) and (6) provides no basis for OFCCP's authority. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."[30] Since section 209(a) is detailed and specific, the rules of statutory construction would dictate that the agency may not read another sanction into that section.[31]

To circumvent that result, however, OFCCP has, from time to time, characterized back pay as "an element of affirmative action,"[32] "appropriate relief,"[33] and a "remedy,"[34] as distinguished from a sanction. Those characterizations are discussed below.

As noted earlier, the OFCCP did not formally claim section 209(a) as authority for its back pay claims until December 28, 1979, when it cited section 209(a)(5) and (6). Although no court has ruled on this question, one court has held that section 209(a)(2) authorizes the U.S. Department of Justice to obtain back pay under the executive order.

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[30] National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers, 414 U.S. 453, 458, (1974), *citing* Botany Worsted Mills v. U.S., 278 U.S. 282, 289, (1929). The Court continued: "This principle of statutory construction reflects an ancient maxim—*expressio unius est exclusio alterius*." 414 U.S. at 458. *See also* Transamerica Mortgage Advisors, Inc. ("TAMA") v. Lewis, ____ U.S. ____, ____ 100 S. Ct. 242, 247 (1979) ("where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it").

In Rogers v. Frito-Lay, Inc., *supra*, 611 F.2d at 1085, the Court applied the above rule to conclude that no private remedy existed under Section 503 of the Rehabilitation Act of 1973 in view of Secretary of Labor's enforcement role under that law.

[31] *Cf.* Service v. Dulles, 354 U.S. 363, 371 n.12 (1957); Cole v. Young, 351 U.S. 536, 543-44 (1956).

[32] *See* 1975 Proposal, 40 Fed. Reg. at 13,313.

[33] 42 Fed. Reg. 3,454, 3,462 (Jan. 18, 1977).

[34] 44 Fed. Reg. 77,002 (Dec. 28. 1979).

Obligations to Provide Financial Relief

In *United States v. Duquesne Light Co.*[35] the U.S. Department of Justice brought an action in the U.S. district court against the employer to enforce the contractual obligations imposed by the executive order. The government sought back pay for female and black employees on the ground that they continued to suffer the present effects of the defendant's past discrimination.

At the outset, the court determined that the President has the inherent authority to require individual relief in the form of back pay if, in the President's opinion, the availability of such relief would "decrease government costs as effectively as would affirmative action plans. . . ."[36]

Next the court considered whether the President, when he issued the executive order, exercised his inherent authority to require back pay for violations of the order. Although the court noted that back pay is not specifically mentioned in the executive order or its implementing regulations (the case was decided prior to 1977, when back pay was first added to the regulations), the court did not interpret that as an "intention to exclude a back-pay order as a sanction available to remedy violations of the Executive Order." The court reasoned that section 209(a)(2) of the order, by its reference to the Department of Justice's authority to institute "appropriate proceedings," impliedly authorizes the government to invoke the court's equitable powers and to seek back pay and any other remedies that will effectuate the purposes of the order, absent congressional limitation of those powers.[37] In so doing, Judge Teitelbaum effectively read out of section 209(a)(2) the phrase ". . . to enforce those provisions, including enjoining . . . compliance" with the executive order.

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[35] 423 F. Supp. 507 (W.D. Pa. 1976).

[36] 423 F. Supp. at 509. The court referred to the cost justifications relied upon by the Third Circuit in Contractors' Ass'n v. Secretary of Labor, *supra* note 19. The court in *Duquesne* concluded that since "neither the language nor the policy" of the Federal Property and Administrative Services Act of 1949, 40 U.S.C., § 486(a), is contradicted by the awarding of back pay relief, the President has the authority to require that relief.

[37] The court cited Mitchell v. DeMario Jewelry, 361 U.S. 288 (1959), and Porter v. Warner Co., 328 U.S. 395 (1945), in support of its equitable power to grant, and the Justice Department's authority to seek, restitutionary relief. In the only other reported case dealing specifically with the back pay issue, United States v. Lee Way Motor Freight, Inc., 20

The Fifth Circuit, on the other hand, has stated that any suit by the Department of Justice under the executive order "would necessarily be an action to enforce contract provisions by way of damages or an injunction; nothing in the order suggests any authority to direct retroactive seniority benefit to third party discriminatees."[38]

In any event, the OFCCP can gain little solace from *Duquesne Light* since the decision's rationale applies only to the *Justice Department's* authority to institute "appropriate proceedings" in the District Court. The executive order grants no such authority to the OFCCP and *Duquesne Light* in no way suggests that the OFCCP possesses the authority, on its own, to compel contractors to provide individual affected class relief.

If, in fact, *Duquesne Light* properly concluded that the Department of Justice can seek back pay under the executive order, the OFCCP's claim of similar authority could well be interpreted as being contrary to section 209's distribution of authority and responsibilities. The language of that section arguably reflects a recognition of the different roles and different expertise of the various agencies charged with elimination of employment discrimination. The executive order gives the OFCCP the responsibility of monitoring the personnel practices of contractors to ensure that they are carrying out their commitment to hire and promote minorities and women. In contrast, section 209 entrusts the Equal Employment Opportunity Commission and the Department of Justice with the responsibility of proving illegal discrimination and obtaining compensatory relief. Under this reasoning, the OFCCP's assumption of authority to require back pay and other affected class relief is an arrogation of authority that was not contemplated by the President.

Fair Empl. Prac. Cas. 1343 (10th Cir. 1979), the Tenth Circuit remanded that issue to the trial court for analysis of the "appropriate proceedings" language in light of the legal principles enunciated in the *DeMario Jewelry* and *Warner Co.* decisions.

[38] United States v. East Tex. Motor Freight Sys., 564 F.2d 184 (5th Cir. 1977).

SECTION 201

Section 201 of the executive order authorizes the Secretary of Labor to promulgate regulations "necessary and appropriate to achieve [its] purposes." In 1971, the Secretary apparently invoked this provision as justification for issuing Revised Order No. 4, which required contractors to "remedy" affected class problems.[39]

Like section 209(a), section 201 offers little if any support for the OFCCP's position. The language in it clearly does not confer any authority on the OFCCP to issue regulations that modify or enlarge the obligations created by the executive order.[40] If the executive order does not otherwise authorize the OFCCP to levy back pay claims, section 201 adds nothing. The source of OFCCP's authority must be sought elsewhere.

SECTION 202

Section 202(1) of the executive order requires contractors to undertake affirmative action to assure equal employment and section 202(6) provides that, in addition to the sanctions authorized elsewhere, "such other sanctions may be imposed and remedies invoked as provided—by rule, regulations, or Order of the Secretary of Labor, or as otherwise provided by law."[41] These two provisions offer the strongest support for OFCCP's claimed back pay authority.

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[39] The 1971 amendments themselves cite no authority, but section 201 was said to be the basis for Revised Order No. 4 when OFCCP amended its regulations in late 1979. *See* 44 Fed. Reg. 77,000 (Dec. 28, 1979).

[40] Southeastern Community College v. Davis, 442 U.S. 397 (1979); Santa Fe Indus. v. Green, 430 U.S. 462 (1977); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).

[41] One commentator has argued that "as otherwise provided by law" should be applied to include the sanctions (*e.g.*, "damages") specified in the definitional section of the Administrative Procedures Act. Moroze, *Back Pay Awards: A Remedy Under Executive Order 11246*, 23 BUFF. L. REV. 439, 444 (1973). The author argues that restitution is therefore "otherwise provided by law" and is authorized by the executive order. That argument is clearly an example of bootstrapping and must be rejected. Obviously, the "otherwise provided by law" refers to other applicable laws prohibiting employment discrimination.

In the preface to the 1979 amendments to its regulations, the OFCCP asserted that section 202(1)'s mandate to undertake affirmative action includes "affirmative action to correct the effects of past discrimination."[42] *On its face,* of course, section 202(1) contains no such requirements. It states merely:

> The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment, or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.

All of the actions enumerated in section 202(1) are prospective in nature. As the Third Circuit observed in *Contractors Association of Eastern Pennsylvania v. Secretary of Labor:*

> The affirmative action covenant is no different in kind than other covenants specified in the invitation to bid. The Plan *does not impose a punishment for past misconduct. It exacts a covenant for present performance.* [Emphasis supplied.]

The OFCCP, however, apparently claims that affirmative action, by definition, must include action to rectify retroactively a contractor's transgressions.

Although the OFCCP has never cited any support for this rationale, a number of statutes include back pay as a form of *affirmative* relief and such inclusion may buttress the agency's claims, at least by analogy. For example, section 706(g) of Title VII authorizes a federal court, after finding an employer guilty of discrimination, to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay."[43]

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[42] 44 Fed. Reg. 77,000 (Dec. 28, 1979).

[43] 42 U.S.C. § 2000e-5(g).

Title VII thus incorporates the awarding of back pay into the broader category of affirmative action. Several other statutes, such as the National Labor Relations Act, are similar.[44] However, statutory language is not uniform and some statutes clearly distinguish between affirmative action and back pay.[45] Moreover, Title VII and the executive order are qualitatively different since Title VII's entire thrust is the creation of a private right to be free from discrimination. The executive order, on the other hand, does not create such a right and the "affirmative action" obligations of Title VII may well be broader than those of the executive order, at least in terms of individual remedies.

Furthermore, "the same words, when used in different statutes, are to be read 'in the light of the mischief to be corrected and the end to be attained' and may therefore, call for varying interpretations."[46] Indeed, even the same word used in two different sections of the *same* statute can have different meanings where the "purposes of the two sections are entirely different."[47] Given the differences between Title VII and the executive order, the courts may be unwilling to interpret the OFCCP's affirmative action authority to encompass back pay.

In addition to section 202(1) of the Order, the OFCCP has also rested its back pay authority on section 202(b), which authorizes the Secretary of Labor to impose "other Sanctions . . . and remedies." Eschewing the possibility of classifying back pay as a *sanction*, the OFCCP has repeatedly stated that it is a *remedy* to correct past wrongs. In 1977, for example, when back pay was first added to the regulations, the OFCCP said that "individual relief is an affirmative step which is required to eliminate discrimination or the effects of discrimination at the subject establishment. It is remedial rather than punitive."[48]

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[44] 29 U.S.C. § 160. *See also* 30 U.S.C. § 937, 30 U.S.C. § 820, 30 U.S.C. § 215(c)(2), 15 U.S.C. § 2622(a)(2)(B).

[45] *See, e.g.*, 42 U.S.C. § 5851(b)(2)(B).

[46] Liberty Mut. Ins. Co. v. Friedman, *supra* note 11, at 1021, *quoting* Commissioner of Internal Revenue v. Aluminum Co., 142 F.2d 663, 668 (3d Cir. 1944), *cert. denied*, 323 U.S. 728 (1944).

[47] Laffrey v. Northwest Airlines, 567 F.2d 429, 462 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

[48] 42 Fed Reg. 3,456 (Jan. 18, 1977).

CONCLUSION

Because the executive order does not explicitly authorize the OFCCP to impose back pay remedy, the validity of OFCCP's regulation will be tested against the general grants of power contained in the executive order. Only section 202 of the order affords any reasonable basis for OFCCP's claims.

OFCCP Regulations as a Possible Source

HISTORY OF OFCCP BACK PAY REGULATIONS

President Johnson, invoking his authority vested by "the Constitution and the statutes of the United States," issued Executive Order 11246 in September 1965, two months after the enactment of Title VII of the Civil Rights Act of 1964.[49] The order gives the Secretary of Labor the responsibility for administering the program, including the authority to issue implementing regulations. The Secretary has, in turn, delegated enforcement responsibility to the Office of Federal Contract Compliance Programs ("OFCCP").

Not only does the *executive order* not expressly authorize the OFCCP to obtain individual relief for "affected class" members, until quite recently OFCCP *regulations* did not even explicitly require individual affected class relief.

In 1968, the OFCCP issued regulations which, for the first time, required contractors to develop *written* affirmative action plans.[50] Those initial regulations did not refer to affected class problems, back pay, or any other type of affected class relief. In 1970, the Secretary issued Order No. 4, a regulation that provided guidance on the required contents of written affirmative action plans.[51] Like the 1968 regulations, however, Order No. 4 required only *prospective* action, such as establishment of goals and timetables.

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[49] 42 U.S.C. §§ 2000e *et seq.* (1970 and Supp. V, 1975). Although both Title VII and the executive order prohibit employment discrimination, their coverage and obligations differ. Title VII covers employers with fifteen or more employees, while the executive order applies to all companies with federal contracts of $10,000. Title VII mandates "affirmative action" only when a court determines that an employer is guilty of unlawful discrimination; the executive order, on the other hand, requires employers generally to take "affirmative action" with respect to the employment and advancement of women and minorities without any reference to past discrimination.

[50] 38 Fed. Reg. 7,804 (1968).

OFCCP regulations did not refer to affected class relief until late 1971, when the Secretary amended Order No. 4 and required contractors to remedy affected class problems.[52] The 1971 amendments to Order No. 4 (known thereafter as Revised Order No. 4) did not specify the type of affected class remedy required. The revisions did not indicate whether affected class remedies were to include retroactive individual relief or were to be entirely *prospective*. More significantly, the 1971 amendments made no mention whatsoever of back pay or any other individual relief.

Although the OFCCP Director issued a *letter* on January 31, 1974, to all executive order compliance agencies requiring the agencies to seek back pay for affected class problems, the Secretary of Labor did not officially propose to change the agency's *regulations* to include back pay until nearly ten years after the order's effective date.

In 1975 the Department of Labor proposed an addition to Revised Order No. 14[53] ("1975 Proposal"), the expressed purpose of which was "to clarify the means of identifying an affected class, methods of resolving affected class problems, and the principles applicable in awarding back pay relief to identifiable victims of discrimination, including affected class individuals."[54] The Secretary's prefatory remarks stated that the policies articulated in the proposal "have been in effect for several years" although never "codified or spelled out with specificity."[55]

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[51] 35 Fed. Reg. 2,586 (Feb. 5, 1970).

[52] 41 C.F.R. § 60-2.1(1971); 36 Fed Reg. 23,152, 23,153 (December 4, 1971).

[53] 41 C.F.R. § 60-60.

[54] 40 Fed. Reg. 13,311 (March 26, 1975).

[55] *Id.* In the summary to a recent promulgation under the executive order, the Labor Department claimed that its policy of requiring back pay relief in appropriate circumstances dates back to since 1967. 44

In the 1975 Proposal, the agency characterized back pay as "a necessary means of achieving the objectives [of the order] and as an element of affirmative action to remedy the effects of the contractor's past discrimination." Further it stated that

> back-pay awards are an appropriate remedy which may be imposed under Executive Order 11246 as a condition of continued contracting with the Federal Government. A contractor's failure to reimburse its employees who have been subjected to discriminatory employment practices may perpetuate the discrimination against them and may constitute a continuing violation of the equal employment opportunity clause.[56]

According to the 1975 Proposal, the OFCCP claimed the authority to order whatever relief is necessary "to make whole identifiable victims of illegal discrimination." The 1975 Proposal authorized back pay awards to rejected applicants and former as well as current employees. According to the proposal, these payments could include interest, overtime, shift differentials, and fringe benefits such as pension adjustment and vacation pay. The 1975 Proposal also stated that a contractor's back pay liability would extend for two years prior to notification of a finding of a violation, but the limitation period would be three years if the violation was willful.

The 1975 Proposal was never formally adopted, however. Back pay was not officially referred to in OFCCP regulations until January 18, 1977, when the phrase "including back pay where appropriate" was added to the section of Revised Order No. 4 requiring relief for affected class members.[57] The addition was said to codify OFCCP policies "which have been in effect

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Fed. Reg. 77,000 (December 28, 1979). However, a U.S. Civil Rights Commission report found no back pay recoveries against contractors as late as 1974. U.S. COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT - 1974 at 230 (1975).

[56] 40 Fed. Reg. 13,313.

[57] 41 C.F.R. § 60-2.1; 42 Fed. Reg. 3,454 (January 18, 1977).

for several years."[58] Unlike the 1975 Proposal, which was lengthy and quite detailed, the 1977 amendment consisted of only the five words noted above.[59]

In December 1979, the OFCCP issued regulations that reaffirmed its position that monetary payments to victims of a contractor's discriminatory practices are essential to the resolution of deficiencies and/or violations of the order. The December 1979 changes amended section 60-1.33 of OFCCP's regulations to require contractors to eliminate affected class problems by undertaking "remedial action as may be necessary . . . including where appropriate (but not necessarily limited to) remedies such as back pay and retroactive seniority."[60]

THE REGULATIONS AS A VALID EXERCISE OF AUTHORITY

Basic texts on administrative law distinguish between legislative rules and interpretative rules.[61] Legislative rules are said to be valid if they are: "(a) within the granted power, (b) issued pursuant to proper procedure, and (c) reasonable as a matter of due process."[62] In theory, at least, legislative rules are given great deference by the courts:

> In a situation of this kind, Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term. In exercising that responsibility, the Secretary adopts regulations with legislative effect. A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner. . . . The regulation at issue in this case is therefore entitled to more than mere deference or weight.

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[58] The 1977 amendments also modified the "enforcement proceedings" sections of OFCCP regulations to include back pay as relief that the government could seek. 41 C.F.R. §§ 60-1.26 (a)(2), (e)(1), and (f).

[59] 42 Fed. Reg. 3,456 (January 18, 1977).

[60] 44 Fed. Reg. 77,000 (December 28, 1979).

[61] *See, e.g.*, 2 DAVIS, ADMINISTRATIVE LAW TREATISE §7.8 (2d ed. 1979).

[62] *Id.* at 36.

> It can be set aside only if the Secretary exceeded his statutory authority or if the regulation is "arbitrary, capricious on abuse of discretion, or not otherwise in accordance with law."[63]

Conversely, at least in theory, courts have much greater discretion to strike down an interpretative rule. The weight given by the court to such a rule "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking in power to control."[64] The contemporaneous nature of the rule is a critical factor affecting an interpretative rule's power to persuade.[65]

Whatever language is used by the courts, however, and whatever may be the clarity of the theoretical distinctions between legislative and interpretative rules, "the theory is often blurred" in practice.[66]

> [T]he decision usually rests upon a plurality of factors, of which the interpretative character of the rule is one. The judicial verbiage in deciding such questions is not necessarily to be taken literally but must be read in a particular context. . . . The verbalisms are usually overstated in the direction the court is inclined to go.[67]

The confusion in the cases over the proper standard against which to measure the validity of a given regulation stems from "the frequent failure of the agencies to make clear whether rules are issued pursuant to their power to make law through rules or whether they are merely making interpretations instead of exercising delegated power."[68]

The OFCCP regulations are no exception to the basic practice. None of the OFCCP regulations related to affected class relief, or back pay in particular, has ever specified whether they were being issued as interpretative or legislative rules. In addition, the courts have made little effort to identify the nature of *any* OFCCP regulations involved in litigation to date.[69]

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[63] Batterton v. Francis, 432 U.S. 416, 425-26 (1977).

[64] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[65] General Elec. Co. v. Gilbert, 429 U.S. 125, 143 (1976).

[66] 2 DAVIS, ADMINISTRATIVE LAW TREATISE, *supra* note 61, at 61.

[67] *Id.* at 61, 64.

[68] *Id.* at 61.

As a practical matter, therefore, the OFCCP's back pay regulations will probably be given some unmeasurable and unpredictable amount of deference and their ultimate power to persuade the court will depend on several factors, some of which may not even be articulated.

Central, of course, to the courts' determination will be whether the authority to require back pay is "within the granted power" of section 202 of the executive order. In the abstract this may be a close question and the arguments on both sides have been explored above. In practice, however, the balance may well be tipped against the government because of the belated and haphazard manner in which the OFCCP has issued its back pay regulations.

In this regard, "courts give extra authoritative weight" to rules, whether they are deemed to be interpretative *or* legislative, "which are made contemporaneous with the enactment of the statute [or] which have been followed consistently over a long period. . . ."[70]

By this standard, the OFCCP regulations, like the EEOC's pre-1972 guidelines on maternity leave, do not score "high marks."[71] The first back pay regulations were issued *twelve years* after the executive order and can hardly be considered contemporaneous. In *General Electric Co. v. Gilbert*, an eight-year lag was an important factor in the court's rejection of the EEOC's guidelines.

In addition, although the OFCCP has repeatedly claimed that its back pay authority had long been asserted before the 1977 amendment to its regulations, little if any factual support for that claim exists. Furthermore, the failure of the 1971 revisions to Order No. 4 to mention any form of *individual* relief may be considered an eloquent rebuttal to OFCCP's claims of antiquity.

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[69] *See, e.g.*, Reynolds Metals Co. v. Rumsfeld, 564 F.2d 663 (4th Cir. 1977); Legal Aid Soc'y of Alameda County v. Brennan, *supra* note 14, at 1338, 1341 n.43; United States v. New Orleans Pub. Serv. Inc., *supra* note 11; Contractors Ass'n of E. Pa. v. Secretary of Labor, *supra* note 19; Liberty Mut. Ins. Co. v. Friedman, *supra* note 11; United States v. Duquesne Light Co., *supra* note 11; Pan American World Airways v. Marshall, 15 Fair Empl. Prac. Cas. 1607 (S.D.N.Y. 1977).

[70] 2 DAVIS, ADMINISTRATIVE LAW TREATISE, *supra* note 61, at 64.

[71] General Elec. Co. v. Gilbert, *supra* note 63, at 142.

Moreover, in 1974 when the OFCCP first informally advised executive order compliance agencies to seek back pay, the general counsel of the largest and most important of those agencies—the Department of Defense—wrote to the Solicitor of Labor and declared that the OFCCP's "opinion appears to depart from past policy and practice. . . ."[72] The Defense Department contended that OFCCP regulations relating to affected class problems "have always had a prospective orientation designed to improve future employment or promotion opportunities, and not to give compensation for past discrimination." Evidently, the OFCCP's "long-standing" policy was a well-kept secret from the most important compliance agency.

Finally, the scattergun approach used by the OFCCP in defining the source of its back pay authority—first one section of the order is relied on, then another, then another—reveals an uncertainty of position that may be fatal.[72a]

Challenging OFCCP's Back Pay Authority

Given the substantial questions about the validity of OFCCP's claimed back pay authority, contractors can legitimately challenge the agency's claims. At least two techniques may be available to test the OFCCP's position.

APPEAL FOLLOWING HEARING

The most direct and obvious way for a contractor to challenge the OFCCP's authority to compel a back pay award is to appeal

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72. Letter dated April 29, 1974, from Martin R. Hoffman, General Counsel, Department of Defense, to William J. Kilberg, Solicitor of Labor.

72a. *But see* Note, *Recovery of Back Pay under Executive Order 11246*, 52 S. CAL. L. REV. 767 (1979) (author concludes that monetary relief is available under Executive Order).

a final adverse order of the Secretary of Labor issued at the completion of the administrative enforcement process. Such an appeal would be to the U.S. District Court under the Administrative Procedure Act (5 U.S.C. §§ 701 *et seq).*[73]

An appeal under the APA, after an enforcement hearing and final order, gives contractors a full opportunity to challenge both the legal and factual basis for an award of back pay or other individual relief. No procedural barriers would preclude review.

Many contractors, and contractor associations, however, may wish to short-circuit the enforcement process and challenge the OFCCP's authority prior to the issuance of a final order in a specific case or even, perhaps, before the commencement of any specific enforcement action. Such efforts are fraught with procedural snares, as described below.

PREEMPTIVE COURT CHALLENGE

Contractors or their associations that attempt to make preemptive legal challenges to the OFCCP's back pay regulations will almost inevitably be met by government claims that such actions are premature because: (1) administrative remedies have not been exhausted; and (2) the issues are not ripe for judicial review. The subtle differences, if any, between the doctrines of exhaustion and ripeness appear to have little practical impact on the outcome of cases and the doctrines are therefore properly considered together.

When OFCCP regulations have been preemptively challenged in the past, the agency has, with one exception,[74] always invoked "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."[75]

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[73] *See* Timken Co. v. Vaughan, 413 F. Supp. 1183 (N.D. Ohio 1976).

[74] Liberty Mut. Ins. Co. v. Friedman, *supra* note 11. *Cf.* Reynolds Metals Co. v. Rumsfeld, *supra* note 69. The Supreme Court has held that exhaustion is not required if the agency fails to assert that defense. Mathews v. Diaz, 426 U.S. 67 (1976); Mathews v. Eldridge, 424 U.S. 319 (1976); Weinberger v. Salfi, 422 U.S. 749 (1975).

The problems of preemptive challenges to government regulations are not subject to such a pat answer, however. For every case the courts have denied review because of lack of exhaustion or ripeness, an indistinguishable case can be found where pre-enforcement review was granted. "Not only are the holdings often irreconcilable, but no opinion of the [Supreme] Court explains the contrariety of holdings. Indeed, the word formulations in the opinions are inadequate, conflicting, and usually affirmatively misleading."[76] The Ninth Circuit has recently concluded, for example, that "the case law on the exhaustion of remedies doctrine is, to say the least, confused," mainly because the "cases are in direct conflict. . . ," even within the Ninth Circuit.[77]

Although indistinguishable factual circumstances regularly lead to diametrically opposite results, the courts generally pay lip service to at least two factors: the extent of the injury inflicted if pre-enforcement review is denied and the nature of the issues presented.[78] In addition, in many cases the degree of clarity of the answers to the questions raised appears to facilitate review.[79]

Obviously, courts are more sympathetic to pre-enforcement review of a regulation if serious, irreparable injury will occur in the absence of immediate review. Many courts have allowed early review where injury to the plaintiff "was present and very real, not a mere possibility in the remote future."[80] Such injury is frequently present when the only alternative to compliance with an agency regulation is to run the risk of incurring substantial civil penalties.

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[75] Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938).

[76] 3 DAVIS, ADMINISTRATIVE LAW TREATISE, *supra* note 61, at 67. Davis's 1980 Supplement declares that the "law of exhaustion of administrative remedies is so unprincipled that occasional judicial rationalizations usually have little meaning [at 141]."

[77] Montgomery v. Rumsfeld, 572 F.2d 250, 252 (9th Cir. 1978). *See also* Harris Tr. & Sav. Bank v. Marshall, 20 Fair Empl. Prac. Cas. 558, 560(N.D. Ill. 1979) ("[T]here appears to be no consistency in the application of the ripeness principle . . .").

[78] 3 DAVIS, ADMINISTRATIVE LAW TREATISE, *supra* note 61, at 69. *See generally* Abbott Labs. v. Gardner, 387 U.S. 136, 148-49 (1967).

[79] 3 DAVIS, ADMINISTRATIVE LAW TREATISE, *supra* note 61, at 69. *But see, e.g.*, Lodge 1858, American Fed'n of Gov't Empl. v. Paine, 436 F.2d 882, 896 (D.C. Cir. 1970). (The fact that "administrative action is probably erroneous does not create an exception to the rule that administrative processes must be exhausted before judicial review is sought.")

> Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts . . . must be permitted. . . . Characteristically, the hardship of delayed review is that it places those who seek it in the following dilemma: in the meantime they must either comply with the agency's policy at some expense which they maintain is unnecessary, or they must risk incurring the sanctions for non-compliance should they turn out to be wrong. If this dilemma is sufficiently acute, then the policy has been "felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner, supra,* 387 U.S. at 153, 154.

Review is frequently available when administrative action "vitally affects the interests of the challenging party . . . even though the action is not embodied in *formal* action."[81]

While the reasonableness of granting pre-enforcement review of agency actions in the face of substantial harm can hardly be questioned, the Supreme Court has often denied review even where substantial injury existed; a welter of conflicting opinions can be found for virtually every conceivable factual circumstance.

In addition to evaluating the extent of real or threatened injuries to the plaintiffs, courts frequently grant or deny pre-enforcement review ostensibly on the nature of the issue presented. If the issues are *purely legal,* not involving the expertise of the agency, review is more likely. The Supreme Court has defined this test as "the fitness of the issues for judicial decision."[82]

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[80] Pierce v. Society of Sisters, 268 U.S. 510, 536 (1925).

[81] 2 DAVIS, ADMINISTRATIVE LAW TREATISE 694 (1970 Supp.) (emphasis supplied). *See, e.g.,* Bantam Books Inc. v. Sullivan, 372 U.S. 58 (1963).

For example, if the challenge to agency action is based entirely on "the legal background of the statute and of the executive orders—a problem on which judges and not administrators are the specialists," judicial review is easier to obtain than if the issues are primarily factual ones involving the agency's expertise.[83]

Furthermore, if the plaintiffs challenge the constitutionality of the underlying statute or executive order, the likelihood of pre-enforcement review may be increased because agencies "commonly hold that they have no power to hold statutes [or executive orders] unconstitutional."[84] Such pre-enforcement constitutional challenges, as well as others, have frequently been permitted where pursuit of an "administrative remedy would be futile because of the certainty of an adverse decision. . . ."[85] The D.C. Circuit, for example, has recently reiterated its view that exhaustion is not required where pursuit of an administrative remedy would be "no more than 'an exercise in futility' or . . . 'it is clear beyond doubt that the relevant administrative agency will not grant the relief in question.'"[86] Probably an equal number of cases, however, deny pre-enforcement review even where resort to the agency's administrative process offered no real hope of success.

Because the courts have not produced a stable, coherent body of law on the exhaustion or ripeness issues, contractors or their associations can find ample support for preenforcement challenge to OFCCP's back pay claims. Conversely, however, the government will be able to muster at least an equally impressive array of Supreme Court and other appellate court decisions to support its motions to dismiss such challenges as premature.

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[82] Abbott Labs. v. Gardner, *supra* note 78, at 148-49; *accord*, Kansas Ass'n of Commerce and Industry v. EEOC, No. 79-445 (D. Kansas May 6, 1980).

[83] 3 Davis, Administrative Law Treatise, *supra* note 61, at 72-73. *See, e.g.*, McKart v. United States, 395 U.S. 185 (1969).

[84] 3 Davis, Administrative Law Treatise, *supra* note 61, at 74 n.1.

[85] *Id.* at 99.

[86] National Conservative Political Action Comm. v. Federal Election Comm'n, No. 78-1543 (D.C. Cir. March 11, 1980) (Slip opinion, p. 5).

Perhaps encouraged by this confused state of the law, many contractors have sought to block the enforcement of various OFCCP regulations. These efforts have met with varying degrees of success, depending principally on the degree of harm threatened.

Where contractors have sought to prohibit the implementation of an OFCCP's regulation,[87] which allows the denial of two contracts without a hearing, they have been almost uniformly successful because of the threatened irreparable injury of the imminent loss of government contracts and the absence of any other remedy.[88]

Contractors' efforts to challenge preemptively other OFCCP regulations, however, have been almost as uniformly unsuccessful, primarily because those regulations posed no threat of *immediate* injury.

In six cases, contractors have sought to challenge, at different stages prior to the issuance of a final order by the Secretary of Labor, various OFCCP regulations.[89] Two-thirds of the cases involved challenges to OFCCP's back pay claims.

Although the contractors in those cases made almost every conceivable argument in support of their preemptive challenges, each effort was turned aside as being premature. In most of the cases, the courts mechanically intoned the rubric of *Myers v. Bethlehem Shipbuilding Corp., Ltd., supra:* "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."

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[87] 41 C.F.R. § 60-2.2(b).

[88] *See, e.g.,* Pan American World Airways v. Marshall, *supra* note 69; Sunstrand Corp. v. Marshall, 17 Fair Empl. Prac. Cas. 432 (N.D. Ill. 1978). The clearly meritorious nature of the contractors' claims also probably influenced the courts.

[89] St. Regis Paper Co. v. Marshall, 591 F.2d 612 (10th Cir. 1979); Uniroyal v. Marshall, 579 F.2d 1060 (7th Cir. 1978); Kerr Glass Mfg. Corp. v. Usery, No. 75-225 (D.C. Cir. Feb. 24, 1977); Harris Tr. & Sav. Bank v. Marshall, *supra* note 77; American Cyanamid Co. v. Roudebush, 411 F. Supp. 1220 (S.D.N.Y. 1976); Commercial Envelope Mfg. Co. v. Dunlop, 11 Fair Empl. Prac. Cas. 117 (S.D.N.Y. 1975).

In five of the cases, plaintiffs made strong arguments that their challenges presented purely *legal* issues, issues of the type that courts and not administrative agencies should resolve.[90] None made the argument successfully.

In *Harris Trust & Savings Bank v. Marshall*, *supra*, for example, the contractor sought pre-hearing review of OFCCP's back pay regulations and argued that "since purely legal issues are involved and no factual determinations, discretionary decisions or expert judgments are required," the issues were ripe for judicial action.[91] Ostensibly applying the standards of *Abbott Laboratories*, the court agreed that "the validity of the back pay regulations presents a purely legal issue and the regulations . . . are 'final agency action' " but concluded that, nevertheless, the case was not *ripe* for review because "the court has no idea whether the administrative law judge will find that plaintiff violated the order and will decide that relief should include back pay or whether the Secretary will adopt the administrative law judge's finding and decision."[92] Therefore, the court concluded, the back pay issue was not appropriate for judicial resolution.

The court of appeals in *St. Regis Paper Co. v. Marshall*, *supra*, also concluded that "the mere fact that a complaint [challenging the OFCCP's back pay regulations] raises questions of statutory interpretation and constitutionality of regulations does not exempt the action from the exhaustion doctrine." According to the court, "Agency review of the challenged regulations prior to judicial consideration is desirable even when pure questions of law are concerned. . . ."[93]

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[90] St. Regis Paper Co. v. Marshall, *supra* note 89; Uniroyal v. Marshall, *supra* note 89; Kerr Glass Mfg. Corp. v. Usery, *supra* note 89; Harris Tr. & Sav. Bank v. Marshall, *supra* note 77; American Cyanamid v. Roudebush, *supra* note 89.

[91] 20 Fair Empl. Prac. Cas. 563.

[92] 20 Fair Empl. Prac. Cas. 563. Elsewhere in the opinion the Court concluded that "more than the mere presence of a legal question is required and . . . the court must also examine the nature of the error asserted to determine whether it would be subject to judicial review after final agency action."

[93] 591 F.2d at 614. The Seventh Circuit in Uniroyal v. Marshall, *supra* note 89, at 1065, also ruled that "the mere presence of a question of

Contractors have been equally unable to convince the courts that the alleged futility of pursuing an administrative remedy was sufficient reason to allow a pre-enforcement challenge to OFCCP regulations. In the *Kerr Glass* case, for example, the court of appeals acknowledged that the company's challenge to OFCCP's back pay authority "will undoubtedly" be resolved against the company at any enforcement hearing, but concluded that a pre-enforcement challenge was inappropriate since "the issue will be presented for judicial review of the final administrative determination" (Memorandum Opinion, p. 4). This *exact* rationale for denying early review, however, has been explicitly rejected by other decisions of the same court.[94]

The Tenth Circuit rejected St. Regis Paper Company's claim of futility in administratively challenging OFCCP's affected class regulations by simply stating that "an administrative hearing cannot be deemed 'futile' where plaintiff will be afforded a full opportunity to present evidence and argue its position".[95]

Finally, and probably decisively, contractors challenging OFCCP's back pay regulations have been unable to show sufficient *immediate*, irreparable injury to justify judicial intervention prior to the exhaustion of the administrative hearing process.

The *Kerr Glass* case is a classic example. The company sued the OFCCP in 1975 shortly after receiving a "show cause" notice for refusing to provide back pay relief to alleged affected class members. Because no sanctions would be imposed on Kerr until after a full hearing and judicial review, "the court can perceive no justification for [Kerr Glass'] failure to exhaust administrative remedies."[96] Five years later, in mid-1980, the *Kerr Glass* administrative enforcement action had not yet resulted in even a recommended decision by the administrative

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statutory interpretation" was insufficient reason to allow a pre-enforcement challenge since the company has "adequate judicial remedies [of review following an enforcement hearing] to test its theories of statutory construction."

[94] *See, e.g.*, National Conservative Political Action Comm. v. Federal Election Comm'n, *supra* note 86.

[95] 591 F.2d at 614. *See also* Harris Tr. & Sav. Bank v. Marshall, *supra* note 77, at 563.

[96] Memorandum Opinion, p. 4.

law judge. Obviously the risk to Kerr Glass was not *imminent* and this lack of immediacy clearly distinguishes cases such as *Pan American Airways*, where the loss of government contracts, without a hearing, was an instant danger.

The remoteness of the debarment threat has been fatal to all pre-enforcement challenges to OFCCP back pay regulations. In addition to *Kerr Glass*, the *Harris Trust* court concluded that the "threat of debarment" is "at this juncture. . . speculative."[97]

Similarly, in *American Cyanamid Co. v. Roudebush, supra*, the company's challenge to OFCCP's back pay claims was rejected because the threat of debarment is "far too speculative to avoid the requirement that it exhaust its administrative remedies."[98] In *St. Regis Paper Co. v. Marshall, supra*, the Tenth Circuit agreed that the threat of debarment "is far too speculative and tenuous to mandate exemptions from the normal rule at this juncture."[99]

Based upon the uniform lack of success of these repeated pre-enforcement challenges, the validity of OFCCP's back pay regulations will probably not be resolved for several years—until enough cases wend their way through the labyrinthian OFCCP hearing process and through the rigors of judicial review.

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[97] 20 Fair Empl. Prac. Cas. at 561.
[98] 411 F. Supp. at 1223.
[99] 591 F.2d at 615.

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June 22, 1981

PRELIMINARY ANALYSIS OF PROPOSED CHANGES IN OFCCP REGULATIONS 1/

INTRODUCTION

Two weeks ago, the Department of Labor transmitted to the Office of Management and Budget ("OMB") a proposal to amend the regulations of the Office of Federal Contract Compliance Programs ("OFCCP"). The Department hopes to obtain OMB clearance for publication of the proposal in the Federal Register on Friday, June 26, 1981, the last business day before the expiration of President Reagan's suspension of the Carter Administration's "midnight" regulations published on December 30, 1980.

According to the OFCCP, the proposed changes are designed "to reduce substantially compliance burdens of government contractors without unnecessarily infringing protection of minorities, women, veterans, and the handicapped." Despite this glowing description, the proposed changes are, for the most part, de minimis, the alleged cost savings are by and large spurious, and management's worst fears appear to be realized by the proposals.

1/ This analysis must be deemed preliminary because it is based on the OFCCP's 56-page official "Summary" and the agency's 61-page cost analysis, rather than the actual text of the proposed changes. To the extent that the OFCCP Summary is either incomplete or inaccurate, this analysis may also be incomplete or inaccurate.

The business community had been heartened in late March when Vice President Bush announced his chairmanship of the Presidential Task Force on Regulatory Relief. Proclaiming "[r]egulatory relief as a major component of the President's economic program," the Vice President eschewed the writing of reports and sounded the call for "action." He specifically admonished the Department of Labor to undertake a comprehensive review of OFCCP regulations "to determine if they exceed legal requirements." He further explicitly directed the agency to reexamine the entire thrust of the Executive Order program, since the "Department's regulations place more stringent requirements on firms that do business with the government than the Civil Rights Act of 1964 requires of other businesses. The appropriateness of such dual tiering should be examined."

Unfortunately, the Department of Labor has totally ignored this mandate. It has not reviewed its regulations to determine if they exceed the Department's lawful authority, nor has it reviewed the propriety of imposing higher standards on government contractors. Instead, the Labor Department has undertaken only a tinkering with its existing regulations. The proposal sent to OMB is, in fact, a monument to the survival skills of the entrenched OFCCP bureaucracy.

OVERVIEW OF THE PROPOSAL

The OFCCP proposal can conveniently be divided into three categories: (1) solicitation of general comments; (2) proposal of substantive changes; and (3) proposal of procedural changes. Virtually all of the proposed changes, whether substantive or procedural, are minor. Although the OFCCP claims that the proposals will result in massive economic relief, these claims appear to be far fetched. When closely scrutinized, the proposal's promised relief is largely ephemeral.

SOLICITATION OF GENERAL COMMENTS

While "no specific regulatory amendments are proposed at this time," the OFCCP invites comment on two issues of widespread interest: (1) "methods for determining the availability of minorities and women" and (2) whether back pay "should be eliminated as a remedy under Executive Order 11246" or "whether back pay may be used in some special way to induce contractors to comply with the Executive Order."

The fact that the OFCCP is merely inviting comment on these issues will shock most EEO professionals. First, "availability" has been studied to death. The OFCCP, more than five years ago, published a proposal to change the method of determining availability and received substantial comments at that time. In 1977, Secretary Marshall's "blue ribbon" panel reviewed the subject and, in its September, 1977 report, recommended a complete overhaul of the regulations. Subsequently, the Equal Employment Advisory Counsel published a comprehensive text on the subject. And finally, the OFCCP itself contracted with an outside consulting firm which filed its 140-page Final Report on availability issues on February 20, 1981.

Surely, by now, the OFCCP should be able to make some specific proposal, rather than weakly "invite comment" on the general subject of availability. Such an approach is a far cry from the "action" called for by Vice President Bush and pushes well into the future any hope that "availability" technology can be made more rational.

Even more distressing, however, is the OFCCP's dual request for comment on back pay. The proposal notably asks for advice on two diametrically opposed positions: (a) the elimination of back pay, and (b) the use of back pay to compel compliance with the Executive Order. Without question, the back pay issue is the one which, unfortunately, draws the most vigorous critical comment from the business community; and almost all employers had expected the Reagan OFCCP to propose the elimination of back pay as a remedy.

Not only has the OFCCP not done that, but it has also invited comment on the use of back pay to compel compliance and, most significantly, has elsewhere in its latest proposal asked for a two-year statute of limitations on all back pay claims. Far from retreating, the OFCCP appears to be forging ahead to solidify the back pay approach launched during the Carter administration.

SUBSTANTIVE CHANGES

1. Back Pay Statute of Limitations. A new section, § 60-1.71, proposes that the OFCCP may obtain back pay for a period of "two years prior to the date on which OFCCP or its predecessor compliance agency notified the contractor of a potential compliance problem involving back pay." Almost as an aside, the proposal concedes that "[o]f course, retention of the proposal regarding limitations period would depend on the ultimate resolution of the back pay issue."

2. Threshhold Limits. Section 60-1.40 would be amended to raise significantly both the maximum dollar and employee threshholds for requiring written affirmative action plans. The OFCCP proposes to require written affirmative action plans only for those employers with at least 250 employees and at least one contract of $1 million or more. Only government bills of lading would be aggregated over a twelve-month period for purposes of triggering the $1 million limit. Financial institutions with at least 250 employees would be required to develop written affirmative action plans without regard to

dollar volume if they have federal deposit insurance, sell or redeem savings bonds, or serve as a depository of federal funds.

This proposed increase in the threshhold limits for written affirmative action plans will produce important regulatory relief for small contractors. Unfortunately, it is the only portion of the proposal package to do so. Moreover, the change will not significantly reduce the overall cost of OFCCP regulations.

Although the OFCCP cost data appear to be very shaky, the agency estimates that contractors will save approximately $13 million dollars in AAP maintenance costs as a result of the increased threshhold requirements. This minor saving is dwarfed, of course, when compared to the Equal Employment Advisory Council's recent estimate that the 500 largest federal contractors alone spend $942 million per year on OFCCP affirmative action requirements.

The OFCCP estimates that 16,767 government contractors are currently required to develop written affirmative action plans. This is an astonishingly small estimate, since other reports uniformly indicate that the government has contracts with over 300,000 companies. In any event, based on its estimate that less than 17,000 of these companies, employing 26,224,330 workers, are currently required to have written affirmative action plans, the OFCCP claims that only 4,143 companies, employing 20,108,557 workers, will meet the proposed higher minimum limits. Thus, according to the agency, about three-fourths of all companies currently required to have written affirmative action programs will be relieved of that obligation, while more than three-fourths of all employees currently covered by written plans will remain covered.

3. *Abbreviated AAP's*. A new Section 60-2.14 would allow contractors with 250-499 employees to develop an "abbreviated" affirmative action program. This proposal is most curious because the "abbreviated" plan appears to be virtually identical to the affirmative action plan requirements proposed for larger contractors. The "abbreviated" plan must contain a statement of policy, a standard work force analysis, a standard utilization analysis, goals and timetables, and "a description of the contractor's procedures to implement its affirmative action obligations."

Apparently, the OFCCP believes its "abbreviated" plan is new in two respects: (a) the utilization analysis may be by "EEO-1 categories" and (b) the detailed affirmative action items currently described in 41 C.F.R. § 60-2, Subpart C, would not be required. Neither of these possible differences appears to be particularly significant.

First, any reasonable interpretation of current regulations permits small contractors to do their utilization analyses by EEO-1 categories, and many smaller contractors in fact do so. While some individual OFCCP compliance officers may have objected to use of EEO-1 categories in the past, their use was clearly *not* prohibited. The current regulations relating to job groups provide ample flexibility for small contractors to use EEO-1 categories. Thus, the codification of current practice hardly constitutes a significant reduction in regulatory burdens. The proposed change does, however, make the regulations clear to even the most obtuse compliance officer who, in the past, may have wanted job groups done in some other manner.

Second, the elimination of the specific affirmative action details currently required by Section 60-2, Subpart C, is equally curious. That section would be eliminated (as discussed below) for *all* contractors, not just those with less than 500 employees. Thus, the "abbreviated" plan requirements for smaller contractors will apparently be identical to those for larger contractors. Moreover, the elimination of the detailed requirements could easily be counter-productive because the proposed regulations do not indicate that contractors shall be granted substantial discretion in formulating their written plans. Without either explicit guidance or a specific grant of substantial discretion to contractors, audits of affirmative action programs will predictably degenerate into irreconcilable disagreements between compliance officers and contractors. Rather than being a blessing, the "abbreviated" plan may well be a Trojan horse for the idiosyncratic whims of individual compliance officers.

4. Aggregation of Small Locations Into a Single Affirmative Action Plan. Without regard to size or location, the OFCCP proposes to add a new Section 60-2.1(c) which would permit contractors to aggregate individual locations into a single affirmative action program where those locations are in the "same chain of command." This proposal is allegedly a dramatic change from the current regulations which are said to require "a separate written AAP at every location."

This interpretation of current regulations is in grave error, and the proposal in fact imposes greater burdens than present regulations which merely require affirmative action plans to be prepared on an "establishment" basis. Currently, the regulations do not define establishment. While some compliance officers, and, evidently, the drafters of the proposed changes, have interpreted existing regulations as requiring separate affirmative action plans for each location, this interpretation is erroneous and has been rejected both by contractors and by the single enforcement decision interpreting the regulations.

In the absence of any definitions, the term "establishment" can be and has been applied in a flexible manner to address the full range of problems faced by contractors. Contractors with small sales offices, for example, routinely aggregate them into a single affirmative action program and no change in the regulations is needed to allow that practice. This aggregation is so widespread today that it is difficult to believe that OFCCP personnel are not aware of it.

Moreover, the Administrative Law Judge's decision in the one enforcement action which involved this issue explicitly declared that the term "establishment" in the present regulations was sufficiently flexible to permit the aggregation of multiple locations into one, nationwide affirmative action program.[2/]

Finally, to gild the lily, the OFCCP smugly claims that contractors can save over $8 million by consolidating locations into a single affirmative action plan. Obviously, since contractors are already permitted to take that action, any claim of additional cost savings is entirely spurious.

Not only is the practice of aggregation both permitted and widespread today, but the new OFCCP proposal appears to eliminate the only meaningful advantage obtained by such aggregation. If this is true, the proposal will substantially increase costs rather than reduce them.

The primary purpose in aggregating individual locations into a single affirmative action plan is to obtain a large enough statistical universe of employees to do a meaningful analysis. The new proposal, however, requires that employment data be "separately identified" for each location "in different recruitment areas." If this provision is interpreted to

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[2/] D.O.L. v. Coldwell Banker, Docket No. 78-OFCCP-12 (June 8, 1979).

require separate work force and utilization analyses and goals and timetables for each location, no useful purpose would be served in aggregating the locations. In that sense, the proposal would be a major setback for contractors with numerous small locations and would impose on those contractors significant new costs. The proposal thus represents either no change or a significant step backward.

5. Definition of Underutilization. The proposal abandons the OFCCP's unsuccessful effort to impose the "any difference" interpretation of underutilization. The current regulation defines underutilization as "having fewer minorities or women in a particular job group than would reasonably be expected by their availability." Although the Carter Administration tried to interpret this definition as requiring a declaration of underutilization whenever any difference, even fractional, existed between availability and current employment, that interpretation was struck down in the Firestone case.

The agency now proposes to require contractors to declare underutilization only where the contractors' current employment rates are less than 80 percent of availability. This change was presumably forced by the OFCCP's loss in the Firestone case, in which the district court upheld the company's use of a statistical probability measure to determine underutilization.

According to the Firestone decision, the existing regulations permit contractors to use any reasonable method of comparing incumbent employment rates and availability, including, presumably, the 80 percent rule now proposed. However, the effect of the OFCCP's proposal would be to prohibit any other method of determining underutilization. Firestone's probability methodology, which is permissible under current regulations, would, therefore, become unlawful under the proposal.

In short, rather than giving contractors additional flexibility as the OFCCP asserts, the proposal robs them of the important flexibility which the Firestone court declared already exists. This change is very important because the proposed 80 percent rule, while easy to apply, is so gross a methodology that fractional goals will still be commonplace. The inadequacy of the 80 percent rule is due to its blanket application without reference to either the size of the job group or the extent of availability. The 80 percent rule will regularly produce fractional goals for small job groups or where availability is very low.[3]

For example, assume a top management job group of 80 persons and an availability rate for minorities of two percent. Assume further that of the 80 persons, one is a minority. One minority, which represents 1.25% of the job group, is less than 80 percent of the two percent availability rate (1.6%). Therefore, under the proposed 80 percent rule, the company underutilizes minorities and must have a goal and timetable, even though the "short fall" is only six-tenths of a minority. The far more accurate probability formula used in Firestone would, of course, declare this fraction of a person to be statistically insignificant.

The real importance of the proposed 80 percent rule is, therefore, that it imposes greater burdens on contractors than the current regulations as interpreted by the Firestone decision. Ironically, the OFCCP claims that its proposal is "substantially" less burdensome than existing regulations.

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[3] The OFCCP Summary of the proposal is silent on the definition of "major" job groups, the only job groups for which a utilization analysis is required. According to the Firestone decision, contractors cannot be required to perform such an analysis for job groups of less than 50 persons.

The proposal is, of course, less burdensome than the Carter Administration's "any difference" interpretation of current regulations. But that interpretation has been struck down as being far too rigid. No change in the regulations, properly interpreted, is required to provide the needed flexibility.

6. Five-Year Plans. A new Section 60-2.3(c) would provide certain contractors, in limited situations, a five-year period in which they would be free from routine compliance reviews. To be eligible for the five-year grace period, a facility must (a) have had an on-site compliance review, (b) "have been found by OFCCP to have in place an acceptable written affirmative action program," and (c) have had "a linkage agreement with the Employment and Training Administration or had a training program which provided reasonable opportunities for minorities, women, veterans and handicapped persons."

Although the OFCCP will undoubtedly tout this five-year proposal as a significant advance, thoughtful observers will probably conclude otherwise. Several major questions appear at first blush. First, should -- indeed can -- the OFCCP subject contractors with acceptable affirmative action plans to repeated audits simply because they have chosen not to adopt a "linkage agreement" with ETA. Viewed properly, the OFCCP is, in effect, trying to "blackmail" contractors who are in full compliance with the Executive Order to do more than the Order requires, i.e., implement a linkage agreement. Under what authority can, or should, the OFCCP base audits on any standard other than compliance with the Executive Order? Far from adhering to Vice President Bush's mandate to review the legal basis for existing regulations, the OFCCP has offered a proposal which appears to extend well beyond its authority.

Second, how many contractors will in fact actually qualify for the five-year grace period? The Executive Order has always authorized the Department of Labor to award certificates of excellence to contractors. Yet no one can remember when the OFCCP last awarded one, if indeed it ever did. Similarly, the OFCCP can now grant blanket approval to national affirmative action plan formats for multi-establishment employers. But, in 1978, the agency revoked all such prior approvals and has not granted any new ones, despite the earnest entreaties of many major corporations.

Furthermore, what additional affirmative action obligations will individual compliance officers extract as the price for such approval? Rather than causing a reduction of compliance costs, the five-year proposal will more likely result in the imposition of burdens well beyond the Executive Order's legitimate requirements as company after company seeks the "golden fleece" of approval.

7. AAP Summary. The proposal formally abandons the Carter Administration's attempt to impose an annual affirmative action plan summary report. Although the OFCCP first proposed such an annual report nearly three years ago, the agency has been unable to develop an acceptable format. The OFCCP now proposes to jettison that effort.

8. Detailed Plan Requirements. The OFCCP proposes to delete entirely all of the detailed affirmative action plan requirements specified in Section 60-2, Subpart C, because "contractors should be permitted to design their own methods of implementing the required ingredients of their affirmative action programs." Subpart C will be republished, however, "in a series of interpretive bulletins."

Contractors may reasonably ask whether this will be any real change. With no regulations to restrict the discretion of compliance officers, most contractors will probably seek approval by slavish adherence to the "interpretive" bulletins. In short, the proposal to change the form in which the details are specified is likely to be just that: a change in form, but not substance.

9. Definition of Applicant. The proposal defines "applicant" in "substantially" the same way as it is defined in Question 15 of the current "Questions and Answers" relating to the Uniform Guidelines on Employee Selection Procedures. According to that document, "The precise definition of the term 'applicant' depends upon the user's recruitment and selection procedures. The concept of an applicant is that of a person who has indicated an interest in being considered for hiring, promotion, or other employment opportunities.

This interest might be expressed by completing an application form, or might be expressed orally, depending on the employer's practice."

10. Definition of Veterans. The OFCCP proposes to amend the definition of "veteran of the Vietnam era" and "disabled veteran" pursuant to the Veterans' Rehabilitation and Education Amendments of 1980. That Act redefined "veteran of the Vietnam era" by eliminating the requirement that the veteran had to have been discharged within four years of the alleged violations of the Vietnam Era Veterans' Readjustment Assistance Act. The proposal reflects that statutory change.

The proposal also seeks to expand the definition of "disabled veteran" based upon an apparent misreading of the 1980 amendments.

11. Comparable Worth. The proposal withdraws the Carter Administration's December 30 changes to Section 20.5 of the

OFCCP's Sex Discrimination Guidelines. That language, according to the latest proposal, was "perceived as an effort to cover the so-called 'comparable worth' issue." The proposal does not, however, state that the OFCCP has abandoned the comparable worth theory, which it is currently pursuing in the Kerr Glass case.

12. FDIC. The proposal adopts in toto the Carter Administration's view that federal deposit insurance is a basis for application of the Executive Order. The agency continues to indicate, however, that it will refer all questions of cancellation of such insurance to the appropriate "financial institution's regulatory agencies."

13. Certifications. The proposal adopts the December 30 rule which eliminates the subcontractor and non-segregated facilities certification requirements.

14. Maternity Leave. The proposal drops the Carter Administration's attempt to require employers to provide disability leave for pregnant employees even if they did not provide leave for other disabilities.

15. Sexual Harassment. The OFCCP proposes to adopt all of the EEOC's guidelines on sexual harassment except that portion of the guidelines which makes contractors liable for the acts of non-employees.

PROCEDURAL CHANGES

1. Pre-award Audits. Pre-award audits would be eliminated.

2. Computerized Data. The OFCCP proposes to bar compliance officers from routinely seeking "access to computer tapes and printouts" and restricts access to such data to "appropriate circumstances," whatever that means.

3. Confidentiality. Apparently fearful of violating the Freedom of Information Act, the OFCCP proposes to delete the current portion of Section 60-1.43 which states that data obtained from contractors will be used "only in connection with the administration" of the Order or the Civil Rights Act of 1964.

4. Complaints. The proposal would permit third parties to file complaints. In addition, the proposal reiterates the OFCCP's intention to continue "to retain, investigate and resolve all systemic and class complaints of discrimination." This aspect of the proposal will undoubtedly be a major disappointment to business groups, which adamantly insist that investigation of allegations of discrimination should be the sole province of the EEOC.

5. Desk Audit. The proposal retains the present 30-day period for submitting an affirmative action plan for desk audit. The December 30 rule would have shortened the period to 15 days.

6. "Pass-over." The proposal formally abandons any claim that the OFCCP can deny contracts without a prior hearing. That power was repeatedly asserted by the Carter Administration and just as regularly rejected by the courts. The OFCCP officially abandoned the practice in 1980, and the proposal codifies that change.

7. Conciliation Agreements. The proposal makes a small, but important, concession to contractors by deleting the following standard language from conciliation agreements and letters of commitment: "This agreement does not preclude future determinations of noncompliance based on a finding that the commitments are not sufficient to achieve compliance."

8. Union Participation. The proposal withdraws the December 30 rule which would have allowed unions to participate in hearings in certain circumstances. The new proposal simply allows the union to make its views known to the OFCCP Director.

9. Expedited Hearings. The OFCCP proposes to amend Section 60-30.32 to allow contractors "to object to the use of the expedited hearing procedures as inapplicable or inappropriate."

Senator HATCH. Our next witness will be Mr. Larry Lavinsky who is representing the Anti-Defamation League of B'nai B'rith.

He is the vice chairman of the National Commission of the Anti-Defamation League and a former chairman of its Civil Rights Committee. He is actively involved in civil rights litigation and has coauthored amicus briefs in the *Bakke* and *Weber* cases.

We were privileged recently to have had Mr. Lavinsky's colleague, Mr. Justin Finger, share with this subcommittee the views of the Anti-Defamation League on the Justice Department's recent consent decree on the PACE examination.

The Anti-Defamation League has been one of the most forthright and articulate organizations in raising concerns about preferential treatment programs by Government.

Mr. Lavinsky, we are happy to have you here.

I do have a time bind and consequently would appreciate it if you could summarize your excellent statement, which will be placed in its entirety in the record.

STATEMENT OF LARRY M. LAVINSKY, VICE CHAIRMAN, NATIONAL COMMISSION OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH

Mr. LAVINSKY. Thank you, Mr. Chairman.

In an effort to try to speed up the process, I have deleted a certain amount of this material.

I would like to read some portions of it if I may, Mr. Chairman.

Senator HATCH. Surely.

Mr. LAVINSKY. For many years, long before the cause was a popular one, the Anti-Defamation League was in the forefront of the battle for minority rights.

It saw in the condition of black people a reflection of the gap between the ideals and the realities of our society—a gap which must be bridged if the full potential of our democracy is to be realized.

Through statutes, such as the Civil Rights Act of 1964, and court decisions interpreting them, much has been accomplished in sensitizing the business community to the many, often subtle, forms of discrimination which in the past have barred the way to employment and advancement of minority group members. For a while it seemed that the principle of nondiscrimination would become an integral part of the mores of our society, as it must, if we are ever to be free of racism.

Affirmative action as initially conceived in the early sixties, incorporated the concept of nondiscrimination in its fullest sense. In addition, it required Government contractors to reach out and recruit those who had in the past been barred by discrimination and to treat them in a nondiscriminatory manner, once they have been employed. Thus, Executive Order 11246, as amended, by its express terms required Government contractors to take affirmative action "to insure that applicants are employed, and that employees are treated during employment, without regard to their race, color, sex, and national origin."

In the early seventies, however, the Federal Office of Contract Compliance, with its revised Order No. 4, transformed Government-required affirmative action into the mechanism for race-conscious hiring and promotion we know today. Its insistence on proportionality to be achieved through the use of mandated numerical goals and timetables reduced the pledge of nondiscrimination to mere lip service devoid of substance. In short, Government with the test of intentions has spawned a new form of racial discrimination. This discrimination, however benign in intent, is no less destructive of individual aspirations, no less a divider of society and no less moral wrong than the racism of the past.

In the short run, race conscious affirmative action may be more effective in terms of numbers than is affirmative action committed to the principle of nondiscrimination. However, the price of racial preference and quotas is unacceptably high for the beneficiaries of such programs, for those deprived of equal opportunity, and for society as a whole.

For racial minorities, quotas and preference tend to reinforce negative stereotypes that obscure their legitimate credentials and very real accomplishments. The impact on minority group members of such stereotyping was described by Dr. Kenneth B. Clark in the following stark terms:

> No black can yet be sure that he is being seen, evaluated, and reacted to in terms of his qualities and characteristics as an individual, rather than categorized and stereotyped as part of a rejected group.

For those who are denied equal opportunity as a result of race conscious programs, the impact is far more direct. Such individuals are not part of a monolithic power structure simply because they are white. The white majority is pluralistic, containing within itself a multitude of religious and ethnic minorities—Catholics, Jews, Italians, Irish, Poles—and many others who are vulnerable to prejudice and who to this day suffer from the effects of past discrimination. Such groups have only recently begun to enjoy the benefits of a free society. They should not be exposed to new discriminatory bars even if raised in the cause of compensation for past inequities.

For society as a whole, preference and quotas inevitably create divisiveness and a loss of confidence in laws that treat some people as more equal than others. Indeed, the civil rights movement, so effective in the fifties and sixties, has itself become a victim of the corrosive effect of racial quotas. The broad national consensus which characterized that vital movement has been lost. Universalism has given way to parochialism, optimism to backlash, and we have all been diminished in the process.

Those who support the present regulatory scheme point to recent decisions by the U.S. Supreme Court sanctioning racial preference and quotas as affirmative action tools in certain contexts. However, the Court's function is to define what is permissible, not what is appropriate or even necessary for a free and open democratic society.

In his dissent in the *DeFunis* case, Mr. Justice Douglas, who for over three decades championed the cause of social justice, warned that "if discrimination based on race is constitutionally permissible when those who hold the reins can come up with compelling reasons to justify it, then constitutional guarantees acquire an accordian-like quality." The recent decisions by the Supreme Court dealing with affirmative action have gone a long way toward making this warning a foreboding reality. Worse still, the Court itself is bitterly divided over the subject of benign racial classifications and its decisions to date provide no discernible consensus as to a coherent policy for the future.

What then should this subcommittee recommend? Should we try to turn back the clock, or allow a period of benign neglect? Given the tragic legacy of Government-sanctioned discrimination against racial minorities, that course is unthinkable. Those of us who ardently yearn for a society under law in which race has become irrelevant to the enjoyment of every civil liberty have a twofold obligation. One is to support all reasonable efforts to assist minority group members into the mainstream of American life; the other is to oppose Government tolerance of racial discrimination, whatever its form or the race of its victims. Without the first, reality would continue to mock our ideals; without the second, the principle of nondiscrimination would itself become a mockery. In short, we must find a means for balancing affirmative action with the principle of nondiscrimination in a way that destroys neither.

We would submit that a precondition for a sound, nondiscriminatory affirmative action policy is the recognition that affirmative action is not as temporary as was previously thought. Government cannot, with the best of intentions end centuries of racial inequity all at once and right away. A decade of race conscious, quota-oriented affirmative action demonstrates this.

Equally important is the need for a shift in emphasis from quantitative to qualitative objectives so as to maximize the likelihood of success both at the outset and in terms of upward mobility. An affirmative action program that emphasizes only numbers is more likely to end in failure and benefit no one.

With these thoughts in mind, we suggest the following guidelines for determining when it is appropriate for the Federal Government to require affirmative action and the nature of the affirmative action to be required:

Governmentally required affirmative action should be limited to circumstances indicating past or present discrimination by the employer. Therefore, no employer should be required, under threat of losing Government contracts, to take affirmative action unless: One, there is a substantial, statistically significant underrepresentation of a minority group in a particular job category indicating discrimination by the employer or, two, there are other facts indicating such discrimination. Where statistics are the basis for requiring affirmative action, the underrepresentation should never be measured by general population statistics or raw work force data but only with reference to qualified persons in the relevant labor market.

Affirmative action objectives should be achieved through systematic recruitment efforts and through training programs designed to increase the pool of qualified minority applicants and other similarly situated individuals. No individual should be given a position in order to fulfill affirmative action objectives unless he or she can meet the qualifications applicable to all other employees. Further, the most qualified applicant should get the job without regard to race, color, religion, sex, or national origin. In sum, the nondiscrimination provision of Executive Order 11246 should be interpreted as meaning precisely what it says.

Goals and timetables should not be required by Government and to the extent that they are voluntarily used by employers as the functional equivalent of quotas, they should be prohibited. Compliance with affirmative action requirements should be determined by the extent of good faith recruitment and training efforts and whether progress is being made, without regard to any preconceived numerical targets.

There can be a valid distinction between goals voluntarily adopted by an employer and racial quotas. However, it is simply unrealistic to assume that an employer, faced with the possible loss of millions of dollars of contracts, will treat Government-coerced goals and timetables in a nondiscriminatory fashion.

We submit that these guidelines provide the basis for an effective, nondiscriminatory affirmative action policy for the Federal Government.

In conclusion, I would like to say that this subcommittee has an unprecedented opportunity to suggest affirmative action standards that will permit social progress while respecting the right of all people to equal opportunity.

The fairness and public acceptance of your proposals will help to determine the efficacy of our law and the future health of our society.

Thank you.

Senator HATCH. Thank you, Mr. Lavinsky.

Your excellent statement will be fully entered into the record. I will submit what I believe are some important questions to you. Your responses will also be placed in the record in their entirety.

Mr. LAVINSKY. I thank you very much for the opportunity to appear here. I look forward to answering the questions.

Senator HATCH. We are delighted that you would take time to be with us.

[The prepared statement of Mr. Lavinsky, questions from Senator Hatch with responses, and additional material follows:]

PREPARED STATEMENT OF LARRY M. LAVINSKY

Mr. Chairman and Members of the Subcommittee:

My name is Larry M. Lavinsky. I am a Vice Chairman of the National Commission of the Anti-Defamation League of B'nai B'rith. During the last decade, I have served ADL first as Chairman of its National Law Committee and thereafter as Chairman of its National Civil Rights Committee. In these capacities, and also as a private attorney involved in civil rights litigation, I have written and lectured extensively on affirmative action and non-discrimination. I have co-authored various amicus briefs to the United States Supreme Court in civil rights matters, including the Anti-Defamation League's amicus briefs in the Bakke and Weber cases.

I welcome the opportunity to testify before you today because I sincerely believe that the course Congress and the administration chart on affirmative action is of vital concern to all Americans. It will help determine whether the ideal of equal opportunity for all people can at long last be achieved.

The Anti-Defamation League was organized in 1913 to advance good will and mutual understanding among Americans of all races and creeds and to combat racial and religious prejudice in the United States. ADL is vitally interested in protecting the civil rights of all persons and in assuring that every individual receives equal treatment under law regardless of his or her race or religion.

For many years, long before the cause was a popular one, ADL was in the forefront of the battle for minority rights. It saw in the condition of black people a reflection of the gap between the ideals and reality of our society, a gap which must be bridged if the full potential of our democracy is to be realized.

Through statutes such as the Civil Rights Act of 1964 and court decisions interpreting them, much has been accomplished in sensitizing the business community to the many, often subtle, forms of discrimination which have in the past barred the way to employment and advancement of minority group members. For a while it seemed that the principle of non-discrimination would become an integral part of the mores of our society as it must if we are ever to be free of racism.

Affirmative action as initially conceived in the early 1960s incorporated the concept of non-discrimination in its fullest sense. In addition, it required government contractors to reach out and recruit those who had in the past been barred by discrimination and to treat them in a non-discriminatory manner, once they have been employed. Thus, Executive Order 11,246 enacted in 1964 by its express terms required government contractors to take affirmative action "to insure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, and national origin."

In the early 1970s however, the Federal Office of Contract Compliance, with its revised Order No. 4, transformed government-required affirmative action into the mechanism for the race conscious hiring and promotion we know today. Its insistence on proportionality to be achieved through the use of mandated numerical goals and timetables reduced the pledge of non-discrimination to mere lip service devoid of substance. In short, government, with the best of intentions, had spawned a new form of racial discrimination. This discrimination, however benign in intent, is no less destructive of individual aspirations, no less a divider of society and no less a moral wrong than the racism of the past.

In the short run, race conscious affirmative action may be more effective in terms of numbers than is affirmative action committed to the principle of non-discrimination. But the price of racial preference and quotas is unacceptably high for the beneficiaries of such programs, for those deprived of equal opportunity, and for society as a whole.

For racial minorities, quotas and preference tend to reinforce negative stereotypes that obscure their legitimate credentials and very real accomplishments. The impact on minority group members of such stereotyping was described by Dr. Kenneth B. Clark in the following stark terms:

> "No black can yet be sure that he is being seen, evaluated and reacted to in terms of his qualities and characteristics as an individual rather than categorized and stereotyped as part of a rejected group."

For those who are denied equal opportunity as a result of race conscious programs, the impact is far more direct. Such individuals are not part of a monolithic power structure simply because they are white. The white majority is pluralistic, containing within itself a multitude of religious and ethnic minorities -- Catholics, Jews, Italians, Irish, Poles -- and many others who are vulnerable to prejudice and who to this day suffer the effects of past discrimination. Such groups have only recently begun to enjoy the benefits of a free society. They should not be exposed to new discriminatory bars even if raised in the cause of compensation for past inequities.

Furthermore, as Justice Stewart observed in the Fullilove case: "[N]o race . . . has a monopoly on . . . disadvantage." By way of example he pointed out that in 1978, 83.4% of persons over the age of 25 who had not completed high school were white and that in 1977, 79% of households with annual incomes of less than $5,000 were white. These disadvantaged people are themselves in need of special consideration. They ought not be asked to step aside in order to benefit others.

For society as a whole, preference and quotas inevitably create divisiveness and a loss of confidence in laws that treat some people as more equal than others. Indeed, the civil rights movement, so effective in the 1950s and 1960s, has itself become a victim of the corrosive effect of racial quotas. The broad national consensus which characterized that vital movement has been lost. Universalism has given way to parochialism, optimism to backlash, and we have all been diminished in the process.

Those who support the present regulatory scheme point to recent decisions by the United States Supreme Court sanctioning racial preference and quotas as affirmative action tools in certain contexts. But the Court's function is to define what is permissible not what is appropriate or even necessary for a free and open democratic society.

In his dissent in the DeFunis case, Mr. Justice Douglas, who for over three decades championed the cause of social justice, warned that "if discrimination based on race is constitutionally permissible when those who hold the reins can come up with compelling reasons to justify it, then constitutional guarantees acquire an accordian-like quality." The recent decisions by the Supreme Court dealing with affirmative action have gone a long way toward making this warning a foreboding reality. Worse still, the Court itself is bitterly divided over the subject of benign racial classifications and its decisions to date provide no discernible consensus as to a coherent policy for the future.

What then should this Subcommittee recommend? Should we try to turn the clock back, or allow a period of benign neglect? Given the tragic legacy of government-sanctioned discrimination against racial minorities, that course is unthinkable. Those of us who ardently yearn for a society under law in which race has become irrelevant to the enjoyment of every civil liberty have a two-fold obligation. One is to support all reasonable efforts to assist minority group members into the mainstream of American life; the other is to oppose government tolerance of racial discrimination whatever its form or the race of its victims. Without the first, reality would continue to mock our ideals; without the second, the principle of non-discrimination could itself become a mockery. In short, we must find a means for balancing affirmative action with the principle of non-discrimination in a way that destroys neither.

We would submit that a precondition for a sound, non-discriminatory affirmative action policy is the recognition that affirmative action is not as temporary as was previously thought. Government cannot, with the best of intentions, end centuries of racial inequity all at once and right away. A decade of race conscious, quota-oriented affirmative action demonstrates this.

Equally important is the need for a shift in emphasis from quantative to qualitative objectives so as to maximize the likelihood of success both at the outset and in terms of upward mobility. An affirmative action program that emphasizes only numbers is more likely to end in failure and benefit no one.

With these thoughts in mind, we would suggest the following guidelines for determining when it is appropriate for the Federal government to require affirmative action and the nature of the affirmative action to be required:

Governmentally-required affirmative action should be limited to circumstances indicating past or present discrimination by the employer. Therefore, no employer should be required, under threat of losing government contracts, to take affirmative action unless (1) there is a substantial, statistically significant underrepresentation of a minority group in a particular job category indicating discrimination by the employer or (2) there are other facts indicating such discrimination. Where statistics are the basis for requiring affirmative action, the underrepresentation should never be measured by general population statistics or raw work force data but only with reference to qualified persons in the relevant labor market.

Affirmative action objectives should be achieved through systematic recruitment efforts and through training programs designed to increase the pool of qualified minority applicants and other similarly situated individuals. No individual should be given a position in order to fulfill affirmative action objectives unless he or she can meet the qualifications applicable to all other employees. Further, the most qualified applicant should get the job without regard to race, color, religion, sex or national origin. In sum, the non-discrimination provision of Executive Order 11,246 should be interpreted as meaning precisely what it says.

Goals and timetables should not be required by government and, to the extent they are voluntarily used by employers as the functional equivalent of quotas, they should be prohibited. Compliance with affirmative action requirements should be determined by the extent of good faith recruitment and training efforts and whether progress is being made, without regard to any preconceived numerical targets.

There can be a valid distinction between goals voluntarily adopted by an employer and racial quotas. However, it is simply unrealistic to assume that an employer, faced with the possible loss of millions of dollars of contracts, will treat government-coerced goals and timetables in a non-discriminatory fashion.

We submit that these guidelines provide the basis for an effective, non-discriminatory affirmative action policy for the Federal government.

In a recent law review article on affirmative action, Judge Skelly Wright urged that we seek humane and effective remedies for the wrongs of the past and that "for the first time in history . . . we do the job right. . . ." If a decade of race conscious affirmative action teaches anything, it is that doing the job right will require more than good intentions.

This Subcommittee has an unprecedented opportunity to suggest affirmative action standards that will permit social progress while respecting the right of all people to equal opportunity. The fairness and public acceptance of your proposals will help to determine the efficacy of our law and the future health of our society.

QUESTIONS POSED BY SENATOR HATCH TO MR. LAVINSKY WITH RESPONSES

DEAR SENATOR HATCH: The following are the questions posed by you at the conclusion of my testimony on July 16, 1981 and the response thereto:

Questions. There is clearly a great deal of concern about affirmative action among the Jewish community. Can you describe in a bit more detail the experience that the Jewish community has had with numerical quotas in the past? To what extent does this experience contribute to present Jewish concerns? How would you respond to those who argue that affirmative action means something entirely different than quotas?

Response. The Jewish community has supported and continues to support nondiscriminatory efforts to assist minority group members into the mainstream of American life. The opposition to quota-oriented affirmative action stems from the long history of discrimination against Jews and others by the use of quotas both in Europe and the United States.[1] That history indelibly brands the quota as an instrument of subjugation, not benificence. It also demonstrates that a benign purpose cannot alter the quota's invidious nature as a divider of society and as a destroyer of personal aspirations.[2] The re-emergence of the quota in our times is all the more unfortunate for its racial base in a society desperately striving to rid itself of racism.

If we are ever to achieve equal opportunity for all within the context of a free and open democratic society, affirmative action can and must mean something entirely different than quotas.

Questions. Proponents of affirmative action argue that affirmative action is entirely consistent with the idea of standards and merit. They argue that affirmative action programs do nothing more than ensure that "qualified" people of all racial and ethnic backgrounds have equal access to employment and educational opportunities. How would you respond to this? Is affirmative action consistent with the merit principle?

Response. Affirmative action such as that envisioned by Excutive Order 11,246 as originally promulgated is entirely consistent with the idea of standards and merit. Indeed, special recruitment and training efforts for those previously denied equal opportunity augment the merit principle by increasing the pool of qualified applicants. It is only when immutable birth characteristics such as race determine the decision to hire or promote that merit is subverted. In short, affirmative action need not and should not conflict with the merit principle.

Questions. Justice Stevens, in his dissent in the *Fullilove* case made several allusions to the old Reichstag laws in Germany which were forced into defining, in very contorted ways, precisely who was and who was not a "Jew." Given that the United States decides to continue with the affirmative action, is it inevitable, in your opinion, that we will someday have to define who is and who is not a "black" or an "hispanic"? Will there have to be courts reviewing these definitions and reviewing their administration?

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[1] See, e.g., Higher Education for American Democracy, A Report of the President's Commission on Higher Education 35 (1947); Kennedy, Jim Crow Guide to the U.S.A. 92 (1959; 1973); Steinberg, "How Jewish Quotas Began", Commentary 67 (Sept. 1971); see also Kisch, The Jews in Medieval Germany: A Study of Their Legal and Social Status (2d ed. 1970); Marcus, The Rise and Destiny of the German Jew 11 (1934); Segal, The New Poland and the Jews 197 (1938); Kochan, ed., The Jews in Soviet Russia since 1917 1–2, 17, 90, 91, 92, 94, 146 (2d ed. 1972); Baron, The Russian Jew under Tsars and Soviets 47 (1964).

[2] The quota on the admission of Jewish students to Harvard College in the 1920's was no less discriminatory because imposed in order to maintain a diverse student body. See N. Belth, A Promise to Keep: A Narrative of the American Encounter with Anti-Semitism 98–110 (1979); H. Heomans, Abbot Lawrence Lowell 209 (1948). See also Lowell, "Jews Facing a Closing College Door," Literary Dig. July 8, 1922 at 28; Dershowitz & Hanst, "Affirmative Action and the Harvard College Diversity-Discretion Model Paradigm or Pretext?" 1 Cardozo L. Rev. 379, 385–99 (1979).

Response. Long before the Reichstag laws in Germany were enacted, the hideous practice of dispensing entitlements or detriments on the basis of the degree of an individual's consanguinity to a favored or subjugated group appeard in the United States. One need only look to the 1896 case of *Plessy* v. *Ferguson,*[1] in which it was held to be a crime for an individual described as being seven-eighths Caucasian and one-eighth of African blood to ride in the same railway carriage as white people. That shame must never again be repeated in a courtroom of these United States. Yet, sooner or later, it will be if opportunities continue to be apportioned on the basis of race. Various extant statutes and regulations provide fertile ground for litigating the nature of a person's race or ethnic background. A way must be found to achieve equal opportunity without sacrificing human dignity.

Questions. How do you respond to those who argue that affirmative action is nothing more than a "remedial" measure, designed to compensate certain groups for past injustices. What is wrong with that? You will concede, I am sure, that there has been this history of injustice and discrimination. Doesn't neutral treatment simply perpetuate the effects of this discrimination?

Response. The history of injustice and discrimination against racial minorities in this country is indisputable. Its effects remain a painful reality which must be remedied if we are to become a mature democratic society.

Affirmative action arose out of the realization that neutral treatment alone might simply perpetuate the effects of past discrimination. The evils of past discriminatory acts live after them, leaving their marks—inferior education, lack of training, inadequate preparation—on many who, thus disadvantaged in competition with others not similarly deprived, are denied equality of opportunity in fact, even when discrimination is no longer practiced against them.

A just society has an obligation to help undo the evils flowing from past discrimination by affording its victims every opportunity to develop to their full potential. It is one thing, however, to assist disadvantaged individuals to help themselves. It is quite another to prefer them over other individuals who played no part in the past discrimination and who are also entitled to equal opportunity.

It is fervently to be hoped that out of these hearings and deliberations, this Subcommittee will develop recommendations for encouraging non-discriminatory affirmative action while eliminating the abuses inherent in racial preference and quotas.

Very truly yours,

LARRY M. LAVINSKY.

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[1] 163 U.S. 537 (1896).

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THE AFFIRMATIVE ACTION TRILOGY AND BENIGN RACIAL CLASSIFICATIONS— EVOLVING LAW IN NEED OF STANDARDS

LARRY M. LAVINSKY†

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With its decision in *Fullilove v. Klutznick*,[1] the United States Supreme Court has completed a trilogy of cases approving various forms of race-conscious affirmative action designed to increase opportunities for minority group members in professional schools, private employment, and in the selection of contractors for construction projects funded by the federal government. While cautiously framed and limited in scope, the decisions in *Bakke*,[2] *Weber*,[3] and now in *Fullilove* have legitimized racial preference and quotas as affirmative action tools in certain contexts.[4]

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† The author is a member of the New York City law firm of Proskauer Rose Goetz & Mendelsohn. His previous publications in the area of civil rights include *DeFunis v. Odegaard*: *The Non-Decision with a Message*, 75 COLUM. L. REV. 520 (1975) and *A Moment of Truth on Racially Based Admissions*, 3 HASTINGS CONST L.Q. 879 (1976). Mr. Lavinsky has co-authored various *amicus* briefs to the United States Supreme Court in civil rights matters, including *amicus* briefs in the *Bakke* and *Weber* cases discussed herein. He wishes to thank Stephen E. Tisman, Esq. and Douglas S. Stanger for their helpful comments and assistance in the preparation of this article.

[1] 100 S. Ct. 2758 (1980).

[2] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[3] United Steelworkers of America v. Weber, 443 U.S. 193 (1979).

In future cases, the Court will be called upon to define more clearly under what circumstances and to what extent government and the private sector can allocate opportunities on the basis of race.[5] A coherent policy in this highly sensitive and controversial area will require a consensus within the Court as to the appropriate legal standards for balancing race-conscious affirmative action with the principle of nondiscrimination in a way that destroys neither. Such a consensus does not exist today. On the contrary, the affirmative action trilogy reflects sharp differences among the Justices over how to analyze the constitutionality of "benign" racial classifications.[6] Furthermore, there appears to be substantial disagreement as to the extent to which such classifications are permissible under the antidiscrimination laws.[7]

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[4] None of the cases in the trilogy involved quotas or other forms of affirmative action ordered by a court as a remedy in response to judicial findings of discrimination and, to date, the Supreme Court has not expressly addressed the permissibility of racial quotas as a court ordered remedy for past discrimination. *But cf.* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 18-20, 23-25 (1971) (use of ratios in school desegregation). For a discussion of *Swann* by Chief Justice Burger, see Fullilove v. Klutznick, 100 S. Ct. 2758, 2776-77 (1980). The judicial remedies for employment discrimination thus far approved by the Court can fairly be characterized as restitution to identifiable victims of discrimination, rather than racial preference as such.

Although cases involving court ordered affirmative action have been drawn upon by the author where relevant, this article focuses principally on affirmative action arising in other contexts. Of course, judicial findings of discrimination can have a significant bearing on the permissible scope of affirmative action whatever its source. See text at note 66 *infra*.

[5] On the same day the Court decided *Fullilove*, it granted certiorari in Minnick v. Cal. Dept. of Corrections, 95 Cal. App. 3d 506, 157 Cal. Rptr. 260 (1979), *cert. granted*, 100 S. Ct. 3055 (1980). *Minnick* involved an affirmative action plan under which females and minorities were given a preference in the promotion and transfer of correctional employees. The program targeted "goals" of 38% women employed and 36% minorities employed by the end of a five-year period. Although the goal for female employees was based on the percentage of women in the California labor force in 1970, the goal for minority employees was aimed at attaining "a level equalling at least 70% of any given 'minority' in the inmate population of the Department." *Id.* at 513-14, 157 Cal. Rptr. at 264. The trial court struck down the plan as violative of the fourteenth amendment, Title VII of the Civil Rights Act of 1964, and 42 U.S.C. §§ 1981, 1983 (1976), as well as the California Constitution and certain California statutes. *Id.* at 517, 157 Cal. Rptr. at 266. The California Court of Appeals reversed. Relying on the *Bakke* decision, it held that the preferences in favor of women and minorities "are necessary to promote the compelling interest of [the] state in the proper management of its correctional system." *Id.* at 522, 157 Cal. Rptr. at 269. Relying on *Weber*, it held that the plan was not violative of Title VII: "The fact that the department is a public employer suggests no basis for excluding it from the reach of the congressional intent and objectives analyzed in [*Weber*]." *Id.* at 523-24, 157 Cal. Rptr. at 270.

On that same day the Court also granted review in Johnson v. Board of Educ., 604 F.2d 504 (7th Cir. 1979), *vacated and remanded*, 101 S. Ct. 339 (1980). *Johnson* involved the city of Chicago school board's voluntary desegregation plan which imposed racial quotas on student enrollment at two high schools to prevent de facto segregation resulting from "white flight." *Id.* 514-15. Since the number of white students seeking admission at each high school was less than the quota set for them and the number of black and hispanic students applying exceeded the quota for those groups, the entire burden of the desegregation plan fell on the latter groups. *Id.* 512. The district court held the plan to be constitutional. Applying the "strict scrutiny—compelling state interest standard," the Seventh Circuit affirmed, finding "the state interest in promoting integration in these two high schools and communities, while at the same time affording all students residing in these attendance areas a viable opportunity to attend high school in an integrated setting, to be compelling." *Id.* 516. On October 20, 1980, the judgment of the court of appeals was vacated and the case was remanded to that court for further consideration in view of respondents' suggestion of mootness. Johnson v. Board of Educ., 101 S. Ct. 339 (1980).

This article will attempt to identify the deep divisions within the Court as it moved from a posture of eschewing racial preference and quotas to one in which these traditional instruments of discrimination have been accepted, at least under some circumstances, as a vehicle for social progress. It will also discuss some of the bitter lessons of the past and some standards for the future as we seek to build a more just society.

I. THE PRE-*BAKKE* CASES

The Court's initial response to racial quotas and preference was negative. Thirty years ago, in *Hughes v. Superior Court of California*,[8] the Court confronted the problem of racial quotas in employment. The issue there was whether it was lawful to picket in support of a demand that the proportion of black clerks employed in a grocery store approximate the proportion of black customers. The California Supreme Court sustained an injunction against the picketing, though pursued in a peaceful manner, and stated that "[the picketers] would, to the extent of the fixed proportion, make the right to work . . . dependent not on fitness for the work nor on an equal right of all, regardless of race, to compete in an open market, but, rather, on membership in a particular race."[9] The United States Supreme Court unanimously affirmed the judgment below, notwithstanding the picketers' contention that their conduct was lawful and that the injunction infringed their constitutional right of free speech.[10] Mr. Justice Frankfurter, delivering the opinion of the Court, stated:

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[6] The views of the Justices as to the appropriate standard of judicial review under the equal protection clause ranged from "strict scrutiny," amounting to almost per se invalidity of the challenged racial classification, as set forth by Justice Stewart in *Fullilove*, to an "intermediate" standard under which an articulated purpose of remedying the effects of past societal discrimination would be deemed a sufficiently important governmental objective to pass constitutional muster, as espoused by Justices Brennan, White, Marshall and Blackmun in *Bakke*. *Compare* Fullilove v. Klutznick, 100 S. Ct. 2758, 2802-03 (1980) (Stewart, J., dissenting), *with* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 359, 362 (1978) (Brennan, White, Marshall & Blackmun, J.J., concurring in part, dissenting in part). Not only was the appropriate equal protection standard in dispute, in these cases there was also disagreement as to whether different standards should be applicable, depending upon the race of those adversely affected by the racial classification.

[7] Since the *Bakke* Court held that Title VI of the Civil Rights Act of 1964 proscribed only those racial classifications that violate the equal protection clause, the uncertainty over the scope of the latter necessarily creates the same uncertainty as to the former. Furthermore, Justice Brennan's majority opinion in *Weber* expressly refrained from defining the extent to which racial classifications are permissible under Title VII. The deep divisions on this subject become apparent when Justice Powell's views in *Bakke*, 438 U.S. at 307-09, are compared with those expressed in the opinion of Justices Brennan, White, Marshall and Blackmun, *id.* 363-66.

[8] 339 U.S. 460 (1950).

> California chose to strike at the discrimination inherent in the quota system by means of the equitable remedy of injunction to protect against unwilling submission to such a system. It is not for this Court to deny to California that choice from among all "the various weapons in the armory of the law."[11]

More recently, the same judicial attitude was expressed in *Griggs v. Duke Power Co.*,[12] a landmark case under Title VII of the Civil Rights Act of 1964. Chief Justice Burger, writing for a unanimous Court, stated that "the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."[13]

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[9] Hughes v. Superior Court, 32 Cal. 2d 850, 856, 198 P.2d 885, 889 (1948), *quoted in* Hughes v. Superior Court of Cal., 339 U.S. 460, 463-64 (1950). The United States Supreme Court noted that the California Supreme Court expressly distinguished between picketing to promote discrimination, as in *Hughes*, and picketing against discrimination, suggesting that the latter "would not be for an unlawful objective." 339 U.S. at 466.

[10] Justices Black and Minton concurred on the ground that the case was controlled by the principles announced in Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949), which upheld the right of state courts to enjoin picketing in violation of a valid state law. Justice Reed, also concurring, interpreted the opinion of the California Supreme Court as holding that the pickets sought from their employer, "discrimination in favor of persons of the Negro race, a discrimination unlawful under California law. Such picketing may be barred by a State." 339 U.S. at 469, *citing* Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).

[11] 339 U.S. at 467, *quoting* Tigner v. Texas, 310 U.S. 141, 148 (1940). Justice Frankfurter commented upon the problems inherent in picketing to secure proportional employment in a society consisting of racial, ethnic and religious minorities:

> To deny to California the right to ban picketing in the circumstances of this case would mean that there could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portuguese in New Bedford, of Mexicans in San Antonio, of the numerous minority groups in New York, and so on through the whole gamut of racial and religious concentrations in various cities. . . . The differences in cultural traditions intead of adding flavor and variety to our common citizenry might well be hardened into hostilities by leave of law. The Constitution does not demand that the element of communication in picketing prevail over the mischief furthered by its uses in these situations.

Id. 464.

[12] 401 U.S. 424 (1971), *construing* 42 U.S.C. 2000e-2 (1976).

In *DeFunis v. Odegaard*,[14] the Court was confronted with a constitutional challenge to a minority admissions program adopted by the University of Washington Law School, a state professional school.[15] Although fully briefed and argued, the Court held that the case was moot because Marco DeFunis, who had been admitted to the school under a court order, was on the eve of graduating.[16] Mr. Justice Douglas wrote a separate dissenting opinion in which he addressed the merits. Finding the "strict scrutiny" standard applicable to the law school's use of a racial classification,[17] Justice Douglas rejected the argument that the objectives of its minority admissions program could constitute a compelling state interest justifying racial preference.[18]

> A DeFunis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color.
>
> . . . .
>
> So far as race is concerned, any state-sponsored preference to one race over another . . . is in my view "invidious" and violative of the Equal Protection Clause.[19]

He also warned: "If discrimination based on race is constitutionally permissible when those who hold the reins can come up with 'compelling' reasons to justify it, then constitutional guarantees acquire an accordion-like quality."[20]

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[13] *Id.* 430-31. With the benefit of hindsight, it is apparent that this often repeated dictum did not reflect a consensus within the Court as to the meaning of the phrase "discriminatory preference" in the context of race-conscious affirmative action.

[14] 416 U.S. 312 (1974).

[15] The law school did not seek to justify its minority admissions program on the basis of past discrimination. On the contrary, it assured the Court that "never in history" had it "been guilty of invidious discrimination on account of race . . . ." Instead it claimed that its program was designed to remedy de facto segregation. Motion of Dismissal of Appeal or, in the Alternative, Affirmance of the Judgment Below and Statement of Opposition to Certiorari at 18-19, *DeFunis v. Odegaard*, 416 U.S. 312 (1972), reprinted in 1 DEFUNIS VERSUS ODEGAARD AND THE UNIVERSITY OF WASHINGTON, The Record 38-45 (A. Ginger ed. 1974).

[16] 416 U.S. at 319-20.

[17] *Id.* 333. For over a quarter of a century prior to *DeFunis*, the law appeared well settled that state action involving a racial classification is "'constitutionally suspect' . . . and subject to the 'most rigid scrutiny' . . . and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose . . . ." McLaughlin v. Florida, 379 U.S. 184, 192 (1964), *quoting* Bolling v. Sharpe, 347 U.S. 497, 499 (1954), Korematsu v. United States, 323 U.S. 214 (1944), Hirabayashi v. United States, 320 U.S. 81, 100 (1943); *see* Loving v. Virginia 388 U.S. 1, 11 (1967). It could be justified only by "some overriding statutory purpose" without which the racial classification "is reduced to an invidious discrimination forbidden by the Equal Protection Clause." 379 U.S. at 192-93.

[18] 416 U.S. at 341-42.

[19] *Id.* 337, 343-44.

Justice Douglas was not insensitive to the problems faced by minority applicants. His opinion coupled a rejection of racial preference with a plea for an admissions policy under which objective factors such as grades and test scores would be tempered by subjective factors—motivation, perseverance and prior achievements of an applicant evaluted "in light of the barriers he had to overcome."[21] Expressing concern that the law school's program stigmatized those it purported to assist,[22] Justice Douglas sought to shift the focus of the selection process from race toward one in which the educationally, culturally and economically disadvantaged, no less than other applicants, are afforded an opportunity for admission commensurate with their ability and potential.

Justice Douglas' eloquent plea was not heeded. Instead, his *DeFunis* dissent became the last hurrah of a vision of equality that never was and may never be.

II. *BAKKE*—STRICT SCRUTINY DILUTED

The decision in *Regents of the University of California v. Bakke*[23] was handed down about three and one-half years after the Court's nondecision in *DeFunis*. By then, the movement toward permitting race-conscious remedies for past and present inequities experienced by minorities had developed a substantial body of law in the lower courts[24] and in decisions of the Supreme Court as well.[25] The *Bakke* decision did not provide a clear-cut resolution of the controversy over race-conscious affirmative action in university admissions. Instead, the six opinions in the case reflected the deep divisions within our society over this difficult issue.

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[20] *Id.* 343.

[21] *Id.* 331. Given the possibility of cultural bias in the standardized Law School Admission Test, Justice Douglas indicated that it would not be improper for the law school to set minority applications apart for separate processing "lest race be a subtle force in eliminating minority members because of cultural differences." *Id.* 335. The purpose of such treatment would be to permit a better probe of the "capabilities and potentials" of racial minorities, not to accord preferences to them. *Id.* 335-36.

[22] *Id.* 343.

[23] 438 U.S. 265 (1978).

[24] *See, e.g.*, EEOC v. Local 638, 565 F.2d 31 (2d Cir. 1977); NAACP v. Beecher, 504 F.2d 1017 (1st Cir.), *cert. denied,* 421 U.S. 910 (1974); Rios v. Steam Fitters Local 638, 501 F.2d 622 (2d Cir. 1974); Morrow v. Crisler, 491 F.2d 1053 (5th Cir.) (en banc), *cert. denied,* 419 U.S. 895 (1974); Associated Gen. Contractors of Mass., Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974); Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1974).

[25] For example, in Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), the Court approved relief in the form of retroactive seniority for "identifiable applicants who were denied employment because of race . . . ." *Id.* 750. In Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Court approved "differential validation" of employment tests under which "data must be generated and results separately reported for minority and nonminority groups wherever technically feasible." *Id.* 435. And in United Jewish Organizations of Williamsburgh v. Carey, 430 U.S. 144 (1977),

Bakke involved a special admissions program at the University of California at Davis Medical School under which 16 out of the 100 places in each entering class were reserved exclusively for minority applicants. The program was challenged both under the equal protection clause and under Title VI of the Civil Rights Act of 1964[26] which prohibits the exclusion of any person on the basis of race from an educational program receiving federal funding. Justice Stevens, joined by the Chief Justice and Justices Stewart and Rehnquist, considered the program a clear violation of Title VI.[27] They declined to discuss "whether race can ever be used as a factor in an admissions decision."[28] Justices Brennan, White, Marshall and Blackmun would have upheld the Davis Program even though there was no showing that the school had ever discriminated against minority applicants, because the program sought to remedy the effects of past "societal" discrimination.[29]

Given these irreconcilable positions, the *Bakke* decision was crafted by a single jurist, Justice Powell. He provided the decisive fifth vote for two separate majorities: one, declaring the Davis program unlawful and directing that Mr. Bakke be admitted; the other, holding that race could be considered to a limited extent in the admissions process. Justice Powell concluded that Title VI "must be held to proscribe only those racial classifications that would violate the Equal Protection Clause . . . ."[30] The Brennan four arrived at the same conclusion.[31] Unlike them, however, Justice Powell was unwilling, at least in name, to abandon the strict scrutiny standard in determining the constitutionality of "benign" racial classifications. In language reminiscent of the Douglas dissent in *DeFunis,* he wrote:

> The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.
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> . . . .

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it upheld a redistricting plan under the Voting Rights Act designed to create 65% nonwhite majorities in two voting districts.

[26] 42 U.S.C. §§ 2000d-2000d-6 (1976).

[27] 438 U.S. at 408.

[28] *Id.* 411.

[29] *Id.* 366.

[30] *Id.* 287.

[31] "We agree with Mr. Justice Powell that, as applied to the case before us, Title VI goes no further in prohibiting the use of race than the Equal Protection Clause . . . ." *Id.* 325.

> Petitioner urges us to adopt for the first time a more restrictive view of the Equal Protection Clause and hold that discrimination against members of the white "majority" cannot be suspect if its purpose can be characterized as "benign" . . . . It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others.[32]

To Justice Powell, it did not matter whether the Davis program was characterized as establishing a "goal" or "quota"[33] for minority applicants. He observed that the program necessarily limited the number of places for which white applicants could compete and concluded that the limitation was a legally impermissible "line drawn on the basis of race and ethnic status."[34] He attributed Mr. Bakke's rejection to "purposeful racial discrimination in the form of the special admissions program."[35]

On the broader issue of whether race could ever be a factor in the admissions process,[36] Justice Powell's equal protection analysis represents a radical departure from the past.[37] He held that "the attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education,"[38] and buttressed this conclusion with the observation that "[a]cademic freedom . . . long has been viewed as a special concern of the first amendment."[39]

In this context, Powell stated that race may be "one element—to be weighed fairly against other elements—in the selection process."[40] It

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[32] *Id.* 289-90, 294-95, (Powell, J.). See text at note 19 *supra*.

[33] *Id.* 289.

[34] *Id.*

[35] *Id.* 321 n.54.

[36] Justice Powell dealt with this broader issue because he viewed the judgment below as having enjoined not merely the special admissions program challenged in *Bakke* but also any consideration of an applicant's race. *Id.* 270.

[37] Not since Korematsu v. United States, 323 U.S. 214 (1944), had the Court upheld a govermental classification under the strict scrutiny standard. See text at note 169 *infra*. As Chief Justice Burger observed in his dissent in Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) (Burger, J., dissenting), "no state law has ever satisfied this seemingly insurmountable standard . . . ." Time and again after *Korematsu*, the Court struck down classifications for failure to meet the requisite showing of compelling interest. *See, e.g.*, Kramer v. Union Free School Dist., 395 U.S. 621 (1969) (exclusion of otherwise qualified voters from limited purpose election); Williams v. Rhodes, 393 U.S. 23 (1968) (restriction on third-party access to ballot); McLaughlin v. Florida, 379 U.S. 184 (1964) (criminal statute prohibiting cohabitation by interracial unmarried couples).

[38] 438 U.S. at 311-12. A similar objective was cited by President A. Lawrence Lowell of Harvard University as a basis for imposing quotas on the admission of Jewish students in the 1920's. H. Heomans, Abbot Lawrence Lowell 209 (1948). *See also* Lowell, *Jews Facing a Closing College Door*, Literary Dig. July 8, 1922, at 28; Dershowitz & Hanst, *Affirmative Action and The Harvard College Diversity-Discretion Model Paradigm or Pretext*? 1 Cardozo L. Rev. 379, 386-99 (1979).

[39] 438 U.S. at 312.

[40] *Id.* 318.

"may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats."[41] Each applicant is entitled to "individualized consideration."[42] Indeed, Justice Powell described the denial to Mr. Bakke of "this right to individualized consideration without regard to his race" as "the principal evil" of the Davis program.[43]

A university with an apparently nondiscriminatory admissions policy will be presumed to be acting in good faith.[44] Justice Powell made clear, however, that this presumption will not protect a university operating that policy "as a cover for the functional equivalent of a quota system."[45]

Justice Powell's rejection of racial set-asides,[46] coupled with his approval of a limited consideration of race in achieving a diverse student body, was a clever formula for providing educational opportunities for minority group members without facially denying equal opportunity to others.[47] This approach did not explicitly recognize a special entitlement in any group and, by its nature, was arguably limited to education. Nevertheless, it came at the price of diluting the strict scrutiny standard, a price that could prove expensive indeed in weakening constitutional guarantees against racial discrimination.[48] Furthermore, while the Brennan four urged the acceptance of racial criteria as a temporary remedial device,[49] the Powell approach could be construed as a permanent authorization to consider race in the admissions process.

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[41] *Id.* 317.

[42] *Id.* 318 n.52.

[43] *Id.*

[44] *Id.* 318-19.

[45] *Id.* 318.

[46] *Id.* 315-16. It is noteworthy that the Davis program was not well regarded by educators, who felt that better means were available to achieve increased minority enrollment in higher education. For example, in an article about the *Bakke* decision, McGeorge Bundy, then president of the Ford Foundation wrote: "[T]he Davis Program was a clear set-aside for racial minorities, and such racially segregated admissions processes will not be widely mourned. Other and better ways of making room for minorities can surely be found." Bundy, *Beyond Bakke What Future For Affirmative Action?* ATLANTIC MONTHLY 69, 70 (Nov. 1978). Earlier, Martin Meyerson the president of the University of Pennsylvania described the Davis program as "rigid and stupid." He stated, "I think what Davis should have done was strive to get 16 very able minority students, recognizing the fact that in some years they may have 20 and in some years they may have 12." N.Y. Times, Nov. 9, 1977, § D (Legal), at 19, col. 4. *See also* Report by Winton H. Manning, in *The Pursuit of Fairness in Admissions to Higher Education,* SELECTIVE ADMISSIONS IN HIGHER EDUCATION, 19, 58 (1st ed. 1977).

[47] That this formulation appeared fair is illustrated by a poll of 600 American Bar Association members. Respondents, "by a margin of nearly four to one," were "generally pleased with the Court's ruling." 64 A.B.A. J. 1348 (1978).

[48] Johnson v. Board of Educ., 604 F.2d 504 (7th Cir. 1978), *vacated and remanded,* 101 S. Ct. 339 (1980), suggests that the burden of permissiveness in racial classifications may not fall solely on whites. See note 5 *supra.*

[49] Justice Powell characterized the Harvard College Admissions Program as taking "race into account in achieving . . . educational diversity" without "the assignment of a fixed number of places to a minority group . . . ." 438 U.S. at 316, 321-24. The opinion of the Brennan four agreed that the Harvard program "is constitutional

Finally, achieving a diverse student body was not the only justification for racial preference envisioned by Justice Powell.[50] In language foreshadowing his position in *Fullilove*,[51] he recognized Congress' special competence to make findings concerning "the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures."[52] Moreover, Justice Powell's sanction of racial preference to remedy "the effects of identified past discrimination" was not limited to appropriate findings by Congress or the courts.[53] In his view, such findings could be made by any "legislative or administrative body" charged with the responsibility of making "determinations of past discrimination . . . ."[54]

The approach of the Brennan four was candid and direct. For them,

> Davis' articulated purpose of remedying the effects of past societal discrimination [was] . . . sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic and that the handicap of past discrimination is impeding access of minorities to the medical school.[55]

Since, in their view, "whites as a class" do not have any of the "tradi-

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. . . at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination." *Id.* 326 n.1.

[50] Although Justice Powell rejected the medical school's contention that its program was needed to improve "the delivery of health care services to communities currently underserved," his opinion could be read as suggesting that, on a proper demonstration of compelling need, it might be lawful to prefer members of particular groups "in order to promote better health care delivery to deprived citizens." *Id.* 310, 311.

[51] See text at notes 114-22 *infra*.

[52] 438 U.S. at 302 n.41. Justice Powell noted: "This case does not call into question congressionally authorized administrative actions such as consent decrees under Title VII . . . ." *Id.* A week after *Bakke* was decided, the Court declined to review a consent decree between American Telephone and Telegraph Company and the Equal Employment Opportunity Commission under which the company agreed to implement an affirmative action program designed to overcome the effects of past discrimination with respect to minorities and women. Among other things, the program accorded minority group members a preference in promotions where necessary to achieve or maintain intermediate targets for minority representation set by the company in each of fifteen job classifications. EEOC v. American Tele. & Tele. Co., 556 F.2d 167, 170-72 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

[53] 438 U.S. at 301.

[54] *Id.* 301.

[55] *Id.* 362.

tional indicia of suspectness" to invoke the strict scrutiny standard,[56] they measured the Davis program by a lesser constitutional standard, one under which "racial classifications designed to further remedial purposes must serve important governmental objectives and must be substantially related to the achievement of those objectives."[57]

The debate in *Bakke* over the appropriate equal protection standard by which to judge race-conscious affirmative action programs proved inconclusive. Neither the Powell view nor that of the Brennan four captured a majority of the Court. Four Justices abstained from the debate altogether. For good measure, Justice White, one of the Brennan four, also joined in Part IIIA of the Powell opinion,[58] which contains the essence of Justice Powell's position that equal protection guarantees apply to individuals without regard to race and that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."[59] In *Fullilove*, Justice White joined in the opinion of the Chief Justice upholding the race-conscious program at issue, without articulating a clear equal protection standard.[60]

III. *WEBER*—STATUTORY INTERPRETATION: A MATTER OF SPIRIT

In *United Steelworkers of America v. Weber*,[61] the controversy over race-conscious affirmative action shifted from university admissions to employment in the private sector and from constitutional analysis to statutory interpretation. At issue in *Weber* was an on-the-job training program in which unskilled workers were trained to fill skilled craft openings. The collective bargaining agreement between Kaiser Aluminum and the United Steelworkers union provided that at least 50% of all openings in the program would go to black workers who comprised 39% of the work force in the surrounding area but less than 2% of the skilled workers at Kaiser's Gramercy, Louisiana plant.[62] This arrangement was to remain in effect until the percentage of black skilled craft workers at the plant approximated the percentage of blacks in the local work force.[63] Brian Weber, a white worker at the Gramercy plant, whose bid for admission to the program was rejected, initiated a class action suit challenging the program under Title VII of the Civil Rights Act of 1964.[64]

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[56] *Id.* 357, *quoting* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

[57] *Id.* 359.

[58] *Id.* 387 n.7. Justice White also joined in Part V-C of Justice Powell's opinion in which he ruled that ". . . so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed." *Id.* 320.

[59] *Id.* 291.

[60] 100 S. Ct. at 2772-75. See text at notes 99-107 *infra*.

[61] 443 U.S. 193 (1979).

[62] *Id.* 197-99.

[63] *Id.* 199.

Justice Brennan, writing for a 5-2 majority, upheld the program. Although there was no showing that the racial imbalance among skilled workers at the plant resulted from any discrimination by the employer,[65] he observed that "[j]udicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice."[66] Stressing the narrowness of the Court's inquiry,[67] and declining to "define in detail the line of demarcation between permissible and impermissible affirmative action plans,"[68] Justice Brennan held that the challenged program "falls within the area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories."[69] In so ruling, he emphasized that this particular program did not:

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[64] 42 U.S.C. § 2000e-17 (1976). In McDonald v. Santa Fe Trail Transp. Co., 427 U.S 273 (1976), the Court held that Title VII protects whites as well as racial minorities from discrimination on the basis of race. Justice Marshall, writing for the Court, stated:

> Title VII of the Civil Rights Act of 1964 prohibits the discharge of "any individual" because of "such individual's race," . . . . Its terms are not limited to discrimination against members of any particular race . . . . This conclusion is in accord with uncontradicted legislative history to the effect that Title VII was intended to "cover white men and white women and all Americans". . . .

427 U.S. at 278-80 (citations omitted).

The discrimination in *McDonald* did not arise in the context of an affirmative action program, however, and the Court in a footnote expressly declined to consider "the permissibility of such a program, whether judicially required or otherwise prompted." *Id.* 280-81 n.8.

In Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), Justice Rehnquist, writing for the Court, stated: "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." 438 U.S. at 579 (emphasis in original).

[65] 563 F.2d 216, 224 (5th Cir. 1977).

[66] 443 U.S. at 198 n.1.

[67] *Id.* 200.

[68] *Id.* 208.

[69] *Id.* 209 (footnote omitted). Justice Brennan did not define the term "traditionally segregated job categories." Justice Blackmun, however, explained in his concurring opinion:

> The sources cited suggest that the Court considers a job category to be "traditionally segregated" when there has been a societal history of purposeful exclusion of blacks from the job category, resulting in a persistent disparity between the proportion of blacks in the labor force and the proportion of blacks among those who hold jobs within the category.

Id. 212 (Blackmun, J., concurring) (footnote omitted).

> [U]nnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hirees. . . . Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance.[70]

Faced with the language of Sections 703(a) and (d) of Title VII making it unlawful to discriminate against any individual because of race when hiring and selecting apprentices for training programs,[71] Justice Brennan looked not to "the letter of the statute" but rather to its "spirit."[72]

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long," . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.[73]

Justice Blackmun, in a separate concurring opinion, expressed some misgivings about the extent to which Title VII's legislative history supported the Court's result.[74] He advocated the approach suggested by Judge Wisdom dissenting from the Fifth Circuit's decision,[75] under which race-conscious affirmative action could be justified by an employer's assessment that it is necessary to cure an "arguable violation" of Title VII.

> Traditionally segregated job categories, where they exist, sweep far more broadly than the class of "arguable violations" of Title VII. The Court's expansive approach is somewhat

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[70] *Id.* 208.

[71] *Id.* 201.

[72] *Id.* On the other hand, in disposing of Section 703(j) which provides, among other things, that nothing contained in Title VII "shall be interpreted to require any employer . . . to grant preferential treatment . . . to any group" because of a racial imbalance in the employer's work force, Justice Brennan looked to the strict letter of that provision. "Had Congress meant to prohibit all race-concious affirmative action, as respondent urges, it easily could have . . . by providing that Title VII would not require or *permit* racially preferential integration efforts. But Congress did not choose such a course." *Id.* 205 (emphasis in original).

[73] *Id.* 204 (citation omitted).

[74] *Id.* 209 (Blackmun, J., concurring).

[75] Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 230 (5th Cir. 1977) (Wisdom, J., dissenting opinion), *rev'd sub nom.*, United Steelworkers of America v. Weber, 443 U.S. 193 (1979).

> disturbing for me because . . . the Congress that passed Title VII probably thought it was adopting a principle of nondiscrimination that would apply to blacks and whites alike. While setting aside that principle can be justified where necessary to advance statutory policy by encouraging reasonable responses as a form of voluntary compliance that mitigates "arguable violations," discarding the principle of nondiscrimination where no countervailing statutory policy exists appears to be at odds with the bargain struck when Title VII was enacted.[76]

Nevertheless, Justice Blackmun concluded that "[s]trong considerations of equity support an interpretation of Title VII that would permit private affirmative action to reach where Title VII itself does not."[77] He revealed the heart of the moral dilemma posed by the *Weber* case in his observation that "[i]t seems unfair for respondent Weber to argue, as he does, that the asserted scarcity of black craftsmen in Louisiana, the product of historic discrimination, makes Kaiser's training program illegal because it ostensibly absolves Kaiser of all Title VII liability."[78]

The Chief Justice dissented, describing the Court's judgment as "contrary to the explicit language of the statute."[79] In a separate dissenting opinion in which the Chief Justice also joined, Justice Rehnquist painstakingly set forth the legislative history of Title VII concluding that "close examination of what the Court proffers as the spirit of the Act reveals it as the spirit animating the present majority, not the 88th Congress."[80]

The *Weber* case was a victory for race-conscious affirmative action, but the extent of that victory is unclear. Justice Brennan's opinion in *Weber* is the only one in the affirmative action trilogy to have captured a majority of the Court. Perhaps this was possible precisely because the opinion stressed its limited nature and refrained from giving detailed guidance as to the circumstances in which race-conscious affirmative action would be appropriate. Even so, Justice Blackmun expressed misgivings over what he regarded as the opinion's "expansive approach."[81] Two Justices dissented, and two others—Justices Powell and Stevens—did not participate. Furthermore, the Court did not address the propriety or enforcement of Executive Order 11246 and the regulations issued pursuant thereto which played no small part in bringing about the "voluntary" affirmative action program challenged in *Weber*.[82] Finally, although the *Weber* decision dealt with race-conscious affirmative action in "the private sector,"[83] since 1972, Title VII has been applicable to government employers.[84] It is not clear what result the Court will reach in reviewing *Minnick v. California Department of Corrections*,[85] in which the California Court of Appeals held *Weber* applicable to public employment.[86]

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[76] 443 U.S. at 212-13 (Blackmun, J., concurring).
[77] *Id.* 214.
[78] *Id.* 214-15.
[79] *Id.* 216 (Burger, C.J., dissenting).
[80] *Id.* 254 (Rehnquist, J., dissenting).
[81] *Id.* 212 (Blackmun, J., concurring).

All of this brings to mind Justice Rehnquist's insightful, if somewhat perjorative comment: "[T]he Court has sown the wind. Later courts will face the impossible task of reaping the whirlwind."[87]

IV. *FULLILOVE*: THE COURT DEFERS TO CONGRESS

Of the three cases in which race-conscious affirmative action has been approved, *Fullilove v. Klutznick*,[88] was both the most predictable and troubling. The result was predictable because it allied those Justices who favor racial classifications for remedial purposes with those who would show great deference to congressional authority, particularly in the civil rights area.[89] The decision is troubling because of the perfunctory and uncritical manner in which Congress passed and the Court sustained what Justice Stevens described as the nation's "first . . . broad legislative classification for entitlement to benefits based solely on racial characteristics."[90]

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[82] Kaiser and the union argued on appeal that if the challenged program was not sanctioned by Title VII, it was sanctioned by Executive Order 11246 and the regulations issued by the Office of Federal Contract Compliance (OFCC) mandating affirmative action by government contractors. The Fifth Circuit noted the district court's findings that the "1974 collective bargaining agreement reflected less of a desire on Kaiser's part to train black craft workers than a self-interest in satisfying the OFCC in order to retain lucrative government contracts." 563 F.2d at 226. However, having concluded that the program was barred by Title VII, it ruled that if Executive Order 11246 "mandates a racial quota for admission to on-the-job training by Kaiser, *in the absence of any prior hiring or promotion discrimination*, the executive order must fall before this direct congressional prohibition." *Id.* 227 (emphasis in original). Since it reached a contrary conclusion with respect to Title VII, the Supreme Court found it unnecessary to "consider petitioners' contention that their affirmative action plan represented an attempt to comply with [Executive Order 11246]." 443 U.S. at 209 n.9.

In McLaughlin v. Great Lakes Dredge & Dock Co., 495 F. Supp. 857 (N.D. Ohio 1980), the court held that an affirmative action plan adopted in order to comply with Executive Order 11246 was "adopted voluntarily" within the meaning of *Weber*. *Id.* 861.

[83] 443 U.S. at 197.

[84] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(1), 86 Stat. 103 (amending 42 U.S.C. § 2000e (1970)), enlarged the definition of the term "person" to include governments, governmental agencies, and political subdivisions. For a discussion of the 1972 amendments to Title VII and the legislative setting for this enactment, see Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 Geo. Wash. L. Rev. 824 (1972).

[85] 95 Cal. App. 3d 506, 157 Cal. Rptr. 260 (1979), *cert. granted*, 100 S. Ct. 3055 (1980). See note 5 *supra*.

[86] 95 Cal. App. 3d at 523-24, 157 Cal. Rptr. at 270. The *Minnick* case presents both statutory and constitutional issues. While the Brief for Petitioners focuses on the latter, a decision by the Court that the challenged plan violates Title VII would avoid the necessity for a constitutional adjudication. *See* Ashwander v. T.V.A., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring opinion).

[87] 443 U.S. at 255 (Rehnquist, J., dissenting). For a critique of the *Weber* decision, see Meltzer, *The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. Chi. L. Rev. 423 (1980).

[88] 100 S. Ct. 2758 (1980).

Fullilove involved a fifth amendment challenge[91] to a provision of the 1977 Public Works Employment Act[92] requiring that, in the absence of an administrative waiver, at least ten percent of any grant for local public works projects "shall be expended for minority business enterprises."[93] The Act defined minorities as "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."[94] The provision was enacted without any explicit findings of past discrimination.[95] There was no testimony or other inquiry at a legislative hearing[96] and the committee reports did not even mention the amendment on which the provision is based.[97] Nevertheless, the Court upheld the legislation by a 6-3 majority.

All of the Justices comprising the majority concluded that the set-aside provision was enacted to remedy the effects of past racial discrimination.[98] Unable to agree on a single legal approach, they wrote three separate opinions. The opinion of the Chief Justice, joined by Justices White and Powell, emphasized the limited and temporary nature of the program,[99] its administrative waiver process,[100] and the

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[89] See text at note 52 *supra*.

[90] 100 S. Ct. at 2811-12 (Stevens, J., dissenting).

[91] An equal protection component of the fifth amendment's due process clause appears not to have been explicitly articulated until Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954). Although the concept is now well settled, the extent to which notions of equal protection under the fourteenth amendment are subsumed in the due process clause of the fifth amendment has been a subject of dispute. Compare Justice Brennan's views in Weinberger v. Wiesenfeld, 420 U.S. 636, 638 (1975) with those of Justice Stevens in Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976).

[92] 42 U.S.C. §§ 6701-6710 (Supp. II 1978).

[93] 42 U.S.C. § 6705(f)(2) (Supp. II 1978).

[94] *Id.* Substantially the same racial and ethnic groups were included in the already existing program under § 8(a) of the Small Business Act of 1958, 15 U.S.C. § 637 (1976), to assist small business concerns owned and controlled by "'socially or economically disadvantaged' persons." 100 S. Ct. 2767 (Burger, C.J.). Under the § 8(a) program, however, participation was not *limited* to those groups. *Id.* Substantially the same groups were also "classified as minorities in the regulations implementing the nondiscrimination requirements of the Railroad Revitalization and Regulatory Reform Act of 1976" on which, according to the Chief Justice, "Congress relied as precedent." *Id.* 2779 n.73.

[95] *See* Fullilove v. Kreps, 584 F.2d 600, 605 (2d Cir. 1978), *aff'd sub nom.*, Fullilove v. Klutznick, 100 S. Ct. 2758 (1980).

[96] 100 S. Ct. at 2811-12 (Stevens, J., dissenting).

[97] *See* 584 F.2d at 605.

[98] 100 S. Ct. at 2775, 2787-88, 2795.

[99] *Id.* 2781 (Burger, C.J.).

[100] *Id.* 2776, 2780.

"deference" due Congress in view of its broad remedial powers.[101] As the Chief Justice put it: "It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees."[102]

The opinion rejected "the contention that in the remedial context the Congress must act in a wholly 'color blind' fashion."[103] Instead of traditional equal protection analysis, it spoke of the program's racial and ethnic criteria as calling for "close examination" with "appropriate deference to the Congress."[104] Later, addressing the equal protection component of the fifth amendment, the Chief Justice stated: "We recognize that need for careful judicial evaluation to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal."[105] Still later, he stated "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees."[106] Given this confusing array of potential standards, perhaps the most significant aspect of the Chief Justice's opinion for future cases is the suggestion that deference to Congress, even in a remedial context, is not inexhaustable.[107]

Justice Powell wrote a separate concurring opinion[108] applying his version of equal protection analysis as set forth in *Bakke*.[109] He began with the proposition that "[r]acial classifications must be assessed under the most stringent level of review . . . ."[110] He asserted that such classifications "are fundamentally at odds with the ideals of a democratic society implicit in the Due Process and Equal Protection Clauses, [and] cannot be imposed simply to serve transient social or political goals, however worthy they may be."[111]

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[101] *Id.* 2773.

[102] *Id.* 2777.

[103] *Id.* 2776-77. In his effort to find apposite authority to support the challenged provision, the Chief Justice suggested that there are "relevant similarities" between it "and the federal spending program reviewed in Lau v. Nichols, 414 U.S. 593 (1974)." 100 S. Ct. at 2775. In *Bakke*, however, the opinion of the Brennan four expressed "serious doubts" as to whether *Lau*, a case involving Title VI of the Civil Rights Acts of 1964, had been correctly analyzed. 438 U.S. at 352.

[104] 100 S. Ct. at 2771-72.

[105] *Id.* 2776. Imputing to the sponsors of the challenged provision reliance on "prior administrative practice" under the Small Business Administration's § 8(a) program, *id.* 2765, and citing the reference by one of the provision's supporters to contractors who are "minority and deprived," *id.* 2771, the Chief Justice characterized the administrative program under the challenged provision as effectuating "the congressional objective of assuring legitimate participation by disadvantaged [minority business enterprises]." *Id.* 2779. Accordingly, he rejected a claim that the program on its face was overinclusive. *Id.* 2779-80. Neither the language of the provision, nor its guidelines, however, limit participation to "disadvantaged" minority contractors.

[106] *Id.* 2781.

[107] Although the Chief Justice endorsed the right of Congress "to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives," he tempered the endorsement, noting the existence of limitations on congressional power. "That the program may press the outer limits of congressional authority affords no basis for striking it down." *Id.*

[108] 100 S. Ct. at 2783-94 (Powell, J., concurring).

[109] See text at notes 32-54 *supra*.

For Justice Powell, the distinction between "permissible remedial action" and "impermissible racial preference" turns on "the existence of a constitutional or statutory violation" as found by "an appropriate governmental authority."[112] Furthermore, "[t]he degree of specificity required in the findings of discrimination . . . may vary with the nature and authority of a governmental body."[113] Accordingly, he asserted that in reviewing the constitutionality of the challenged provision:

> [W]e must decide: (i) whether Congress is competent to make findings of unlawful discrimination; (ii) if so, whether sufficient findings have been made to establish that unlawful discrimination has affected adversely minority business enterprises, and (iii) whether the 10% set-aside is a permissible means for redressing identifiable past discrimination.[114]

Justice Powell answered each of these questions in the affirmative. In answering (i), he referred to "the unique constitutional power" given Congress "of legislating to enforce the provisions of the Thirteenth, Fourteenth and Fifteenth Amendments."[115] Responding to (ii), he stated "the legislative history . . . demonstrates that Congress reasonably concluded that private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors."[116] Yet, tacitly recognizing the paucity of that legislative history—and noting the need for support—Justice Powell urged Congress not to "be content with findings that merely meet constitutional standards."[117]

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[110] 100 S. Ct. at 2784 (Powell, J., concurring).

[111] *Id.* 2794.

[112] *Id.* 2785. Justice Powell rejected the suggestion of the court of appeals that the challenged provision "must be viewed as serving a compelling state interest if the reviewing court can 'perceive a basis' for legislative action," stating: "[s]uch a test might allow a court to justify legislative action even in the absence of affirmative evidence of congressional findings." *Id.* 2788 n.4. Interestingly, Justice Powell seems to have approved "the percentage chosen for the set-aside" as being "within the scope of congressional discretion" because he was able to perceive a reasonable basis for that percentage. See note 120 *infra*.

[113] 100 S. Ct. at 2794 n.14 (Powell, J., concurring).

[114] *Id.* 2785.

[115] *Id.* 2786.

[116] *Id.* 2787-88. Elsewhere, Justice Powell noted: "Congress knew that minority contractors were receiving only 1% of federal contracts at the time the set-aside was enacted." *Id.* 2793. In his view, the Court was not confined to an examination of the legislative history of the challenged provision alone. "Rather, we may properly examine the total contemporary record of congressional action dealing with the problems of racial discrimination against minority business enterprises." *Id.* 2787.

In answering (iii), Justice Powell spoke of the "special responsibility" of the courts "to make a searching inquiry into the justification for employing a race-conscious remedy" and their need to "be sensitive to the possibility that less intrusive means might serve the compelling state interest equally as well."[118] Nevertheless, noting the emphasis placed upon "the importance of Congressional action to effectuate the goals of the Fourteenth Amendment,"[119] he concluded that it was sufficient to sustain "Congress' choice of a remedy . . . if the means selected are equitable and reasonably necessary to the redress of identified discrimination."[120] Justice Powell explicitly related his more permissive "means" test to congressional legislation.[121] Even in this limited context, however, he appears to have espoused strict scrutiny in form while dismantling it in substance.[122]

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117. *Id.* 2789 n.8. Justice Powell stated:

> Race-conscious remedies, popularly referred to as affirmative action programs, almost invariably affect some innocent persons . . . . Respect and support for the law, especially in an area as sensitive as this, depend in large measure upon the public's perception of fairness. . . . It therefore is important that the legislative record supporting race-conscious remedies contain evidence that satisfies fair minded people that the congressional action is just.

Id.

118. *Id.* 2791. To the same effect, see Dunn v. Blumstein, 405 U.S. 330, 334 (1972).

119. 100 S. Ct. at 2790 (Powell, J., concurring). Asserting that the federal courts have not been "limited to the least restrictive means" in their choice of remedies to redress racial discrimination, Justice Powell reasoned that "the enforcement clauses of the Thirteenth and Fourteenth Amendments give Congress a similar measure of discretion to choose a suitable remedy for the redress of racial discrimination." *Id.*

120. *Id.* 2791. Since nothing in the language of the challenged provision or its legislative history gives any indication as to how the set-aside percentage was determined, Justice Powell's analysis on this subject consisted of adding the percentage of minority contractors (4%) to the percentage of minority group members in the "national population" (17%) and dividing by two. *Id.* 2793. On the basis of these calculations, he concluded that "[t]he percentage chosen for the set-aside is within the scope of congressional discretion." *Id.*

121. Justice Powell cautioned: "My view that this set-aside is within the discretion of Congress does not imply . . . that use of a set-aside will always be an appropriate remedy or that the selection of a set-aside by any other governmental body would be constitutional." He added "[T]he breadth of discretion in the choice of remedies may vary with the nature and authority of a governing body." *Id.* 2797 n.14.

One federal court has not considered itself bound by the *Fullilove* decision in the context of a federal agency regulation requiring set-asides on the basis of race and sex in awarding contracts on state highway projects. Central Alabama Paving, Inc. v. James, Civ. Action 80-358-N. (D.C.M.D. Ala. Oct. 10, 1980).

122. Interestingly, in *Bakke*, Justice Powell wrote:

> Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, . . . but the standard of justification will remain constant. This is as it should be, since those political judg-

Justice Marshall, in a brief opinion,[123] joined by Justices Brennan and Blackmun, applied the intermediate standard of scrutiny suggested by the Brennan four in *Bakke*.[124] "The proper inquiry is whether racial classifications designed to further remedial purposes serve important governmental objectives and are substantially related to achievement of those objectives."[125] Based on this standard, he found that "the 10% minority set-aside provision . . . is plainly constitutional."[126] Contrary to the view of the Chief Justice,[127] Justice Marshall declared that "the question is not even a close one."[128]

Justice Stewart, in a dissenting opinion joined by Justice Rehnquist,[129] wrote: "Under our Constitution, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid."[130] Analogizing congressional legislation to a judicial decree, he asserted that where either "imposes burdens on the basis of race [it] can be upheld only where its *sole* purpose is to eradicate the actual effects of illegal race discrimination."[131] Finding that the challenged provision was enacted, at least in part, "to assure to minority contractors a certain percentage of federally funded public works contracts,"[132] and "to compensate for the effects of social, educational, and economic 'disadvantage,'"[133] Justice Stewart concluded that "it cannot stand as a remedy that comports with strictures of equal protection."[134]

Turning to what he termed the "ramifications" of the Court's decision, Justice Stewart argued that the laws would again contain odious

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> ments are the product of rough compromise struck by contending groups within the democratic process. When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis *is precisely tailored* to serve a compelling governmental interest.

438 U.S. at 299 (emphasis added) (footnotes omitted).

[123] 100 S. Ct. at 2795 (Marshall, J., concurring).

[124] See text at note 57 *supra*.

[125] 100 S. Ct. at 2796 (Marshall, J., concurring).

[126] *Id.* In *Bakke*, the question of whether the challenged set-aside amounted to a quota was sharply disputed. Justice Marshall in his *Fullilove* opinion, however, had no difficulty characterizing the set-aside at issue as "creat[ing] a quota" though not one "in the invidious sense of a ceiling." *Id.* 2797.

[127] See note 107 *supra*.

[128] 100 S. Ct. at 2796 (Marshall, J., concurring).

[129] *Id* 2798 (Stewart, J., dissenting).

[130] *Id.*

[131] *Id.* 2801 (emphasis added).

[132] *Id.*

[133] *Id.* Justice Stewart observed that "[n]o race . . . has a monopoly on . . . disadvantage." By way of example, he pointed out that "in 1978, 83.4% of persons over the age of 25 who had not completed high school were 'white,' . . . and in 1977, 79.0% of households with annual incomes of less than $5,000 were 'white.'" *Id.* 2801 n.11.

[134] *Id.* 2802.

definitions of race,[135] that preferential programs would reinforce common stereotypes depicting certain people as unable to achieve success without special protection,[136] and that notions of "racial entitlement" would be fostered and private discrimination would necessarily be encouraged.[137]

Justice Stevens, writing a separate dissenting opinion,[138] stated that he was not convinced that the equal protection clause contains an "absolute prohibition against any statutory classification based on race."[139] Instead, his concern was that "the reasons for any such classification [would] be clearly identified and unquestionably legitimate."[140] Moreover, there must be "the most exact connection between justification and classification."[141] Referring to the six preferred subclasses, Justice Stevens stated: "There is not one word in the remainder of the Act or in the legislative history that explains why any Congressman or Senator favored the particular definition over any other or that identifies the common characteristics that every member of the preferred class was believed to share."[142]

Justice Stevens emphasized the shortcomings of the challenged legislation by contrasting it with the Voting Rights Act.[143] He pointed out that the latter was "preceded by exhaustive hearings and debates . . . and became effective in specific States only after specific findings were made. . . ."[144] It remedied the problem of denying access to the electoral process by prohibiting specific practices and preventing "the erection of new barriers."[145] By contrast, the minority set-aside provision "was not the subject of any testimony or inquiry in any legislative hearing on the bill that was enacted."[146] Moreover, it "authorize[d] an automatic nationwide preference for all members of a diverse racial class . . . ."[147] To Justice Stevens, the difference was not merely one of "legislative craftsmanship but a difference of constitutional significance."[148]

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[135] *Id.* 2802 (Stewart, J., dissenting). The guidelines included as an appendix to the opinion of the Chief Justice avoid odious definitions of race. As Justice Stevens suggested in his opinion, however, the guidelines "are too vague to be useful." *Id.* 2804 n.5 (Stevens, J., dissenting).

An article in the New York Times discussing the challenged provision suggested that "[s]o far . . . enforcement has been fraught with nagging problems, not the least of which is the determination of who, precisely, is a member of a minority group." N.Y. Times, Nov. 13, 1977, § A, at 1, col. 1, at 66, col. 2. Walter G. Farr, Jr., the general counsel of the Economic Development Administration, the branch of the Commerce Department in charge of the public works program, was quoted as saying "[w]hatever a person is considered by his community, that's what we're basing our judgment on." *Id.*

[136] 100 S. Ct. at 2802 (Stewart, J., dissenting). Justice Stevens was also concerned that the challenged provision would reinforce negative stereotyping. *See id.* 2809 (Stevens, J., dissenting).

[137] *Id.* 2803 (Stewart, J., dissenting). An empirical study reported in a recent article indicated that some of Justice Stewart's concerns are borne out in the workplace. *Diagnosing Race Relations in Management*, 16 J. APPLIED BEHAVIORAL SCI. 135 (1980).

[138] 100 S. Ct. at 2803 (Stevens, J., dissenting).

[139] *Id.* 2811.

[140] *Id.* 2804.

[141] *Id.* 2805.

[142] *Id.* 2804. He went on to observe, "[q]uite obviously the history of discrimination against black citizens in America cannot justify a grant of privileges to Eskimos or Indians." *Id* 2805.

[143] 42 U.S.C. §§ 1971-1974e (1976).

[144] 100 S. Ct. at 2810 (Stevens, J., dissenting).

Urging that, in a strict scrutiny context, "judicial review should include a consideration of the procedural character of the decisionmaking process,"[149] Justice Stevens concluded that the challenged provision "cannot fairly be characterized as a 'narrowly tailored' racial classification because it simply raises too many serious questions that Congress failed to answer or even to address in a responsible way."[150]

In *Fullilove*, the sharp differences that surfaced in the *Bakke* case over how to analyze the constitutionality of "benign" racial classification became more evident. In these cases, read together, the strict scrutiny standard was altered, both in terms of permissible ends and means, with no discernable consensus as to a coherent policy for future cases.

V. LESSONS OF THE PAST

In no other area of the law does the Court function in the shadow of past errors as it does in dealing with governmental action involving racial classifications. As Justice Powell expressed it in *Fullilove*: "In the history of this Court and this country, few questions have been more divisive than those arising from governmental action taken on the basis of race. Indeed, our own decisions played no small part in the tragic legacy of government-sanctioned discrimination."[151] As the Court enters a new era of permissiveness for what it regards as "benign" racial classifications, it is appropriate to consider earlier, less altruistic examples of such permissiveness to determine what lessons they may teach for the future.

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[145] *Id.*

[146] *Id.* 2812.

[147] *Id.* 2810. Continuing his comparison of the approach used in the challenged provision with that employed under the Voting Rights Act, Justice Stevens stated:

> A comparable approach in the electoral context would support a rule requiring that at least 10% of the candidates elected to the legislature be members of specified racial minorities. Surely that would be an effective way of ensuring black citizens the representation that has long been their due. Quite obviously, however, such a measure would merely create the kind of inequality that an impartial sovereign cannot tolerate. Yet that is precisely the kind of "remedy" that this Act authorizes.

Id. 2810.

[148] *Id.* 2810.

[149] *Id.* 2812.

[150] *Id.* 2813.

[151] *Id.* 2794 (Powell, J., concurring).

Plessy v. Ferguson[152] involved a constitutional challenge of legislation enacted by the State of Louisiana requiring, under penalty of fine and imprisonment, separate railway carriages for the white and black races.[153] Plessy, described as being "seven eighths Caucasian and one eighth African blood,"[154] was charged with violating the Act.[155] The Court upheld the statute with a sole dissent by Justice John Marshall Harlan.[156] Speaking of the fourteenth amendment, Justice Henry Billings Brown, who delivered the opinion of the Court, drew a distinction between social and political equality: "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality . . . ."[157] Justice Brown applied a reasonableness standard to determine the validity of the legislation. Allowing the legislature a "necessarily . . . large discretion,"[158] and citing "the acts of Congress requiring separate schools for colored children in the District of Columbia,"[159] he concluded that the "[Court] cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable. . . ."[160] Justice Brown rejected the argument pressed by Justice Harlan,[161] that the same reasoning would justify legislation "requiring colored people to walk upon one side of the street, and white people upon the other,"[162] stating: "The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class."[163]

For Justice Harlan, the challenged statute constituted a constitutionally impermissible regulation of "the use of a public highway by citizens . . . solely on the basis of race."[164] He characterized the Act as seeking, "under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while travelling in railroad passenger coaches,"[165] and suggested that "[n]o one would be so wanting in candor as to assert the contrary."[166] Expressing a view of the Civil War amendments that was ahead of his time, and ours as well, he wrote: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens . . . . The law regards man as man, and takes no account of his . . . color when his civil rights as guaranteed by the supreme law of the land are involved."[167]

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[152] 163 U.S. 537 (1896).
[153] *Id.* 541.
[154] *Id.*
[155] *Id.* 542.
[156] *Id.* 552 (Harlan, J., dissenting).
[157] *Id.* 544 (Brown, J., majority opinion).
[158] *Id.* 550.
[159] *Id.* 551.
[160] *Id.* 550-51.
[161] *Id.* 557 (Harlan, J., dissenting).
[162] *Id.* 549 (Brown, J., majority opinion).
[163] *Id.* 550.
[164] *Id.* 553 (Harlan, J., dissenting).

Justice Harlan's views were rejected and the Court remained "wanting in candor" for over a half century as the now infamous "separate but equal" doctrine left black people defenseless against a vertiable deluge of discriminatory legislation by the states.[168]

In *Korematsu v. United States,*[169] an American citizen of Japanese descent was convicted of remaining in a "military area" contrary to a civilian exclusion order issued in 1942 pursuant to an act of Congress.[170] The order directed that all persons of Japanese ancestry be excluded from the area. Previously, in *Hirabayashi v. United States,*[171] the Court had sustained a conviction for violation of a curfew order issued under the same act. It upheld the conviction in *Korematsu* with three Justices dissenting in three separate opinions.[172]

Justice Black, delivering the opinion of the Court, began with what appears to be the first elaboration of the strict scrutiny standard.[173] "It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."[174] Recognizing that exclusion from the location of one's home is a far greater deprivation than a curfew, he observed that "[n]othing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either."[175] Based on *Hirabayashi*, the Court was unable to conclude that the exclusion of those of Japanese ancestry from the West Coast war area at that particular time was beyond the war power of Congress and the Executive.[176]

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[165] *Id.* 557.

[166] *Id.*

[167] *Id.* 559.

[168] *See* T. EASTLAND & W. BENNETT, COUNTING BY RACE 84-86 (1979). Almost a quarter of a century after *Plessy*, the Court continued to maintain that "[i]n *Plessy v. Ferguson*, classification of accommodations was permitted on the basis of equality for both races." Buchanan v. Warley, 345 U.S. 60, 79 (1917). *See also* Gong Lum v. Rice, 275 U.S. 78, 85 (1927).

[169] 323 U.S. 214 (1944).

[170] *Id.* 215-16, 220.

[171] 320 U.S. 81 (1943).

[172] 323 U.S. at 225, 233, 242.

[173] "Strict scrutiny" in equal protection analysis was mentioned in Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). *See also* United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938) (reference made to "more exacting" and "more searching judicial scrutiny" under certain circumstances).

[174] 323 U.S. at 216.

[175] *Id.* 218.

Justice Roberts, in his dissent, characterized the case as one in which a citizen has been convicted "for not submitting to imprisonment in a concentration camp, based on his ancestry . . . without evidence or inquiry concerning his loyalty . . . ."[177] Justice Murphy suggested in his dissent that loyalty hearings should have been held.[178]

Justice Jackson's dissent focused on the future implications of the decision. He stated that:

> A military order, however unconstitutional, is not apt to last longer than the military emergency. . . . But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.[179]

Citing "'the tendency of a principle to expand itself to the limit of its logic,' "[180] he warned:

> A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image.[181]

Justice Jackson cited the progression from *Hirabayashi* to *Korematsu* to illustrate the danger he perceived.

> [I]n spite of our limiting words [in *Hirabayashi*] we did validate a discrimination on the basis of ancestry for mild and temporary deprivation of liberty. Now the principle of racial

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[176] *Id.* 217-18. *Korematsu* and *Hirabayashi* have been severly criticized. *See, e.g.*, J. TENBROEK, E. BARNHART & F. MATSON, PREJUDICE, WAR AND THE CONSTITUTION 308-09, 325-34 (1954); Rostow, *The Japanese-American Cases—A Disaster*, 54 YALE L.J. 489 (1945).

[177] 323 U.S. at 226 (Roberts, J., dissenting).

[178] *Id.* 242 (Murphy, J., dissenting).

[179] *Id.* 246 (Jackson, J., dissenting).

[180] *Id.*, *quoting* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 51 (1921).

[181] *Id.*

> discrimination is pushed from support of mild measures to very harsh ones, and from temporary deprivations to indeterminate ones. . . . How far the principle of this case would be extended before plausible reasons would play out, I do not know.[182]

As these cases illustrate, the history of racial classifications has been anything but beneficent. The "tragic legacy of government-sanctioned discrimination" of which Justice Powell spoke in *Fullilove*[183] stemmed from judicial permissiveness, at times influenced by the popular will reflected in congressional legislation. The legal fiction at the heart of the "separate but equal" doctrine was probably the most outrageous and destructive in the post-Civil War history of the Court. But, as Justice Stevens suggested in his *Fullilove* dissent,[184] lesser fictions based upon overly broad generalizations about racial classes can also corrupt "benign" classifications. *Hirabayashi* and *Korematsu* teach that even narrowly defined racial classifications tend to expand, further diluting equal protection guarantees.[185] It is little wonder, therefore, that the Chief Justice, in his *Fullilove* opinion warned: "The history of governmental tolerance of practices using racial or ethnic criteria for the purpose or with the effect of imposing an invidious discrimination must alert us to the deleterious effects of even benign racial or ethnic classifications when they stray from narrow remedial justifications."[186]

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[182] *Id.* 247.

[183] 100 S. Ct. at 2794 (Powell, J., concurring).

[184] Justice Stevens cautioned:

> In the past, traditional attitudes too often provided the only explanation for discrimination against women, aliens, illegitimates, and black citizens. Today there is a danger that awareness of past injustice will lead to automatic acceptance of new classifications that are not in fact justified by attributes characteristic of the class as a whole.

Id. 2813 (Stevens, J., dissenting).

[185] The affirmative action trilogy reflects this tendency. For example, in *Bakke*, the Court rejected racial set-asides in university admissions but sustained a limited racial preference for the purpose of achieving diversity. Yet, in *Fullilove* it sanctioned a set-aside established by the federal government similar to that rejected in *Bakke* The *Weber* Court interpreted Title VII as leaving "to the private sector" an "area of discretion . . . voluntarily to adopt affirmative action plans . . . ." 443 U.S. at 209. Now, in Minnick v. Cal. Dept. of Corrections, 5 Cal. App. 3d 506, 157 Cal. Rptr. 260 (1979), *cert. granted*, 100 S. Ct. 3055 (1980), the Court is being asked to review a decision extending that ruling to public employment. Finally, the affirmative action program at issue in *Weber* did not involve displacing white workers from their jobs. Yet, having legitimized racial preference and quotas as affirmative action tools in some circumstances, who can doubt that the time will come when the Court will be asked to approve a program involving such displacement as well. *See* Local 35, IBEW v. City of Hartford, 625 F.2d 416, 425-29 (2d Cir. 1980) (Van Graafeiland, dissenting); Tangren v. Wackenhut Serv. Inc., 480 F. Supp. 539 (D.C. Nev. 1979).

[186] 100 S. Ct. at 2779.

VI. THE CONTINUING NEED FOR JUDICIAL OVERSIGHT AND GUIDANCE

Given the deep divisions among the Justices and likely changes in the composition of the Court, it is by no means clear whether the affirmative action trilogy will be given an expansive or restrictive interpretation in future cases. If history teaches anything, however, it is that absent careful oversight by the courts, the current era of "benign" racial classifications will result in new injustice to innocent persons on account of their race. As Judge J. Skelly Wright stated in a recent law review article:[187]

> [T]he courts must be vigilant to ensure that new forms of invidious discrimination are not approved in the guise of remedial affirmative action. In this the critics of affirmative action are correct: by rejecting a clear line against remedial racial preferences, the courts have taken on an oversight task of great subtlety and difficulty.[188]

If oversight is to amount to anything more than a series of subjective, ad hoc determinations, the Supreme Court must provide guidance in the form of standards, guidance largely lacking at present.

Judge Wright, an outspoken advocate of race-conscious affirmative action,[189] suggests seven "considerations" to use in distinguishing "permissible" from "impermissible" affirmative action plans.[190] Although some of them would appear to be little more than rationalizations for "benign" racial classifications rather than a basis for realistic standards, Judge Wright's formulation and observations provide a valuable framework for discussion.

(1) Adopting the rationalization formulated by Professor John Hart Ely in his article, *The Constitutionality of Reverse Racial Discrimination*,[191] Judge Wright observes that "discrimination by the white majority against discrete, insular, and powerless minorities is considered 'invidious' and subjected to 'strict scrutiny' because we are suspicious that the ends sought by the majority may be illegitimate or the means irrational."[192] On the other hand, "[w]hen the majority group acts to disadvantage itself for the benefit of the minority," Judge

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[187] Wright, *Color-Blind Theories and Color-Conscious Remedies,* 47 U. CHI. L. REV. 213 (1980).

[188] *Id.* 231.

[189] *See, e.g., id.* 216-18.

[190] *Id.* 233.

[191] Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 735 (1974).

[192] Wright, *supra* note 187, at 233.

Wright asserts that "there should be a strong presumption of legality."[193]

There are a number of problems with this formulation as a basis for distinguishing between permissible and impermissible affirmative action plans. First, white society is not monolithic. As Judge Wright concedes:

> [A] group of whites in power may establish a remedial program for the benefit of blacks, to the detriment of a discrete and powerless subgroup of whites. Indeed, it may be "the natural consequence of our governing processes that the most 'discrete and insular' of whites often will be called to bear the immediate, direct costs of benign discrimination."[194]

Furthermore, given the growing political influence of racial minorities,[195] to regard them as "powerless" is becoming questionable. Finally, Judge Wright's suggestion that affirmative action programs require more careful scrutiny when "instituted by decisionmakers of the minority race"[196] is both difficult to implement[197] and odious in concept. Surely, the permissibility of an affirmative action program should turn on considerations more basic to the program itself than the race of those who propounded it.

(2) Judge Wright suggests that "[a]ny evaluation of the legality of an affirmation action plan must include a serious search for a stigmatizing purpose or effect . . . . Any affirmative action program that would label a class of persons as innately inferior should therefore

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[193] *Id.* 234-35.

[194] *Id.* 235, *quoting* United Jewish Organizations v. Carey, 430 U.S. 144, 174 (1977) (Brennan, J., concurring). By way of example, Judge Wright pointed to *United Jewish Organizations*, see note 25 *supra*, involving the split-up of a voting district of predominantly Hasidic Jewish voters in order to increase the representation of nonwhite voters. Judge Wright suggests that had the Hasidim been recognized as a "discrete and insular" group, rather than treated as indistinguishable from other white voters in New York City, the redistricting plan at issue might not have been sustained. *Id.* 235-36.

[195] *See, e.g.*, N.Y. Times, Apr. 3, 1978, § A, at 1, col. 1. "[B]lack voters, as much as any single factor, probably shaped the outcome of the 1976 Presidential campaign and may have permanently altered the arithmetic of national elections." *Id.* § A, at 16, col. 1. *See also Minority Delegates Debate the Uses of Their Newly Increased Influence*, N.Y. Times, Aug. 12, 1980, § B, at 13, col. 2; N.Y. Times, Apr. 1, 1979, § IV, at 5, col. 3; *The Hispanic Community—A Growing Force to be Reckoned With*, 14 NAT'L J. 548 (1979). *But cf. Black Politicians Fear They Can't Do Much To Help Their People*, Wall St. J., Oct. 29, 1980, at 1, col. 1.

[196] Wright, *supra* note 187, at 236.

[197] Judge Wright's article provides no insight as to how a court is to determine whether an affirmative action program has been instituted by "decisionmakers of the minority race." Must they constitute a majority of the governmental body that authorized or required it? Short of that, how is the influence of minority decisionmakers to be determined? Such inquiry may be as difficult as it is ill-advised.

be struck down."[198] Realistically, this is a non-standard. Judge Wright himself observed: "I do not expect that many racial affirmative action programs would be struck down on a theory of 'stigma.'"[199]

(3) A more significant consideration posed by Judge Wright is whether the challenged affirmative action program disturbs "vested rights."[200] He observed: "Programs that take away the vested rights of innocent persons—as opposed to those that affect only the possibility of future benefits—may require a more substantial justification."[201] Implicit in this observation is a recognition that whatever the level of scrutiny of "benign" racial classifications, they ought not unreasonably intrude on the rights of innocent persons. The distinction between "vested rights" and an expectation of "future benefits," however, is not always clear or adequate. For example, do white police officers who had to progress through a series of positions requiring a minimum of nine years of service before competing for the position of captain have a right to that opportunity free of a racial quota which ignores this service requirement? In *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission*,[202] the Second Circuit suggested that they did. It struck from the judgment there at issue "all quota requirements above the rank of patrolman" and remanded the case to the district court "for consideration of other possible solutions which may be feasible and will not create the inequities inherent in the imposition of quotas at higher levels."[203]

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[198] Wright, *supra* note 187, at 237.

[199] *Id*. 238. Although stigma will rarely invalidate a race-conscious affirmative action program, the problem of reinforcing negative stereotypes, as Justice Stewart recognized in his *Fullilove* dissent, is a real one. See notes 136-37 *supra*. The impact on minority group members of such stereotyping was described by Dr. Kenneth B. Clark:

> No black can yet be sure that he is being seen, evaluated and reacted to in terms of his qualities and characteristics as an individual rather than categorized and stereotyped as part of a rejected group. Until this is a fact, then racism dominates class achievements in spite of the wishful thinking of black and white liberals, social workers and social scientists.

N.Y. Times, Mar. 22, 1978, § A, at 25, cols. 1-4.

[200] Wright, *supra* note 187, at 238. In *Weber*, Justice Brennan pointed out that the program did not "unnecessarily trammel the interests of white employees." 443 U.S. at 208. On the contrary, it afforded them and black employees training opportunities not previously available. *Id*. 198.

[201] Wright, *supra* note 187, at 238. Judge Wright went on to state:

> Often, employers and other persons in authority attempt to reallocate the vested rights of innocent persons in order to cover their own misdeeds. The courts should insist where possible that affirmative remedies be at the expense of the wrongdoers rather than at the expense of innocent bystanders. Back-pay remedies, special training, damages, and the like place the onus for correcting past injustice on the employer-perpetrator rather than on the innocent employee, and should therefore be preferred.

Id. 239.

[202] 482 F.2d 1333 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1974).

[203] *Id*. 1341.

(4) Avoiding what he described as "the largely meaningless quest for a verbal formulation that expresses the appropriate level of 'scrutiny,'"[204] Judge Wright stated: "Perhaps the most important mode of analysis the courts may employ to determine whether a race-conscious remedial program is legal or constitutional is to insist that the purpose of the program be articulated, and that the program be reasonably designed to accomplish that purpose."[205] Despite his disclaimer and his later observation that a middle level of scrutiny seems best,[206] the above-quoted language might, itself, be viewed as a formulation of a level of scrutiny emphasizing permissiveness rather than limits. Thus, Judge Wright's analysis of "ends" would apparently go no further than to require that race-conscious remedial objectives be articulated. His analysis of "means" would require even less scrutiny than that articulated by the Brennan four in *Bakke*[207] and by Justice Marshall in *Fullilove*.[208]

Yet, Judge Wright's discussion of underinclusive and over-inclusive classifications suggests a higher standard of scrutiny than the above-quoted language seems to indicate. Thus, if the purpose of an affirmative action program "is to help persons from deprived backgrounds," he would insist that "persons advantaged by the program in fact come from such backgrounds" and further that "other persons, equally or more deprived than those of the preferred class" not be excluded from the program.[209] Judge Wright is correct in his observation that such scrutiny would not strike down many affirmative action programs.

> Rather, once the courts begin to scrutinize programs in this way, the universities, governments, and employers of this country should respond by being more careful in the design of their affirmative action programs. Instead of designing them to placate the demands of the most vocal and powerful of the minorities, they may seek to assist those persons and groups most in need of help.[210]

(5) Judge Wright suggests that the courts consider the factors other than race that are used as criteria for selection.[211] His observa-

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[204] Wright, *supra* note 187, at 240.

[205] *Id.*

[206] *Id.* 241.

[207] See text at note 57 *supra*.

[208] See text at note 125 *supra*. Justice Powell articulated a permissive means standard for congressional legislation in *Fullilove*. He cautioned, however, that "the breadth of discretion in the choice of remedies may vary with the nature and authority of a governmental body." 100 S. Ct. at 2794 n.14 (Powell, J., concurring). See notes 119, 122 *supra*.

[209] Wright, *supra* note 187, at 241.

[210] *Id.* 241-42.

[211] *Id.* 242.

tions that affirmative action is not necessarily in conflict with the meritocratic ideal[212] and that "a genuine commitment to equality of opportunity is often consistent with at least some consideration of race"[213] are well taken. No basis for a meaningful standard of review is provided, however, under Judge Wright's view that race-conscious affirmative action is appropriate whether race is "used as a supplement to other arbitrary, non-ability-related criteria" or "considered along with predictors of ability."[214]

(6) Pointing to a fundamental difference in terms of "procedural fairness" between "a system that accords members of a minority group an advantage in an otherwise competitive process" and one "that removes certain positions or privileges from competition altogether,"[215] Judge Wright predicted that the permissibility of an affirmative action program may turn on whether all applicants "are accorded equivalent procedural treatment."[216] It is entirely appropriate, as Judge Wright suggests, that "an affirmative action program guarantee to all applicants the right to compete—even as it recognizes the legitimacy of using race as one criterion for decision."[217]

(7) Few would argue with Judge Wright's observation that "an affirmative action program that will terminate is more defensible than one that may persist in perpetuity."[218] This factor was considered in both *Weber*[219] and *Fullilove*.[220] Nevertheless, the following observations would seem appropriate. First, from the standpoint of an innocent person who loses an opportunity to compete, the effects of even a temporary affirmative action program may last a lifetime. Second, a program with more gradual targets may be less intrusive and more successful than one of theoretically shorter duration by virtue of higher mathematical ratios.

Judge Wright offered his seven considerations in no particular order.[221] The subject matter of numbers 4, 6, 7, and 3, in that order, would appear to provide a valuable starting point for standards, whatever level of scrutiny the Court ultimately adopts in reviewing "benign" racial classifications.

Thus, at a minimum, it is essential that the remedial purposes of a race-conscious program be fully articulated, and the means adopted be reasonably designed to accomplish those purposes (Consideration No. 4). If there is to be meaningful judicial oversight, however, more is required. Appropriate findings of fact where a program is established or required by government,[222] or a careful, written, self-evaluation where it is voluntarily undertaken, is necessary to judge whether there is a need for remedial action, whether the group or groups to be benefited under the program require such remedial action, whether the means chosen to accomplish the program's purposes are appropriate and whether the program's racial thrust is necessary to and consonant with the purposes articulated.[223]

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[212] *Id.*
[213] *Id.* 243.
[214] *Id.*
[215] *Id.*
[216] *Id.* 244.
[217] *Id.* 243.
[218] *Id.* 244.
[219] 443 U.S. 193, 208 (1979).
[220] 100 S. Ct. 2758, 2780 (1980).
[221] Wright, *supra* note 187, at 233.

There is, as Judge Wright observes,[224] a fundamental difference between according minority group members an advantage in an otherwise competitive process and the use of racial set-asides or quotas which remove certain opportunities from competition altogether (Consideration No. 6). Widespread use of the latter threatens to blur the distinction between remedying past inequities and erecting new racial barriers to equal opportunity. Set-asides and quotas ought be permitted only as a last resort to begin the process of remedying the effects of longstanding systemic discrimination.

The principles that an affirmative action program should be temporary, and should not unnecessarily trammel the interests of others (Consideration Nos. 7 and 3) are part of the broader judicial concern that remedial programs not be unduly intrusive. If these considerations, and the general concern about overintrusiveness are to be met, it is essential that race-conscious programs be subject to periodic review and reevaluation and that they be sufficiently flexible to adapt to changing circumstances. These safeguards are necessary to assure that affirmative action objectives are attained within the context of equal opportunity for all.

Similar considerations suggested in *Fullilove*, include the following: (1) whether other remedies short of fixed racial set-asides "failed to ameliorate the effects of racial discrimination,"[225] (2) whether the program has administrative safeguards providing "reasonable assurance that application of racial or ethnic criteria will be limited to accomplishing . . . remedial objectives . . . and that misapplications of the program will be promptly and adequately remedied . . . ,"[226] and (3) whether the program's effect "is limited and so widely dispersed that its use is consistent with fundamental fairness."[227]

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[222] Since Judge Wright's approach focuses almost exclusively on means rather than ends, he makes no reference to findings of past discrimination sufficient to justify government sponsored preferences on the basis of race. On the contrary, pointing to "the past treatment of this nation's black citizens by the white majority . . . ," Judge Wright takes Justice Powell to task for his ruling in *Bakke* that findings of past discrimination are necessary. Wright, *supra* note 187, at 229.

[223] Where an affirmative action program contains such generalized purposes as helping persons of disadvantaged backgrounds, promoting cultural diversity at a university, or correcting for errors in the testing process, the program may, as Judge Wright suggests, be both overinclusive and underinclusive if it allocates benefits solely on the basis of race. Wright, *supra* note 187, at 241. See also text at notes 209, 210 *supra*.

[224] *Id.* 243.

[225] 100 S. Ct. at 2791-92 (Powell, J., concurring).

Judge Wright did not purport to provide an all-inclusive list of factors to be considered in distinguishing between permissible and impermissible affirmative action plans; and, even as to those mentioned, there is an important analytical tool missing. Since he essentially regarded all minority group members as having suffered societal discrimination, he drew no distinction in terms of whether those benefited by an affirmative action program are themselves identifiable victims of specific discrimination or gratuitous beneficiaries of a social policy. Yet, as cases like *Franks v. Bowman Transportation Co.*[228] suggest, the extent to which rights of innocent persons can lawfully be intruded upon may depend upon whether those to be benefited are in fact victims of specific racial discrimination.

Furthermore, where an affirmative action program involves numerical targets it is essential that they be realistic in relation to the pool of qualified minority applicants likely to be reached by the program. As the First Circuit cautioned in *Associated General Contractors, Inc. v. Altshuler,*[229] a program that includes unrealistic minority hiring goals "could be fulfilled only by taking on workers who were unqualified" and "might impose an unreasonable burden . . . upon qualified workers who were denied jobs because they were not members of the racial minority."[230]

All men of goodwill must respect Judge Wright's plea that we seek humane and effective remedies for the wrongs of the past and that

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[226] *Id.* 2779 (Burger, C.J.).

[227] *Id.* 2793 (Powell, J., concurring). Justice Powell found this to be true of the challenged program since the minority set-aside reached only "about .25% of all the funds expended yearly on construction work in the United States." *Id.*

The Second Circuit has expressed concern over the fairness of remedial racial classifications that impact a "small ascertainable group of non-minority persons." EEOC v. Local 28, Sheetmetal Workers Internat'l Ass'n, 532 F.2d 821, 828 (2d Cir. 1976). For example, the court struck down a racial quota on promotions to the rank of sergeant noting that those by-passed for advancement would be "a small number of readily identifiable candidates for promotion." Kirkland v. New York Dep't of Correctional Servs., 520 F.2d 420, 429 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976).

[228] 424 U.S. 747 (1976). *See also* International Bhd. of Teamsters v. United States, 431 U.S. 324, 364-71 (1977).

[229] 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974).

[230] *Id.* 18. The court further stated, "[U]nrealistically high goals are likely, in addition, to forment [sic] racial tensions and to prompt employers to circumvent the rules." *Id. Cf.* Contractors Ass'n v. Secretary of Labor, 311 F. Supp. 1002, 1010 (E.D. Pa. 1970), *aff'd*, 442 F.2d 159 (3d Cir. 1971), *cert. denied*, 414 U.S. 854 (1971).

"for the first time in history . . . we do the job right . . . ."[231] Doing the job right, however, will require more than good intentions. It will require a delicate balancing of group interests with those of the individual, and of affirmative action with the principle of nondiscrimination, the moral foundation for society's concern over past inequities. The Court has a responsibility to define standards by which this balancing can be accomplished in a way that will permit social progress while minimizing injustice to innocent persons. It has a responsibility to articulate and apply a level of scrutiny sufficient to assure that judicial oversight of racial classifications under the equal protection clause does not become mere lip service to constitutional guarantees devoid of substance. The fairness and public acceptance of the standards adopted by the Court and the consistency with which they are applied will help to determine the efficacy of our law and the future health of our society.

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[231] Wright, *supra* note 187, at 245.

Senator HATCH. Our final witness today will be Wanda Flowers, legal counsel for Working Women.

Working Women is a national organization for office workers and has been active in representing the views of these workers on the subject of affirmative action programs.

We are extremely pleased to have you with us this morning, Ms. Flowers.

STATEMENT OF WANDA FLOWERS, LEGAL COUNSEL, WORKING WOMEN

Ms. FLOWERS. Thank you, Senator Hatch.

AFFIRMATIVE ACTION HAS POSITIVE BENEFITS

I want to tell you what affirmative action has meant to me. I want you to keep in mind that thousands of Working Women members across the country could tell similar stories.

Becoming an attorney was no easy task for me. Finishing high school itself was a struggle because I was also rearing my three younger sisters.

My problems did not begin when I was 9 and had to begin caring for my sisters because my mother was too ill to do it and my father was too busy working trying to keep food on the table.

They began when I was born a black little girl on the East Side of Jacksonville, Fla., a depressed neighborhood, to parents who were virtually uneducated.

My father's lack of education and marketable skills forced him to have to take a laborer's job on the docks and at the shipyards of Jacksonville. My father was unable to complete his education because he was born in Georgia and had to begin working in the fields at a young age to help support his younger brothers and sisters.

Because he had so little education, my father valued an education and encouraged all of us to pursue an education. My father was very proud that all five of his daughters finished high school.

I was considered the brilliant one in the family, so my father always said that he wanted me to go to college. At that time he did not know how he could afford to send me.

Fortunately, by the time the money was needed to send me off to college, my education could be financed through moneys being given to colleges and universities to carry out affirmative action programs.

I financed my education, including my legal degree, through financial aid targeted to minority students. I am not ashamed of this fact, because otherwise I would not be before you testifying as the attorney for Working Women.

I was certainly qualified to go to college. I was a National Merit Semi-Finalist, scored in the top 30 percent in the country on aptitude tests, and graduated salutatorian from my high school.

Had it not been for the financial aid that I received, I would not have been able to attend college—not to mention law school.

I am competent to perform the job that I have, but I only received the opportunity to do so because of affirmative action programs.

DISCRIMINATION STILL EXISTS

From my own experience, I know that women and minorities are just as qualified as white men. The experiences of my own sisters support Working Women's position that discrimination still exists in the United States.

All of my sisters have been clerical workers at one time or another. Two are still employed as clerical workers for a utility company.

Their experiences typify those of millions of clerical workers throughout the country. For example, one of my sisters worked at an insurance company for over 7 years and was never promoted to a level above that of clerk.

After she was divorced, her salary was inadequate to support herself and her two children, and she had to begin receiving food stamps.

Finally, feeling that she was in a dead end job and that the company's discriminatory policies would not allow her to advance, she quit her job. She then went to work at a utility company with another sister. The conditions at this company were not greatly improved.

Women and minorities do not hold positions above the lowest supervisory level. All of the decisionmaking positions are held by white males.

A third sister is employed as an underwriter at an insurance company. She was promoted to this position from her clerical position. She is underpaid for the work that she performs but will not leave her present employer because all the other companies where she might be hired have even worse employment conditions for a person with her skills.

A fourth sister managed to move from the clerical field to the position of associate manager of her company but only after the Office of Federal Contract Compliance Programs, the agency which Senator Hatch would abolish, came in and did an investigation.

She was the first black female to hold a managerial position with this company, and this was in the late seventies.

My sisters and I are very much aware of the discrimination that exists in this country. We know that it is only through Government intervention that some of the problems are eliminated.

Clerical workers in similar positions to those of my sisters know the frustration of being in a dead end job with no opportunity for advancement. Most women who work have to in order to support themselves or their families singlehandedly or because their salary is necessary to supplement their husband's or because their husbands are out of work.

These women, our members, know that discrimination still exists and that many employers still have bad employment practices.

ARGUMENTS AGAINST AFFIRMATIVE ACTION

The opponents of affirmative action usually take pains to assert their strong commitment to civil rights. Yet looked at carefully, their opposition to affirmative action is grounded in bias.

Let us look carefully at Senator Hatch's arguments, set forth in an article in "Policy Review," September 1980, called "Loading the Economy."

If you leave people alone, they will tend to employ those who do the best job, and the overall production of wealth will be maximized.

Translation: There is no such thing as discrimination.

Senator Hatch complains of the inefficiencies due to the employment and promotion of marginal labor forced on employers by affirmative action.

Translation: Women and minorities are less qualified than white men.

ARGUMENTS FOR AFFIRMATIVE ACTION

Affirmative action is a net cost to the economy.

None of these arguments hold water. All of them prove Senator Hatch to be no friend of the millions of women and minorities who have been systematically denied the opportunity to use their full potential in the work force.

Working Women believes that affirmative action is necessary in the face of the employment discrimination that is still an ugly reality; affirmative action has worked effectively to reduce discrimination; there is no available workable alternative to affirmative action; and the benefits of affirmative action far outweigh its costs.

Discrimination is not a thing of the past. It is still alive and well in the vast majority of American corporations.

While virtually every occupation now boasts at least one female or minority employee, the basic pattern of women and minorities occupying low-level, low-paying positions remains.

In fact, a higher percentage of women work as clerical and service workers—the Nation's lowest paying jobs—than did 20 years ago. The percentage of women in management has increased by only a little over 1 percent.

In every occupation, women continue to be paid less than men for equal work. Most women work in so-called women's jobs which pay less than men's jobs, even when the women's work requires more skill, effort, and responsibility than the men's.

There is no denying that discrimination remains a tremendous social and economic problem in America. Yet it is also undeniable that affirmative action enforcement has worked to reduce discrimination.

Working Women examined the employment policies and profiles of banks before and after publicity generated by Working Women and investigations by the OFCCP. We found that the banks which received the greatest Government attention made the greatest progress in certain employment areas.

The banks' reports to the Government show that while the percentage of managers who are women rose slowly before strong Government enforcement—from 11.6 percent in 1950 to 12.2 percent in 1960—the percentage rose markedly once enforcement was stepped up—from 17.6 percent in 1970 to 31.6 percent in 1979.

For over 20 years, Government executive orders, urging voluntary affirmative action, has had no effect on Federal contractors' hiring practices.

As mandatory affirmative action requirements were developed and enforced, we began to see progress. Without the spur of Government regulation, we can expect employers not to try so hard to bring women and minorities into full participation in the labor force.

Critics of affirmative action, including those in the business community, often cite the EEOC, which enforces title 7 of the Civil Rights Act of 1964, as an adequate tool for fighting discrimination.

Affirmative action, enforced by the Department of Labor, is, they claim, unnecessarily duplicative. Yet an article in the "American Banker," May 28, 1981, reveals that "the EEOC has not been a serious litigation threat in most instances."

The Labor Department's effectiveness in pursuing problems that require companywide changes in policy have made it a great boon to those suffering from discrimination and a great threat to those who profit from discrimination.

Senator Hatch and others complain that they cannot criticize affirmative action without embarrassment. They have cause to be embarrassed.

They are proposing to remove an important and effective tool of protection from women and minorities, yet they have proposed no alternative plan for bringing women and minorities into full participation in the economy.

THE COST OF AFFIRMATIVE ACTION

The cost-benefit analysis has become fashionable with the new administration, adding as it does a cloak of scientific measurement to their ideologically based policies.

Yet neither business which complains of the high cost of affirmative action nor the Government critics of affirmative action have produced a cost-benefit analysis which assesses the true advantages and disadvantages of affirmative action.

Instead, they have selected out a small number of costs, neglected the benefits, and ignored the costs of discontinuing affirmative action. In fact, affirmative action has minimal costs and major benefits.

Even using their own figures, the costs of affirmative action incurred by business are tiny.

Citicorp, America's third largest bank, spent more on auto racing in 1978 than it did on affirmative action in 1977. Citicorp gave one-half of a million dollars to the U.S. Auto Club racing program on condition that the drivers wear Citicorp patches on their driving suits or decals on their cars.

A massive study prepared by the Business Roundtable studied 48 large companies which together represent 19 percent of the U.S. corporate capital.

For banks, the cost of writing and implementing an affirmative action program averaged only 0.01 percent of gross revenues.

In banking, the salary of the average chief executive is considerably higher than the cost of the affirmative action program.

A congressional research service document found that affirmative action cost the Federal Government $37.3 million in 1975. Subsequently, the Government program was streamlined, consolidating 33 agency programs into 1—the Office of Federal Contract Compliance program—with a 1980 budget of only $50.6 million.

The OFCCP oversees 350,000 companies employing nearly 40 million workers, an expenditure on only $1.26 per employee covered.

In fact, OFCCP's systemic approach is extremely cost efficient when compared with agencies that work on an individual basis.

The OFCCP estimates the cost of an individual complaint processing to be $4,000 to $5,000, while the entire cost of a field investigation of an entire corporation is only $10,000.

Sex and race discrimination at the workplace deprives the economy of the talents of millions. Anyone who has ever worked in a corporation knows that far from hiring the person best qualified for the job, employers often tend to hire someone they feel comfortable with.

The concept of affirmative action merely ask the employers to draw in addition upon the vast available pool of qualified women and minorities.

Some full-time bank tellers are eligible for food stamps. Because the banks will not pay a living wage, the taxpayers supplement the income of full-time workers at some of the Nation's most profitable corporations. Over 90 percent of bank tellers are women.

Federal Government payments to full and part-time working people are substantial. A disproportionate amount goes to women and minority workers who are trapped in low-paying, dead-end jobs.

In fact, over 12 million full-time workers—67 percent of whom are women and 25 percent of whom are minorities—are eligible for food stamps and other public assistance. These are full-time workers whose employers will not pay them a living wage.

It is the taxpayer who subsidizes the discriminatory low wages paid out by banks and other highly profitable businesses.

WAYS TO MAKE AFFIRMATIVE ACTION MORE EFFECTIVE

If affirmative action is imposing an unfair regulatory burden on the Nation's businesses, the Department of Labor—not the Congress—should take steps to ease that burden, while bringing the benefits of affirmative action to all by doing the following:

Targeting the healthy, growing industries for vigorous enforcement. The office and service industries, with their burgeoning job opportunities, are ideal places to implement affirmative action with few repercussions on white male employees or recruitment difficulties.

Targeting industries as a whole. This will insure that the costs of implementing fair employment practices, whatever they may be, will not unfairly put a single company at a competitive disadvantage.

Simplify reporting procedures. Stress an annual summary report that breaks down the work force by sex, race, and salary level.

Use the full range of remedies and sanctions available, including back pay and debarment, as an incentive to compliance.

Emphasize the institution of fair employment practices that have companywide benefits.

CONCLUSION

In conclusion, affirmative action is necessary and it is effective. There is no available effective alternative, and the benefits of affirmative action far outweigh its costs.

Those who are attempting to eliminate affirmative action, whatever their moral arguments, are lending a helping hand to employers who are out to profit from discrimination as usual.

Working Women know these employers and their lobbying groups all too well.

We are committed to defending our rights and taking the profit out of discrimination.

Working Women, the national association of office workers, is outraged that you, Senator Hatch, are proposing to outlaw affirmative action. We are determined to preserve this precious heritage from the civil rights movement.

Finally, in his testimony, Mr. Herrity, chairman of the Fairfax County Board of Supervisors, suggested that the local government in Fairfax is the victim of Federal Government harassment. I have consulted with Government attorneys working on the Fairfax case and have been informed that on "March 30, 1981, that the court entered a memorandum opinion finding that the defendent, Fairfax County had engaged in patterns and practices, of intentional discrimination against blacks in job categories 2, 3, 4, 6, and 7, and against women in job categories 2, 3, 4, 5, 7, and 8, between 1972 and 1978.

Thank you.

Senator Hatch. Thank you for your statement, Ms. Flowers. I have a number of questions for you which I will submit in writing and which hopefully you can answer.

I would like to make one distinction here that I think is important in order to clarify the record with regard to this proposed Equal Protection Amendment, S.J. Res. 41.

As you know, this amendment does not do away with affirmative action programs based upon "sex." I have experienced criticism with respect to this fact, so let me express the reasons for this.

I am just as concerned about affirmative action programs involving sexual discrimination, but I felt that it was inappropriate to be treating sex and race discrimination identically for the purposes of the amendment.

Quite simply, this is because I can never envision any circumstances under which legal distinctions can be justified which treat people differently, based strictly upon their skin color.

I cannot comfortably, however, establish such an absolute prohibition on distinctions with respect to gender.

I do think however, that such distinctions can only rarely be justified. A good illustration however is the recent Supreme Court decision regarding the elgibility of men and women for draft registration.

Thus, I would have the same problem with absolutely prohibiting gender distinctions in the context of this amendment, as I do with respect to the absolutist nature of the proposed Equal Rights Amendment.

That was the reason we left distinctions on account of sex out of the Equal Protection Amendment.

You have eloquently expressed the viewpoint of your organization, which is clearly contrary to what my own viewpoint is.

You have done a fine job of supporting your viewpoint, nevertheless.

Thank you, very much.

Ms. **Flowers**. Thank you.

[The prepared statement of Ms. Flowers and questions from Senator Hatch with responses follow:]

PREPARED STATEMENT OF WANDA FLOWERS

My name is Wanda Flowers, and I am legal counsel to WORKING WOMEN, a national association of office workers. I want to tell you what Affirmative Action has meant to me, and I want you to keep in mind that thousands of WORKING WOMEN members across the country could tell similar stories.

Becoming an attorney was no easy task for me. Finishing high school itself was a struggle because I was also rearing my three younger sisters. But my problems did not begin when I was nine and had to begin caring for my sisters because my mother was too ill to do it and my father was too busy working trying to keep food on the table. They began when I was born a black little girl on the East Side of Jacksonville, Florida, a depressed neighborhood, to parents who were virtually uneducated.

My father's lack of education and marketable skills forced him to have to take a laborer's job on the docks and at the shipyards of Jacksonville. My father was unable to complete his education because he was born in Georgia and had to begin working in the fields at a young age to help support his younger brothers and sisters.

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Fortunately, by the time the money was needed to send me off to college, my education could be financed through monies being given to colleges and universities to carry out Affirmative Action programs. I financed my education--including my legal degree--through financial aid targetted to minority students. I am not ashamed of this fact because otherwise I would not be testifying before you as the attorney for WORKING WOMEN.

I was certainly qualified to go to college--I was a National Merit Semi-Finalist, scored in the top 30% in the country on aptitude tests, and graduated salutatorian from my high school. Yet, had it not been for the financial aid that I received, I would not have been able to attend college, not to mention law school. I am competent to perform the job that I have, but only got the opportunity to do so because of Affirmative Action programs.

From my own experience, I know that women and minorities are just as qualified as white men, and the experiences of my own sisters support WORKING WOMEN's position that discrimination still exists in the United States. All of my sisters have been clerical workers at one time or another. Two are still employed as clerical workers for a utility company.

Their experiences typify those of millions of clerical workers throughout the country. For example, one of my sisters worked at an insurance company for over seven years and was never promoted to a level above that of clerk. After she was divorced, her salary was inadequate to support her and she had to begin receiving food stamps. Finally, feeling that she was in a dead-end job, and that the company's discriminatory policies would not allow her to advance, she quit her job. She then went to work at a utility company with another sister. The conditions at this company were not greatly improved. Women and minorities do not hold positions above the lower supervisory level. All of the decision-making positions are held by white males.

A third sister is employed as an underwriter at an insurance company. She was promoted to this position from her clerical position. She is underpaid for the work that she performs, but will not leave her present employer because all the other companies where she might be hired have even worse conditions for a person with her skills.

A fourth sister managed to move from the clerical to the position of associate manager of her company, but only after the Office of Federal Contract Compliance Programs--the agency which Senator Hatch would abolish--came in and did an investigation. She was the first black female to hold a managerial position with this company, and this was in the late 1970's.

My sisters and I are very much aware of the discrimination that exists in this country and we know that it is only ghrough government intervention that some of the problems are eliminated.

Clerical workers in similar positions to those of my sisters know the frustration of being in a dead-end job with no opportunity for advancement. Most women who work have to, because they support themselves or their families single-handedly, because their salary is necessary to supplement their husband's, or because their husband is out of work. These women--our members--know that discrimination still exists and that many employers still have bad employment practices.

The opponents of Affirmative Action usually take pains to assert their strong commitment to civil rights. Yet looked at carefully, their opposition to Affirmative Action is grounded in bias.

Let's look carefully at Mr. Hatch's arguments, set forth in an article in Policy Review (September, 1980) called "Loading the Economy:"

1) "If you leave people alone, they will tend to employ those who do the best job, and the overall production of wealth will be maximized."

   Translation: There is no such thing as discrimination.

2) Mr. Hatch complains of the "inefficiencies due to the employment and promotion of marginal labor" forced on employers by Affirmative Action.

   Translation: Women and minorities are less qualified than white men.

3) "Affirmative Action is a net cost to the economy."

None of these statements holds water. All of them prove Mr. Hatch to be no friend to the millions of women and minorities who have been systematically denied the opportunity to use their full potential in the workplace.

WORKING WOMEN believes that:

--Affirmative Action is necessary in the face of the employment discrimination that is still an ugly reality;

--Affirmative Action has worked effectively to reduce discrimination;

--there is no available, workable alternative to Affirmative Action;

--the benefits of Affirmative Action far outweigh its costs.

Discrimination is Alive and Well

Discrimination is not a thing of the past. It is still alive and well in the vast majority of American corporations.

While virtually every occupation probably now boasts at least one female or minority employee, the basic pattern of women and minorities occupying low-level, low-paying positions remains. In fact, a higher percentage of women work as clerical and service workers (the nation's lowest paying jobs) than did twenty years ago. The percentage of women in management has increased by only a little over one percent.

In every occupation, women continue to be paid less than men for equal work. Most women work in so-called "women's jobs," which pay less than men's jobs even when the women's work requires more skill, effort, and responsibility than the men's.

Affirmative Action Works

There is no denying that discrimination remains a tremendous social and economic problem in America. Yet it is also undeniable that Affirmative Action enforcement has worked to reduce discrimination.

WORKING WOMEN examined the employment policies and profiles of banks before and after publicity generated by WORKING WOMEN and investigations by the OFCCP. We found that the banks which received the greatest government attention made the greatest progress in certain employment areas.

The banks' reports to the government show that while the percentage of managers who are women rose slowly before strong government enforcement (from 11.6% in 1950 to 12.2% in 1960), the percentage rose markedly once enforcement was stepped up (from 17.6% in 1970 to 31.6% in 1979).

Is There an Alternative to Affirmative Action?

For over twenty years, government Executive Orders urging voluntary Affirmative Action had no effect on federal contractors' hiring practices. As mandatory Affirmative Action requirements were developed and enforced, we began to see progress. Without the spur of government regulation, we can expect employers not to try so hard to bring women and minorities into full participation in the labor force.

Critics of Affirmative Action, including those in the business community, often cite the Equal Employment Opportunity Commission, which enforces Title VII of the Civil Rights Act of 1964, as an adequate tool for fighting discrimination. Affirmative Action, enforced by the Department of Labor, is, they claim, unnecessarily duplicative. Yet an article in the

American Banker (May 28, 1981) reveals that "EEOC...has not been a serious litigation threat in most instances."

The Labor Department's effectiveness in pursuing problems that require company-wide changes in policy have made it a great boon to those suffering from discrimination. And a great threat to those who profit from discrimination.

Mr. Hatch and his cohorts complain that they can't criticize Affirmative Action without embarrassment. They have cause to be embarrassed. They are proposing to remove an important and effective tool of protection from women and minorities. Yet they have proposed no alternative plans for bringing women and minorities into full participation in the economy.

Cost-Benefit Analysis of Affirmative Action

The cost-benefit analysis has become fashionable with the new Administration, adding as it does a cloak of scientific meansurement to their ideologically based policies. Yet neither business--which complains of the high cost of Affirmative Action--nor the government critics of Affirmative Action have produced a cost-benefit analysis which assesses the true advantages and disadvantages of Affirmative Action. Instead, they have selected out a small number of costs, neglected the benefits, and ignored the costs of discontinuing Affirmative Action. In fact, Affirmative Action has minimal costs and major benefits.

Costs to Business

Even using their own figures, the costs of Affirmative Action incurred by business are tiny.

Citicorp, America's third largest bank, spent more on auto racing in 1978 than it did on Affirmative Action in 1977. (Citicorp gave over half a million dollars to the U.S. Auto Club racing program on conditions that the drivers wear Citicorp patches on their driving suits or decals on their cars.)

A massive study prepared by the Business Roundtable studied 48 large companies which together represent 19% of U.S. corporate capital (The Cost of Government Regulation Study, March 1979). For banks, the cost of writing and implementing an Affirmative Action program averaged only 0.01% of gross revenues.

In banking, the salary of the average chief executive is considerably higher than the cost of the Affirmative Action program.

Costs to the Government

A Congressional Research Service document found that Affirmative Action cost the federal government $37.3 million in 1975. Subsequently the government program was streamlined, consolidating 33 agency programs into one, the Office of Federal Contract Compliance Programs (DOL) with a 1980 budget of only $50.6 million. The OFCCP oversees 350,000 companies employing nearly 40 million workers...an expenditure of only $1.26 per employee covered.

In fact, OFCCP's systemic approach is extremely cost-efficient when compared with agencies that work on an individual basis. The OFCCP estimates the cost of an individual complaint processing to be $4,000 to $5,000, while the entire cost of a field investigation of an entire corporation is only $10,000.

Social and Economic Costs of Discrimination

Sex and race discrimination at the workplace deprives the economy of the talents of millions. Anyone who has ever worked in a corporation knows that far from hiring the person best qualified for the job, employers often tend to hire someone they feel comfortable with. The concept of Affirmative Action merely asks employers to draw in addition upon the vast available pool of qualified women and minorities.

Taxpayers Subsidize Job Discrimination

Some full-time bank tellers are eligible for food stamps. Because the banks will not pay a living wage, the taxpayers supplement the income of full-time workers at some of the nation's most profitable corporations. Over 90% of bank tellers are women.

Federal government payments to full- and part-time working people are substantial. A disproportionate amount goes to women and minority workers who are trapped in low-paying, dead-end jobs.

In fact, over 12 million full-time workers--67% of whom are women, and 25% of whom are minorities--are eligible for food stamps and other public assistance. These are full-time workers whose employers will not pay them a living wage. It is the taxpayer who subsidizes the discriminatory low wages paid out by banks and other highly profitable businesses.

Correcting the Faults in Affirmative Action: A Positive Approach

If Affirmative Action is imposing an unfair regulatory burden on the nation's businesses, the Department of Labor--not the Congress--should take steps to ease that burden while bringing the benefits of Affirmative Action to all:

--Target the healthy, growing industries for vigorous enforcement. The office and service industries, with their burgeoning job opportunities, are ideal places to implement Affirmative Action with few repurcussions on white male employees or recruitemtn difficulties.

--Target industries as a whole. This will ensure that the costs of implementing fair employement practices (whatever they may be) will not unfairly put a single company at a competitive disadvantage.

--Simplify reporting procedures. Stress an annual summary report that breaks down the workforce by sex, race, and salary level.

--Use the full range of remedies and sanctions available--including back pay and debarment--as an incentive to compliance.

--Emphasize the institution of fair employment practices that have company-wide benefits.

Conclusion

In conclusion , Affirmative Action is necessary and it is effective. There is no available effective alternative. And the benefits of Affirmative Action far outweigh its costs.

Those who are attempting to eliminate Affirmative Action--whatever their moral arguments--are lending a helping hand to employers who are out to profit from discrimination as usual. Working women know those employers and their lobbying groups all too well. We are committed to defending our job rights and taking the profit out of discrimination. WORKING WOMEN, the national association of office workers, is outraged that Senator Hatch is proposing to outlaw Affirmative Action. We are determined to preserve this precious heritage from the civil rights movement.

QUESTION SUBMITTED TO WANDA FLOWERS BY SENATOR HATCH

1. In your opinion, have women suffered from the same history of discrimination in this country as, for example, blacks or hispanics? What groups, specifically, are entitled to the protections of affirmative action? How do we determine what minorities groups are protected and which are not? What are the criteria, in your view?

2. I would like to ask you the same question that I asked Dr. Lowery. That is: assuming that we maintain affirmative action programs as a remedy for past discrimination, at what point would you be prepared to concede that affirmative action was no longer necessary? How precisely do we know when the vestiges of past discrimination have been overcome? You would concede, would you not, that affirmative action is not designed to be a permanent institution?

3. Given that many women tend to enter the work-force later in life than men, for a variety of totally non-discriminatory reasons, is it fair to assume that men and women would be earning similar salaries and would be represented in different positions of employment on a totally equal basis, absent sex discrimination? How do we calculate the impact of these and other factors, such as the fact that women may have different career goals than men?

4. I have had a number of blacks indicate that affirmative action programs for blacks have not been as effective as they believe they could have been because there has been an increase in the number of individuals considered as being part of the "protected classes". They often refer to the inclusion of women in this class, for example. How do you respond to the view—and I am not suggesting that it is a majority view; I do not know—that affirmative action programs for women are doing little but limiting the benefits of these programs for blacks and other racial and ethnic minorities?

WORKING WOMEN,
A NATIONAL ASSOCIATION OF OFFICE WORKERS,
July 23, 1981.

Hon. ORRIN G. HATCH,
Senate Subcommittee on the Constitution,
Washington, D.C.

DEAR SENATOR HATCH: On July 16, I testified on behalf of WORKING WOMEN at the hearings on Affirmative Action before the Senate Sub-Committee on the Constitution. Since you were unable to question me at the hearing, questions were submitted to me in writing. Following are my responses to those questions.

In my opinion, women, blacks, and Hispanics have all suffered some form of discrimination in this country. It does not matter in what form the discrimination has occurred. What does matter is the fact that the discrimination has resulted in women and minorities not sharing an equal position with white men in employment. The purpose of the discrimination and affirmative action laws is to create equal employment opportunity in the United States.

I believe that all groups that are underrepresented in decision making positions in the work force should be protected by anti-discrimination and affirmative action laws. There are not set criteria for determining who is protected by the laws. Who is protected should vary with the particular job. For example, there is an overabundance of women in the nursing field. Perhaps men could benefit from affirmative action in the nursing profession. On the other hand, women and minorities are underrepresented in corporate executive offices where policy decisions are made. Affirmative action and equal employment opportunity are necessary to provide them the chance to acquire these positions. Affirmative action does not guarantee that a certain number of women and minorities will be occupying these jobs at all given times, but it does guarantee women and minorities access to positions that they otherwise would not have.

Affirmative action will no longer be necessary in the United States when equal employment is a reality.

I do not agree that it is a given that women tend to enter the work force later than men. Most of the women who are members of WORKING WOMEN entered the work force immediately after high school or college out of necessity. Many of them have been responsible for training white males who have become their supervisors. I might add that these white males in many instances did not have more education and obviously did not have more experience since a more experienced woman was doing the training.

In calculating the impact of different factors on job discrimination, I can not speak to the other factors because they have not been made specific. I can say from personal experience that I have experienced discrimination both because I am black and because I am a woman. Thousands of women and minorities can truthfully say the same.

I am not aware of the blacks who contend that affirmative action for women only serves to limit the benefits for blacks and other minority groups. I would like to hear their testimony. What I do know is that WORKING WOMEN has a very good relationship with the NAACP Legal Defense Fund, the Urban league, and the Mexican American Legal Defense and Education Fund. We have never had them express the view to us that they thought that there would be more for them if women were not among the protected classes.

Sincerely,

WANDA FLOWERS,
Legal Counsel.

Senator **HATCH**. With that, we will recess these hearings until the next scheduled date.

[Whereupon, at 11:45 a.m., the subcommittee recessed, to reconvene at the call of the Chair.]

APPENDIX

PART I—MISCELLANEOUS STUDIES AND ARTICLES

AFFIRMATIVE ACTION IN THE 1980--
U.S. COMMISSION ON CIVIL RIGHTS

Part A

The Problem: Discrimination

Making choices is an essential part of everyday life for individuals and organizations. These choices are shaped in part by social structures that set standards and influence conduct in such areas as education, employment, housing, and government. When these choices limit the opportunities available to people because of their race, sex, or national origin, the problem of discrimination arises.

Historically, discrimination against minorities and women was not only accepted, but was also governmentally required. The doctrine of white supremacy, used to support the institution of slavery, was so much a part of American custom and policy that the Supreme Court of the United States in 1857 approvingly concluded that both the North and the South regarded slaves "as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect."[1] White supremacy survived the passage of the Civil War amendments to the Constitution and continued to dominate legal and social institutions in the North as well as the South to disadvantage not only blacks,[2] but other racial and ethnic groups as well—American Indians, Alaskan Natives, Asian and Pacific Islanders, and Hispanics.[3]

While minorities were suffering from white supremacy, women were suffering from male supremacy. Mr. Justice Brennan has summed up the legal disabilities imposed on women this way:

> [T]hroughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children.[4]

In 1873 a member of the Supreme Court proclaimed: "Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."[5] Such romantic paternalism has alternated with fixed notions of male superiority to deny women in law and in practice the most fundamental of rights, including the right to vote, which was not granted until 1920;[6] the Equal Rights Amendment has yet to be ratified.[7]

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[1] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 408 (1857).

[2] For a concise summary of this history that refers to numerous other sources, see U.S., Commission on Civil Rights, *Civil Rights: A National, Not a Special Interest* (1981), pp. 1-33; *Twenty Years After Brown* (1975), pp. 4-29; *Freedom to the Free: Century of Emancipation 1863-1963* (1963).

[3] The discriminatory conditions experienced by these minority groups have been documented in the following publications by the U.S. Commission on Civil Rights: *Indian Tribes: A Continuing Quest for Survival* (1981); *The Navajo Nation: An American Colony* (1975); *The Southwest Indian Report* (1973); *Success of Asian Americans: Fact or Fiction?* (1980); *The Forgotten Minority: Asian Americans in New York City* (New York State Advisory Committee, 1977); *Stranger in One's Land* (1970); *Toward Quality Education for Mexican Americans* (1974); *Puerto Ricans in the Continental United States: An Uncertain Future* (1976).

[4] Frontiero v. Richardson, 411 U.S. 677, 685 (1973), *citing* Leo Kanowitz, *Women and the Law: The Unfinished Revolution* (Albuquerque: University of New Mexico Press, 1969), pp. 5-6, and Gunnar Myrdal, *An American Dilemma* (20th Anniversary ed., 1962), p. 1073. Justice Brennan wrote the opinion of the Court, joined by Justices Douglas, White, and Marshall. Justice Stewart concurred in the judgment. Justice Powell, joined by Chief Justice Burger and Justice Blackmun, wrote a separate concurring opinion. Justice Rehnquist dissented. See also H.M. Hacker, "Women as a Minority Group," *Social Forces*, vol. 30 (1951), pp. 60-69; W. Chafe, *Women and Equality: Changing Patterns in American Culture* (New York: Oxford University Press, 1977).

Although beliefs and practices based on white and male supremacy linger, public attitudes toward civil rights have improved noticeably.[8] The blatant racial and sexual discrimination that originated in our often forgotten past, however, continues to affect the present. A steady flow of data reveals persistent and widespread gaps throughout society between the status of white males and various minority groups and women.[9] Because they occur so often and in so many places, such statistically observable inequalities are strong evidence of a systematic denial of equal opportunities. Those inequalities result from a complex interaction of attitudes and actions of individuals, organizations, and the network of social structures that makes up our society.

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[5] Bradwell v. State, 83 U.S. (16 Wall) 130, 141 (1873) (Bradley, J., concurring), *quoted in* Frontiero v. Richardson, 411 U.S 677, 684 (1973).

[6] U.S., Const. amend. XIX.

[7] See U.S., Commission on Civil Rights, *The Equal Rights Amendment: Guaranteeing Equal Rights for Women Under the Constitution* (1981); *Statement on the Equal Rights Amendment* (1978).

[8] Public opinion polls reveal that the expression of prejudiced attitudes toward blacks and women have continued to decline, particularly in the last decade, although such prejudice persists in a significant percentage of the public. A 1978 Gallup poll showed a decline in the expression of prejudice in issues related to housing and politics. Between 1965 and 1978, the number of whites who said they would move out of their neighborhoods if blacks moved in declined from 35 percent to 16 percent. Between 1969 and 1978, the number of whites who said they would vote for a qualified black Presidential candidate of their own party increased from 67 to 77 percent. *Gallup Poll*, Aug. 27, 1978. Another poll found that betweeen 1971 and 1978 a declining number of whites said they believed blacks to be inferior (from 22 percent to 15 percent) or of less native intelligence than whites (from 37 percent to 25 percent). Poll by Louis Harris and Associates for the National Conference on Christians and Jews, *Newsweek*, Feb. 26, 1979, p. 48.

Although blacks continue to see racial prejudice as an important cause of many of their social and economic problems, whites are now less often seen as standing in the way of black progress compared to a decade ago. In 1969 a, *Newsweek* poll found a plurality of blacks (46 percent) feeling that most whites wanted to keep them down. The February 1981 *Newsweek* poll showed fewer (32 percent) supporting this view. *Gallup Poll Watch*, May 18, 1981.

With regard to women, the findings are ambiguous. A recent Gallup poll shows public support for the Equal Rights Amendment at a new high with 63 percent of Americans who have heard or read about the ERA favoring it and 32 percent opposed. In surveys conducted regularly by the Gallup Poll since 1975, support for the ERA had never exceeded 58 percent. *Gallup Poll*, Aug. 9, 1981. Another poll conducted by the Roper Organization showed a decline in support for the ERA (from 55 percent of women and 68 percent of men in 1975 to 51 percent of women and 52 percent of men in 1980). However, the same poll indicated that support for efforts to strengthen the status of women had increased (from 40 percent of women and 44 percent of men in 1970 to 60 percent of women and 64 percent of men in 1980). *Virginia Slims American Women's Opinion Poll* (Roper Organization, 1980).

[9] The Commission has issued a report evaluating the Nation's progress toward equality by systematically comparing the social conditions of the minority and female population to those of the white male population, *Social Indicators of Equality for Minorities and Women* (1978). Separately analyzed by sex were statistics on American Indians and Alaskan Natives, blacks, Mexican Americans, Japanese Americans, Chinese Americans, Filipino Americans, Puerto Ricans, and the majority population. According to the report, minorities and women are less likely to have completed as many years of high school or have a high school or college education than white males. If not undereducated, they tend to be educationally overqualified for the work they do and earn less than comparably educated white males. As of 1976, among those persons 25–29 years of age, 34 of every 100 white males were college educated, while only 11 out of every 100 minorities were college educated. Ibid., p. 26.

Women and minorities are more likely to be unemployed, to have less prestigious occupations than white men, and to be concentrated in different occupations. From 1970 to 1976, when unemployment rates were rising for all groups, the disparity between minority and female rates and the majority male rate generally increased; blacks, Mexican Americans, and Puerto Ricans of both sexes moved from having approximately twice the unemployment of majority males in 1970 to nearly three times the majority male rate in 1976. Ibid., p. 29. In 1976, 47.8 percent of black male teenagers, 51.3 percent of black female teenagers, and 55.2 percent of Puerto Rican male teenagers were unemployed, compared to 15.0 percent unemployment among majority male teenagers. Ibid., p. 32. Occupational segregation is also intense: One-third of the jobs held by minority men and two-thirds to three-fourths of the jobs held by women in 1976 would have to be changed to match the occupational patterns of white males. Ibid., p. 45.

Minorities and women have less per capita household income and a greater likelihood of being in poverty. "The indicator values for median household per capita income for 1959, 1969, and 1975 show that most minority and female-headed households have only half the income that is available to majority households." Ibid., p. 65. Relative to the income of white males, the incomes available to Mexican Americans and Puerto Ricans in 1975 were the same as or less than they were in 1965 and 1970. In addition, minority-headed families, regardless of the sex of the family head, are twice as likely to be in poverty as majority-headed families, and minority female-headed families are over five times as likely to be in poverty as majority-headed families. Ibid., pp. 65–66.

Finally, minority and female-headed households are more likely to be located in central cities than in the suburbs where majority-headed households are located. Between 1960 and 1970 most minority households were only about one-half to two-thirds as likely as white households to be situated outside a central city. Minorities and women are less likely to be homeowners, more likely to live in overcrowded conditions, and more likely to spend more than a quarter of their family income on rent. American Indian, Alaskan Native, black, Chinese American, Filipino American, and Puerto Rican rental households were all more than two, with Mexican American households almost six, times as likely to be overcrowded as white households in 1970. In 1976 minority and female-headed households were, at best, two-thirds as likely to be owner occupied as majority-headed households. Ibid., pp. 75, 84–85.

Individual Discrimination

The most common understanding of discrimination rests at the level of prejudiced individual attitudes and behavior. Although open and intentional prejudice persists, individual discriminatory conduct is often hidden and sometimes unintentional.[10] Some of the following are examples of deliberately discriminatory actions by consciously prejudiced individuals. Some are examples of unintentionally discriminatory actions taken by persons who may not believe themselves to be prejudiced, but whose decisions continue to be guided by deeply ingrained discriminatory customs.

- Personnel officers whose stereotyped beliefs about women and minorities justify hiring them for low level and low paying jobs exclusively, regardless of their potential experience or qualifications for higher level jobs.[11]
- Hiring officials, historically white males, who rely on "word-of-mouth" recruiting among their friends and colleagues, so that only their friends and proteges of the same race and sex learn of potential job openings.[12]
- Employers who hire women for their sexual attractiveness or potential sexual availability rather than their competence, and employers who engage in sexual harassment of their female employees.[13]
- Teachers who interpret linguistic and cultural differences as indications of low potential or lack of academic interest on the part of minority students.[14]
- Guidance counselors and teachers whose low expectations lead them to advise female and minority students to avoid "hard" courses, such as mathematics and science, and to take courses that do not prepare them for higher paying jobs.[15]
- Real estate agents who show fewer homes to minority buyers and steer them to minority or mixed neighborhoods because they believe white residents would oppose the presence of black neighbors.[16]
- Families who assume that property values inevitably decrease when minorities move in and

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[10] *See, e.g.*, R.K. Merton, "Discrimination and the American Creed," in R.K. Merton, *Sociological Ambivalence and Other Essays* (New York: The Free Press, 1976), pp. 189–216. In this essay on racism, published for the first time more than 30 years ago, Merton presented a typology which introduced the idea that discriminatory actions are not always directly related to individual attitudes of prejudice. Merton's typology consisted of the following: Type I—the unprejudiced nondiscriminator; Type II—the unprejudiced discriminator; Type III—the prejudiced nondiscriminator; Type IV—the prejudiced discriminator. In the present context, Type II is crucial in its observation that discrimination is often practiced by persons who are not themselves prejudiced, but who respond to, or do not oppose, the actions of those who discriminate because of prejudiced attitudes (Type IV). See also D.C. Reitzes, "Prejudice and Discrimination: A Study in Contradictions," in *Racial and Ethnic Relations*, ed. H.M. Hughes (Boston: Allyn and Bacon, 1970), pp. 56–65.

[11] *See* R.M. Kanter and B.A. Stein, "Making a Life at the Bottom," in *Life in Organizations, Workplaces as People Experience Them*, ed. R.M. Kanter and B.A. Stein (New York: Basic Books, 1976), pp. 176–90; also, L.K. Howe, "Retail Sales Worker," ibid., pp. 248–51; also, R.M. Kanter, *Men and Women of the Corporation* (New York: Basic Books, 1977).

[12] *See* M.S. Granovetter, *Getting A Job: A Study of Contract and Careers* (Cambridge: Harvard University Press, 1974), pp. 6–11; also, A.W. Blumrosen, *Black Employment and the Law* (New Brunswick, N.J.: Rutgers University Press, 1971), pp. 232–34. *See also* EEOC v. Detroit Edison Co., 515 F.2d 301, 313 (6th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977) (practice of relying on referrals by a predominantly white work force rather than seeking out new employees in the marketplace for jobs was found to be discriminatory); EEOC v. Ford Motor Co., 645 F.2d 183, 198 (4th Cir. 1981) (a policy of favoring job applicants who were friends of current workers, where current work force was exclusively male, plus statistical data showing bias in hiring practices, established discrimination under Title VII).

[13] *See* U.S., Equal Employment Opportunity Commission (EEOC), "Guidelines on Discrimination Because of Sex," 29 C.F.R. §1604.4 (1979); L. Farley, *Sexual Shakedown: The Sexual Harassment of Women on the Job* (New York: McGraw Hill, 1978), pp. 92–96, 176–79; C.A. Mackinnon, *Sexual Harassment of Working Women* (New Haven: Yale University Press, 1979), pp. 25–55.

[14] *See* R. Rosenthal and L.F. Jacobson, "Teacher Expectations for the Disadvantaged," *Scientific American*, 1968 (b), pp. 218, 219–23; also, D. Bar Tal, "Interactions of Teachers and Pupils," in *New Approaches to Social Problems*, ed. I.H. Frieze, D. Bar Tal, and J.S. Carrol (San Francisco: Jossey Bass, 1979), pp. 337–58; also, U.S., Commission on Civil Rights, *Teachers and Students, Report V: Mexican American Education Study, Differences in Teacher Interaction With Mexican American and Anglo Students* (1973), pp. 22–23.

[15] Ibid.

[16] U.S., Department of Housing and Urban Development, *Measuring Racial Discrimination in American Housing Markets: The Housing Market Practices Survey* (1979); D.M. Pearce, "Gatekeepers and Home Seekers: Institutional Patterns in Racial Steering," in *Social Problems*, vol. 26 (1979), pp. 325–42; "Benign Steering and Benign Quotas: The Validity of Race Conscious Government Policies to Promote Residential Integration," *Harvard Law Review*, vol. 93 (1980), pp. 938, 944.

therefore move out of their neighborhoods if minorities do move in.[17]

- Parole officials who assume minority offenders are more dangerous or more unreliable than white offenders and consequently more frequently deny parole to minorities than to whites convicted of equally serious crimes.[18]

These contemporary examples of discrimination need not be motivated by conscious prejudice. The personnel manager is likely to deny believing that minorities and women can only perform satisfactorily in low level jobs even while acting in ways consistent with such beliefs. In some cases the minority or female applicants may not be aware that they have been discriminated against—the personnel manager may inform them that they are deficient in experience while rejecting their applications because of prejudice; the white male hiring official who recruits through his friends or white male work force excludes minorities and women who never learn of the available positions. The discriminatory results these activities cause may not even be desired. The guidance counselor may honestly believe there are no other realistic alternatives for minority and female students.

Whether conscious or not, open or hidden, desired or undesired, these acts build on and support prejudicial stereotypes, deny their victims opportunities provided to others, and perpetuate discrimination, regardless of intent.

Organizational Discrimination

Discrimination, though practiced by individuals, is often reinforced by the well-established rules, policies, and practices of organizations. These procedures may be officially approved, formal parts of organizational decisionmaking, or they may be unarticulated, informal ways of doing business. Whether formal or informal, they are the organization's standard operating procedures and are carried out by individuals as just part of their day's work.

Discrimination at the organizational level takes forms that are similar to those on the individual level. For example:

- Height and weight requirements that are unnecessarily geared to the physical proportions of white males without regard for the actual requirements needed to perform the job, and, therefore, exclude females and some minorities.[19]
- Seniority rules, when applied to jobs historically held only by white males, that make more recently hired minorities and females more subject to layoff—the "last hired, first fired" employee—and less eligible for advancement.[20]
- Nepotism-based membership policies of some referral unions that exclude those who are not relatives of members who, because of past employment practices, are usually white.[21]
- Restrictive employment leave policies, coupled with prohibitions on part-time work or denials of fringe benefits to part-time workers, that make it difficult for the heads of single-parent families, most of whom are women, to get and keep jobs and meet the needs of their families.[22]
- Rules requiring that only English be spoken at the workplace, even when not a business necessity, which result in discriminatory employment practices toward individuals whose primary language is not English.[23]
- Standardized academic tests or criteria, geared to the cultural and educational norms of the

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[17] *See* M.N. Danielson, *The Politics of Exclusion* (New York: Columbia University Press, 1976), pp. 11–12; U.S., Commission on Civil Rights, *Equal Opportunity in Suburbia* (1974).

[18] *See* L.L. Knowles and K. Prewitt, eds., *Institutional Racism in America* (Englewood Cliffs, N.J.: Prentice Hall, 1969) pp. 58–77, and E.D. Wright, *The Politics of Punishment* (New York: Harper and Row, 1973). Also, S.V. Brown, "Race and Parole Hearing Outcomes," in *Discrimination in Organizations*, ed. R. Alvarez and K.G. Lutterman (San Francisco: Jossey Bass, 1979), pp. 355–74.

[19] Height and weight minimums that disproportionately exclude women without a showing of legitimate job requirement constitute unlawful sex discrimination. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977); Bowe v. Colgate Palmolive Co., 416 F.2d 711 (7th Cir. 1969). Minimum height requirements used in screening applicants for employment have also been held to be unlawful where such a requirement excludes a significantly higher percentage of Hispanics than other national origin groups in the labor market and no job relatedness is shown. *See* Smith v. City of East Cleveland, 520 F.2d 492 (6th Cir. 1975).

[20] U.S., Commission on Civil Rights, *Last Hired, First Fired* (1976); Tangren v. Wackenhut Servs., Inc., 480 F. Supp. 539 (D. Nev. 1979), *notice of appeal filed* (9th Cir. Dec. 4, 1979).

[21] U.S., Commission on Civil Rights, *The Challenge Ahead, Equal Opportunity in Referral Unions* (1977), pp. 84–89.

[22] A. Pifer, "Women Working: Toward a New Society," pp. 13–34, and D. Pearce, "Women, Work and Welfare: The Feminization of Poverty," pp. 103–24, both in K.A. Fernstein, ed., *Working Women and Families* (Beverly Hills: Sage Publications, 1979). *See also*, U.S., Commission on Civil Rights, *Child Care and Equal Opportunity for Women* (1981), pp. 44–49. Disproportionate numbers of single-parent families are minorities. *See* U.S., Department of Commerce, Bureau of the Census, *Families Maintained by Female Householders 1970–79* (1980), p. 5.

[23] *See* EEOC, "Guidelines on Discrimination Because of National Origin," §1606.7, 45 Fed. Reg. 85635 (1980) (to be codified in 29 C.F.R. Part 1606).

middle-class or white males, that are not relevant indicators of successful job performance.[24]

- Preferences shown by law and medical schools in the admission of children of wealthy and influential alumni, nearly all of whom are white.[25]
- Credit policies of banks and lending institutions that prevent the granting of mortgage monies and loans in minority neighborhoods or prevent the granting of credit to married women and others who have previously been denied the opportunity to build good credit histories in their own names.[26]

Superficially "colorblind" or "gender neutral," these organizational practices have an adverse effect on minorities and women. As with individual actions, these organizational actions favor white males. Even when taken with no deliberate intent to affect minorities and women adversely, they protect and promote the status quo arising from the racism and sexism of the past. If, for example, the jobs now protected by "last hired, first fired" provisions had always been integrated, seniority would not operate to disadvantage minorities and women. If many educational systems from kindergarten through college had not historically favored white males, more minorities and women would hold advanced degrees and thereby be included among those involved in deciding what academic tests should test. If minorities had lived in the same neighborhoods as whites, there would be no minority neighborhoods to which mortgage money could be denied on the basis of their being minority neighborhoods.

Such barriers to minorities and women too often do not fulfill legitimate needs of the organization, or these needs can be met through other means that adequately further organizational interests without discriminating. Instead of excluding all women on the assumption that they are too weak or should be protected from strenuous work, the organization can implement a reasonable test that measures the strength actually needed to perform the job or, where possible, develop ways of doing the work that require less physical effort. Admissions to academic and professional schools can be decided not only on the basis of grades, standardized test scores, and the prestige of the high school or college from which the applicant graduates, but also on the basis of community service, work experience, and letters of recommendation. Lending institutions can look at the individual and his or her financial ability rather than the neighborhood or marital status of the prospective borrower.

Some practices that disadvantage minorities and women are readily accepted aspects of everyday behavior. Consider the "old boy" network in business and education built on years of friendship and social contact among white males, or the exchanges of information and corporate strategies by business acquaintances in racially or sexually exclusive private clubs paid for by the employer.[27] These actions, all of which have a discriminatory impact on minorities and women, are not necessarily acts of conscious prejudice. Because such actions are so often considered part of the "normal" way of doing things, people have difficulty recognizing that they are part of a discriminatory process and, therefore, resist abandoning them despite the clearly discriminatory results. Consequently, many decisionmakers have difficulty considering, much less accepting, nondiscriminatory alternatives that may work just as well or better to advance legitimate organizational interests, but without systematically disadvantaging minorities and women.

This is not to suggest that all such discriminatory organizational actions are spurious or arbitrary. Many may serve the actual needs of the organization. Physical size or strength at times may be a legitimate job requirement; sick leave and insurance policies must be reasonably restricted; English proficiency and educational qualifications are needed for many jobs; lending institutions cannot lend to people who cannot reasonably demonstrate an ability to repay loans. Unless carefully examined and then modified or eliminated, however, these apparently neutral rules, policies, and practices will continue to perpetuate age-old discriminatory patterns into the structure of today's society.

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[24] *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971); U.S., Commission on Civil Rights, *Toward Equal Educational Opportunity: Affirmative Admissions Programs at Law and Medical Schools* (1978), pp. 10–12; I. Berg, *Education and Jobs: The Great Training Robbery* (Boston: Beacon Press, 1971), pp. 58–60.

[25] *See* U.S., Commission on Civil Rights, *Toward Equal Educational Opportunity*, pp. 14–15.

[26] *See* U.S., Commission on Civil Rights, *Mortgage Money: Who Gets It? A Case Study in Mortgage Lending Discrimination in Hartford, Conn.* (1974); J. Feagin and C.B. Feagin, *Discrimination American Style, Institutional Racism and Sexism* (Englewood Cliffs, N.J.: Prentice Hall, 1976), pp. 78–79.

[27] See *Club Membership Practices by Financial Institutions: Hearing Before the Committee on Banking, Housing and Urban Affairs, United States Senate*, 96th Cong., 1st sess. (1979). Pursuant to President Reagan's directive, the Office of Federal Contract Compliance Programs has withdrawn a rule it earlier proposed (45 Fed. Reg. 4954, 1980) that would have made the payment or reimbursement of membership fees in a private club that accepts or rejects persons on the basis of race, color, sex, religion, or national origin a prohibited discriminatory practice if such membership enhances employment opportunities. 46 Fed. Reg. 19004 (Mar. 27, 1981). It is the position of the Labor Department, however, that the Executive order provisions prohibiting discrimination and requiring affirmative action are "adequate to prevent an employer from using such memberships to structure the conduct of its businesses in a manner which creates employment discrimination." *Id.*

Whatever the motivation behind such organizational acts, a process is occurring, the common denominator of which is the denial of equality of opportunity to large numbers of minorities and women.[28] When unequal outcomes are repeated over time and in numerous societal and geographical areas, it is a clear signal that a discriminatory process is at work.

Such discrimination is not a static, one-time phenomenon that has a clearly limited effect. Discrimination can feed on discrimination in self-perpetuating cycles:[29]

- The employer who recruits job applicants by word of mouth within a predominantly one-race, one-sex work force reduces the chances of receiving applications from people of another race or sex. Traditionally, those holding the most desirable jobs in the work force have been white males. If word-of-mouth recruiting is the method used to fill these jobs, minorities and women will have no opportunity to apply, since they will not hear about vacancies. Since they do not apply, they are not hired. Since they are not hired, they cannot recruit other minority or female applicants. Because there are no minority or female employees to recruit others, the employer is left to recruit from among its predominantly white and male work force.[30]
- The teacher who expects poor academic performance from minority and female students may not become greatly concerned when their grades are low. The acceptance of their low grades removes incentives to improve. Without incentives to improve, their grades remain low. Their low grades reduce their expectations, and the teacher has no basis for expecting more of them.[31]
- The realtor who assumes that white homeowners do not want minority neighbors "steers" minorities to minority neighborhoods. Those steered to minority neighborhoods tend to live in minority neighborhoods. White neighborhoods then remain white, and realtors tend to assume that whites do not want minority neighbors.[32]
- Elected officials appoint voting registrars who impose linguistic, geographic, and other barriers to minority voter registration. Lack of minority registration means that fewer minorities vote. Lower minority voting rates lead to the election of fewer unresponsive officials. These elected officials then appoint voting registrars who maintain the same barriers.[33]

Structural Discrimination

Such self-sustaining discriminatory processes occur not only in employment, education, housing, and government, but also between these structural areas. There is a classic cycle of structural discrimination that reproduces itself. Discrimination in education denies the credentials to get good jobs. Discrimination in employment denies the economic resources to buy good housing. Discrimination in housing confines its victims to school districts providing inferior education, closing the cycle in a classic form.[34]

The cycles of discrimination that white women encounter differ from those minorities encounter, but all women face structural discrimination when they compete with men. When white women live with white men, the women share many of the material and educational advantages that the men enjoy. In addition, white males often pass such advantages on to their daughters or wives. But sharing resources is not the same as sharing power. Access to some of the same material resources that white males enjoy does not give white women the ability to obtain these resources independently. In this sense, white women are caught in a discriminatory cycle that neutralizes the advantages derived by relationships with white men. The educational experiences of white women perhaps best illustrate this cycle. Educational programs, most conspicuously vocational and athletic programs,[35] have significantly disadvantaged white females, although not in the same ways or to the same degree as segregated minorities. On the whole, girls tend to perform at least as well as boys in elementary and high school and even in higher educational programs.[36] Nonetheless, females as a group have yet to do as well in the employment market as do similarly or less educated males.[37]

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[28] *See* discussion of the courts' use of numerical evidence of unequal results in Part B of this statement, "Civil Rights Law and the Problem."

[29] *See* U.S., Commission on Civil Rights, *For All the People. . .By All the People* (1969), pp. 122–23.

[30] *See* note 12.

[31] *See* note 14. Non-English-speaking students may suffer a similar fate. *See,e.g.*, Dexter Waugh and Bruce Koon, "Breakthrough for Bilingual Education: *Lau v. Nichols* and the San Francisco School System," *Civil Rights Digest*, vol. 6, no. 4 (1974), pp. 18–26.

[32] *See* notes 16 and 17.

[33] *See* Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, statement before the Subcommittee on Constitutional Rights, Committee on the Judiciary, U.S. Senate, on S.407, S.903, and S.1279, Apr. 9, 1975, pp. 15–18, based on U.S., Commission on Civil Rights, *The Voting Rights Act: Ten Years After* (January 1975).

[34] *See,e.g.*, U.S., Commission on Civil Rights, *Equal Opportunity in Suburbia* (1974).

For women who are minorities, discriminatory cycles may have even more devastating effects. Minority women are subject to the same types of discrimination as white women, but cannot draw on the resources available in the white community. For minority women, the cycle of discrimination is as tightly closed and rigidly self-perpetuating as it is for minority men.

Regarding the similarities and differences between the discrimination experienced by women and minorities, one author has aptly stated:

> [W]hen two groups exist in a situation of inequality, it may be self-defeating to become embroiled in a quarrel over which is more unequal or the victim of greater oppression. The more salient question is how a condition of inequality for both is maintained and perpetuated—through what means is it reinforced?[38]

It is far more productive to understand the various forms and dynamics of the discrimination that minorities and women experience than to engage in endless, value-laden debates over who is suffering more. The nature and extent of the processes that cause the suffering should be the focus of analysis, not just the pain and unfairness caused by those processes.

The following are additional examples of the interaction among social structures that affects minorities and women:

- The absence of minorities and women from executive, writing, directing, news reporting, and acting positions in television contributes to unfavorable stereotyping on the screen, which in turn reinforces existing stereotypes among the public and creates psychological roadblocks to progress in employment, education, and housing.[39]
- Living in inner-city high crime areas in disproportionate numbers, minorities, particularly minority youth, are more likely to be arrested and are more likely to go to jail than whites accused of similar offenses, and their arrest and conviction records are then often used as bars to employment.[40]
- Because of past discrimination against minorities and women, female- and minority-headed businesses are often small and relatively new. Further disadvantaged by contemporary credit and lending practices, they are more likely than white-male-owned businesses to remain small and be less able to employ full-time specialists in applying for government contracts. Because they cannot monitor the availability of government contracts, they do not receive such contracts. Because they cannot demonstrate success with government contracts, contracting officers tend to favor other firms that have more experience with government contracts.[41]

Discriminatory actions by individuals and organizations are not only pervasive, occurring in every sector of society, but also cumulative, with effects limited neither to the time nor the particular structural area in which they occur. This process of discrimination, therefore, extends across generations, across organizations, and across social structures in self-reinforcing cycles, passing the disadvantages incurred by one generation in one area to future generations in many related areas.[42]

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[35] *See generally* U.S., Commission on Civil Rights, *More Hurdles to Clear: Women and Girls in Competitive Athletics* (1980).

[36] Ruth Bader Ginsburg, "Realizing The Equality Principle," in *Social Justice and Preferential Treatment*, ed. William Blackstone and Robert Heslop (Athens: University of Georgia Press, 1977), pp. 136–37.

[37] Elizabeth McTaggart Almquist, *Minorities, Gender, and Work* (Lexington, Mass.: Lexington Books, 1979), p. 181.

[38] Chafe, *Women and Equality*, p. 78.

[39] U.S., Commission on Civil Rights, *Window Dressing on the Set* (1977).

[40] *See* note 18; Gregory v. Litton Systems, Inc., 472 F.2d 631 (9th Cir. 1972); Green v. Mo.-Pac. R.R., 523 F.21 1290 (8th Cir. 1975).

[41] *See* U.S., Commission on Civil Rights, *Minorities and Women as Government Contractors* (1975), pp. 20, 27, 125.

[42] *See,e.g.*, A. Downs, *Racism in America and How to Combat It* (prepared for the U.S. Commission on Civil Rights, 1970); "The Web of Urban Racism," in *Institutional Racism in America*, ed. Knowles and Prewitt, pp. 134–76. Other factors in addition to race, sex, and national origin may contribute to these interlocking institutional patterns. In *Equal Opportunity in Suburbia* (1974), this Commission documented what it termed "the cycle of urban poverty" that confines minorities in central cities with declining

These interrelated components of the discriminatory process share one basic result: the persistent gaps seen in the status of women and minorities relative to that of white males. These unequal results themselves have real consequences. The employer who wishes to hire more minorities and women may be bewildered by charges of racism and sexism when confronted by a genuine shortage of qualified minority and female applicants. The guidance counselor who sees one promising minority student after another drop out of school or give up in despair may resent allegations of racism when there is little he or she alone can do for the student. The banker who denies a loan to a female single parent may wish to act differently, but believes that prudent fiscal judgment requires taking into account her lack of financial history and inability to prove that she is a good credit risk. These and other decisionmakers see the results of a discriminatory process repeated over and over again, and those results provide a basis for rationalizing their own actions, which then feed into that same process.

When seen outside the context of the interlocking and intertwined effects of discrimination, complaints that many women and minorities are absent from the ranks of qualified job applicants, academically inferior and unmotivated, poor credit risks, and so forth may appear to be justified. Decisionmakers like those described above are reacting to real social problems stemming from the process of discrimination. But many too easily fall prey to stereotyping and consequently disregard those minorities and women who have the necessary skills or qualifications. And they erroneously "blame the victims" of discrimination,[43] instead of examining the past and present context in which their own actions are taken and the multiple consequences of these actions on the lives of minorities and women.

The Process of Discrimination

Although discrimination is maintained through individual actions, neither individual prejudices nor random chance can fully explain the persistent national patterns of inequality and underrepresentation. Nor can these patterns simplistically be blamed on the persons who are at the bottom of our economic, political, and social order. We regard as an age-old canard of bigotry that the victims of discrimination have only themselves to blame for their victimization. Public opinion polls indicate that overt racism and sexism based on attitudes of white and male supremacy have been widely repudiated, but our history of discrimination based on race, sex, and national origin has not been readily put aside. Past discrimination continues to have present effects. The task today is to identify those effects and the forms and dynamics of the discrimination that reproduce them.

Discrimination against minorities and women should now be viewed as an interlocking process involving the attitudes and actions of individuals and the organizations and social structures that guide individual behavior. That process, started by past events, now routinely bestows privileges, favors, and advantages on white males and imposes disadvantages and penalties on minorities and women. This process is also self-perpetuating. Many normal, seemingly neutral, operations of our society create stereotyped expectations that justify unequal results; unequal results in one area foster inequalities in opportunity and accomplishment in others; the lack of opportunity and accomplishment confirms the original prejudices or engenders new ones that fuel the normal operations generating unequal results.

As we have shown, the process of discrimination involves many aspects of our society. No single factor sufficiently explains discrimination, and no single means will suffice to eliminate it. We must continuously examine such elements of our society as our history of *de jure* discrimination, deeply ingrained prejudices,[44] inequities based on economic

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tax bases, soaring educational and other public needs, and dwindling employment opportunities, surrounded by largely white, affluent suburbs. This cycle of poverty, however, started with and is fueled by discrimination against minorities. *See also* W. Taylor, *Hanging Together, Equality in an Urban Nation* (New York: Simon & Schuster, 1971).

[43] The "self-fulfilling prophecy" is a well-known phenomenon. "Blaming the victim" occurs when responses to discrimination are treated as though they were the causes rather than the results of discrimination. *See* Chafe, *Women and Equality*, pp. 76–78; W. Ryan, *Blaming the Victim* (New York: Pantheon Books, 1971).

[44] *See, e.g.*, J.E. Simpson and J.M. Yinger, *Racial and Cultural Minorities* (New York: Harper and Row, 1965), pp. 49–79; J.M. Jones, *Prejudice and Racism* (Reading, Mass.: Addison Wesley, 1972), pp. 60–111; M.M. Tumin, "Who Is Against Desegregation?" in *Racial and Ethnic Relations*, ed. H. Hughes (Boston: Allyn & Bacon, 1970), pp. 76–85; D.M. Wellman, *Portraits of White Racism* (Cambridge: Cambridge University Press, 1977).

and social class,[48] and the structure and function of all our economic, social, and political institutions[49] in order to understand their part in maintaining or countering discriminatory processes.

It may be difficult to identify precisely all aspects of discriminatory processes and assign those parts their appropriate weight. But understanding how discrimination works starts with an awareness that it is a process, and that to avoid perpetuating it, we must carefully assess the context and consequences of our everyday actions.

The Commission believes that a more productive and pragmatic approach toward eliminating discrimination starts with an informed awareness of the forms, dynamics, and subtleties of the process of discrimination. Decisionmakers are then better able to develop programs utilizing the tools of administration to change an organization's practices to those that promote equality instead of support continued inequality. The problem-remedy approach advanced in this statement is intended as an aid toward moving in that direction.

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[48] *See,e.g.,* D.C. Cox, *Caste, Class and Race: A Study in Social Dynamics* (Garden City, N.Y.: Doubleday, 1948); W.J. Wilson, *Power, Racism and Privilege* (New York: MacMillan, 1973).

[49] H. Hacker, "Women as a Minority Group," *Social Forces,* vol. 30 (1951), pp. 60–69; J. Feagin and C.B. Feagin, *Discrimination American Style;* Chafe, *Women and Equality;* J. Feagin, "Indirect Institutionalized Discrimination," *American Politics Quarterly,* vol. 5 (1977), pp. 177–200; M.A. Chesler, "Contemporary Sociological Theories of Racism," in *Towards the Elimination of Racism,* ed. P. Katz (New York: Pergamion Press, 1976); P. Van den Berghe, *Race and Racism: A Comparative Perspective* (New York: Wiley, 1967); S. Carmichael and C. Hamilton, *Black Power* (New York: Random House, 1967); Knowles and Prewitt, *Institutional Racism in America;* Downs, *Racism in America and How to Combat It.*

Part B

Civil Rights Law and Affirmative Action

This statement started from the premise that the remedy of affirmative action can be most productively discussed by reference to discrimination, the problem it was created to address.

Lawyers often equate "discrimination" with activities prohibited by law and commonly limit remedies to attempts to correct such illegal acts. This statement, however, defines "discrimination" to include all the expressions of discrimination related to race, sex, and national origin explained in the preceding section of this statement, whether legal or illegal. Correspondingly, the term "remedy" as used here encompasses all antidiscrimination measures, including those that take race, sex, and national origin into account.

This broader definition has been used because civil rights laws do not prohibit all forms of discrimination experienced by minorities and women, especially the more complex processes of discrimination. Such discrimination may continue due to practical difficulties in establishing that a legal violation has, in fact, occurred.[1] In addition, despite consistently unequal results, some discrimination is entirely lawful.[2] If civil rights laws are interpreted to restrict the use of affirmative action to those acts that are or may be illegal, they can put beyond remedial reach essential components of the process of discrimination described in Part A.

Civil rights law already requires the imposition of even the most controversial measures taking race, sex, or national origin into account when necessary to remedy illegal discrimination. These laws also encourage the voluntary implementation of affirmative action plans to eliminate all other forms of discrimination. Depending on the circumstances, these voluntary corrective efforts may include the use of quotas and "preferential treatment."[3] The legal issue has evolved from the general question of whether affirmative action is ever lawful to the more particular question of what specific measures taking race, sex, and national origin into account within affirmative action plans are lawful in which circumstances to remedy what forms of discrimination.

This section examines civil rights laws as they both support and are supported by the problem-remedy approach to the issue of affirmative action. It shows, first, how civil rights laws acknowledge the numerous forms of discrimination, including the overall process of discrimination affecting minorities and women. Next, it discusses how these laws combat discrimination through various required remedies, including affirmative action plans containing remedies that explicitly use race, sex, and national origin as criteria in decisionmaking. Finally, this section addresses the issue of voluntary affirmative action and explains the conditions under which the same remedies ordered by the courts and Federal civil rights agencies for illegal discrimination may be voluntarily undertaken without incurring legal liability.

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[1] Civil rights plaintiffs, for example, often have the difficult, and sometimes impossible, burden of proving discriminatory intent. *See Harvard Civil Rights-Civil Liberties Law Review*, vol. 12 (1977), p. 725. In Title VII cases, class action litigation and use of statistical data to show discrimination have become increasingly expensive, complex, and time-consuming. *See,e.g.*, W. Connolly and D. Peterson, *Use of Statistics in Equal Opportunity Litigation* (New York: Law Journal Seminars-Press, 1979); B. Schlei and P. Grossman, *Employment Discrimination Law* (1976), pp. 1161–93.

[2] For example, employers may lawfully hire only white males for certain jobs if discrimination in education or by other employers has prevented minorities and women from acquiring the qualifications or experience actually necessary to perform the jobs. *See, e.g.*, United Steelworkers of America v. Weber, 443 U.S. 193, 214 (1979) (Blackmun, J., concurring). The Supreme Court and others have referred to discrimination for which no one in particular can legally be held accountable as "societal" discrimination. See Part B of this statement, "Voluntary Affirmative Action," below.

[3] Goals, quotas, and preferential treatment as legal issues are addressed in Part B, "Civil Rights Law and the Remedy," below; they are addressed as policy issues in Part C, "Goals, Quotas, and 'Preferential Treatment'."

Civil Rights Law and the Problem

As Part A discussed, discrimination is manifested most frequently and tellingly by the unequal outcomes it generates. Accordingly, courts and enforcement agencies rely on statistics showing disparate results among race, sex, and national origin groups as indicators of the likely presence or absence of illegal discrimination.

For example, the Supreme Court of the United States has said that numerical evidence showing a marked exclusion or underrepresentation of minorities in jobs, classrooms, geographic areas, or juries:

> raises a strong inference that. . .discrimination and not chance has produced this result because elementary principles of probability make it extremely unlikely that a random selection process would. . .so consistently reduc[e] the number. . . .[4]

That "strong inference" can be rebutted, however, by demonstrating in a particular circumstance that other factors unrelated to race, sex, or national origin have produced the unequal result.[5] Unequal results as a matter of law. therefore, are only *quantitative* suggestions of discriminatory conduct; they do not conclusively establish the presence of illegal discrimination. They help identify the *qualitative* actions, and the motivation, that caused the unequal outcomes.

Because discrimination can be either intended or unintended, civil rights law has two markedly different legal standards for determining when illegal discrimination has occurred.[6] Constitutional guarantees of equal protection of the law, contained in the 5th and 14th amendments, are violated only by intentional, purposeful, or deliberate actions[7] that harm persons because of their race, national origin, or sex.[8] Various laws, however, such as Title VII of the Civil Rights Act of 1964,[9] Executive Order No. 11246,[10] and the Emergency School Aid Act,[11] forbid actions, regardless of their intent, that have a disproportionate effect on the basis of race, national origin, and sex and that cannot be justified by any legitimate reason.

Although both the "intent" and the "effects" standards use statistical data in determining whether illegal discrimination has occurred, such data serve distinctly different purposes. In "intent" cases, the courts have had to develop a variety of ways to determine whether intentional discrimination exists, because few decisionmakers publicize or otherwise expose their discriminatory intent. Primary among these is numerical evidence of unequal results because "[i]n many cases the only available avenue of proof is the use of. . .statistics to uncover clandestine and covert discrimination."[12] Other factors that may indicate such discriminatory intent include the sequence of events leading to the decision, abnormal procedures, the historical background of the decision, and contemporary statements by decisionmakers.[13]

In "effects" cases, however, numerical evidence is not used to assess the likelihood that the accused discriminator has intentionally caused harm to the victim on the basis of race, national origin, or sex because the intent of the discriminator is not determinative. In these cases, numerical evidence emphasizes the existing unequal conditions in our society, whether they are caused by one discriminator or many, intentionally or not.

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[4] Alexander v. Louisiana, 405 U.S. 625, 630 (1972) (*prima facie* case of racial discrimination established by the disproportionate exclusion of blacks from grand juries); accord, Int'l Bhd. of Teamsters v. U.S., 431 U.S. 324, 339–340 (1977). The same principle is applied in sex discrimination cases. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 329–30 (1977).

[5] *Id.* at 632. *See also* Griggs v. Duke Power Co., 401 U.S. 424 (1971), discussed in the text accompanying notes 14–20, below.

[6] *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335–36 n.15 (1977), in which the Supreme Court distinguished between "disparate treatment" cases, where proof of discriminatory intent is critical, and "disparate impact" cases, where proof of discriminatory intent is not required. "Either theory, of course, may be applied to a particular set of facts." *Id.*

[7] Intentional discrimination on the basis of race, color, religion, sex, or national origin can also violate Title VII of the Civil Rights Act of 1964, as well as other statutes. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[8] *See, e.g.*, Washington v. Davis, 426 U.S. 229, 238–39 (1976); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979).

[9] 42 U.S.C. §§2000e—2000e–17 (1976).

[10] 3 C.F.R. 339 (1965), *reprinted in* 42 U.S.C. §6000e, at 1232 (1976).

[11] 20 U.S.C. §§3191–3207 (Supp. II 1978); *see* Board of Educ. v. Harris, 444 U.S. 130, 140–52 (1979).

[12] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339–40 n. 20 (1977), *quoting* United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir. 1971).

[13] Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579–80 (1978); Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 266–68 (1977); Washington v. Davis, 426 U.S. 229, 238–39 (1976).

Perhaps the single most important decision in the evolution of equal employment opportunity law, *Griggs v. Duke Power Co.,*[14] best explains this significant difference between an "intent" and an "effects" standard. In *Griggs* the Supreme Court interpreted Title VII of the 1964 Civil Rights Act to invalidate general intelligence tests and other criteria for employment that disproportionately excluded minorities, because these selection devices were not shown to be dictated by "business necessity."[15] Although the lower courts had found that Duke Power's tests were not deliberately discriminatory, the Supreme Court concluded:

> [G]ood intent or [the] absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability.[16]

Not all employment selection mechanisms that have an "adverse impact" or "disparate effect" (that is, screen out a significantly higher percentage of minorities and women than whites or males when compared to their presence in the relevant labor market) are unlawful. Only those that cannot be shown to be job related are unlawful. *Griggs* establishes that the employer must demonstrate that practices which adversely affect the opportunities of minorities and women do, in fact, fairly measure or predict actual performance on the job.[17]

Griggs interpreted Title VII as requiring that "the posture and condition of the jobseeker be taken into account."[18] The Court recognized that the disproportionate failure rate of minorities on tests of the kind used by the Duke Power Company was caused by the inferior education they had received in the area's segregated schools. As the Supreme Court said in a later decision:

> *Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the rest of their lives.[19]

By presuming on the basis of statistical data showing unequal results that illegal discrimination has occurred, *Griggs* recognizes the existence of a pervasive and interlocking process of discrimination in education, employment, and other areas. "Neutrality"—the presence of good or the absence of bad intent—in such a context will only perpetuate inequalities. To prevent the perpetuation of discrimination, the *Griggs* principle imposes a legal duty on employers and unions not to compound the discriminatory acts of others through their own arbitrary acts (i.e., using selection devices that have no direct relationship to the jobs to be performed).[20]

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[14] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[15] *Id.* at 431.

[16] *Id.* at 432.

[17] *Id.* at 436. Pursuant to *Griggs* and other cases, the four Federal agencies having primary responsibility for the enforcement of Federal equal employment opportunity laws (the Equal Employment Opportunity Commission, the Civil Service Commission—now the Office of Personnel Management, the Department of Labor, and the Department of Justice) adopted guidelines in 1978 establishing a uniform Federal Government position with respect to selection procedures having an adverse impact. Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §1607 (1979) (hereafter cited as Uniform Guidelines on Employee Selection Procedures). The fundamental principle underlying the guidelines is that employment selection practices that have an adverse impact on the employment opportunities of members of any race, sex, or ethnic group are illegal under Title VII and Executive Order No. 11246, unless justified by business necessity. An employer may usually avoid the task of justifying its selection procedures by using procedures that have no adverse impact or by choosing alternatives that further its business needs with lesser adverse impact. 29 C.F.R. §§1607.3B, 1607.4C, 1607.6. For example, if an employer ranks all applicants, and this ranking system does not cause minorities and women to be underrepresented in the employer's work force, the procedure is lawful under the guidelines. However, if the ranking system causes underrepresentation, the guidelines advise the use of alternate procedures, such as a pass/fail method, to assure the legality of the selection procedure. 29 C.F.R. §1607.5G.

Seniority systems are a partial exemption to the adverse impact rule. 29 C.F.R. §1607.3C. The Supreme Court has held that under §703(h) of Title VII, a *bona fide* seniority system (one that does not have its genesis in intentional discrimination) is lawful even where the employer is shown to have engaged in past discriminatory hiring and promotion practices and the effects of those practices are perpetuated by the seniority system. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

[18] 401 U.S. at 431.

[19] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 806 (1973).

[20] Founded as it is on the historical and current process of discrimination against minorities and women, the *Griggs* principle cannot sensibly be applied to white males. There is no history of discrimination against white males because of the color of their skin or their gender, no interacting individual, organizational, and structural attitudes and actions denying white males opportunities that disadvantage them in the job market on account of their race and/or sex. Title VII does ban deliberate discrimination against

Numerical evidence of unequal results, however, is not conclusive proof that illegal discrimination has been committed. Under the "effects" test, the actions that produced such results are lawful if there is no reasonable alternative other than to perpetuate the unequal results. Nor is evidence of unequal results caused only by parts of an employer's operations likely to be scrutinized by Federal enforcement agencies. If the outcome of the total selection procedure—its "bottom line" statistical profile—shows that minorities and women are employed in rough proportion to their participation in the relevant work force, Federal enforcement agencies will allocate their limited enforcement resources elsewhere.[81]

Civil Rights Law and the Remedy

Because Federal civil rights agencies and courts view unequal results as a strong indication that discrimination may have occurred, they also view the reduction of unequal results as a strong indication that such discrimination is being remedied. Consequently, some civil rights laws require affirmative action plans that include numerical measures which affirmatively take account of race, sex, and national origin.[82] Other laws mandate such affirmative action as needed to remedy identified illegal acts.[83]

To remedy constitutional violations in school desegregation cases, for example, courts normally set mathematical ratios of majority to minority students in the school system as a "starting point in the process of shaping a remedy."[84] These mathematical ratios, the Supreme Court has ruled, are not "inflexible requirement[s]."[85] Indeed, courts permit significant deviation from these ratios when one-race schools are not the products of earlier deliberately segregative acts by school officials. But once a systemwide constitutional violation has been established, the burden is on the school authorities to overcome the presumption that the racial composition of such schools is the result of present or past discriminatory acts on their part.[86]

This legal presumption recognizes that "[p]eople gravitate toward school facilities, just as schools are located in response to the needs of people."[87] The "profound reciprocal effect" between the decisions of school authorities and the housing decisions of parents, the Supreme Court has stated, dictates the "common sense" conclusion that the actions of school authorities "have an impact beyond the particular schools that are the subjects of those actions."[88]

Once again, the law is acknowledging the interlocking nature of the discriminatory process. Racial neutrality in school assignments will inevitably perpetuate segregation when applied to the "loaded game board"[89] of a community with segregated schools and segregated housing.

Unconstitutional school segregation, the courts have found, can best be remedied through desegregation plans that use numerical measures. These numerical targets are starting points for the remedy, however, not the remedy itself. School desegregation plans use a variety of *qualitative* desegregative techniques (including redrawing school attendance zones; opening, closing, or building schools; pairing and clustering schools; magnet schools; optional majority to minority transfers; and student transpor-

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white males because of their race and/or sex, and such arbitrary action has been found to have occurred. *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (white male employees who misappropriated cargo and were discharged while a black male employee, also involved in such theft, was retained have a cause of action under Title VII); Calcote v. Texas Educational Foundation, Inc., 458 F. Supp. 231 (W.D. Tex. 1976), *aff'd*, 578 F.2d 95 (5th Cir. 1978) (white male was paid a lower salary, received smaller salary increases than an equally qualified black male, and was harassed because of his race); Sawyer v. Russo, 19 Empl. Prac. Dec. par. 8996 (D.D.C. 1979) (qualified white male was passed over for promotion by black supervisors in favor of lesser qualified black applicants and in violation of regulations). Such discrimination, however, is isolated and not part of a self-perpetuating process of discrimination such as that experienced by minorities and women.

[81] Under the "bottom line" formulation of the Uniform Guidelines on Employee Selection Procedures, if the business' total selection process reveals no adverse impact, Federal enforcement agencies in the exercise of their administrative and prosecutorial discretion generally will not take enforcement action, even where adverse impact may be caused by a component of the process. 29 C.F.R. §1607.4C (1979). *But see* Connecticut v. Teal, 645 F.2d 133, *cert. granted*, 50 U.S.L.W. 3213 (October 1981), which will consider whether illegal discrimination has occurred where one "pass-fail" component of a promotion procedure has an adverse impact on minorities, but the overall promotion procedure results in no adverse impact.

[82] Exec. Order No. 11246, 3 C.F.R. 339 (1965), *reprinted as amended* at 42 U.S.C. §2000c at 1232 (1976); Civil Rights Act of 1964, *as amended*, Title VII, §717, 42 U.S.C. §2000e–16 (1976).

[83] Civil Rights Act of 1964 as amended, Title VII, §706(g), 42 U.S.C. §2000c–5(g) (1976).

[84] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25 (1971).

[85] *Id.*

[86] *Id.* at 26; Keyes v. School Dist. No. 1 (Denver), 413 U.S. 189, 208–10 (1973).

[87] *Id.* at 20.

[88] Keyes v. School Dist. No. 1, 413 U.S. 189, 202–03 (1973).

[89] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. at 28.

tation) whose effectiveness is judged by *quantitative* measures.

Numerically based remedies are also used in the Federal contract compliance program under Executive Order No. 11246, as amended,[30] which requires businesses that contract with the Federal Government to agree as a condition of their contracts not to discriminate and to take affirmative action. This general affirmative action requirement, when first added to the contract compliance program in 1961, generated little progress. By the end of the 1960s, enforcement officials realized that discernible indicators of progress were needed to ensure that Federal contractors, particularly construction contractors and building trades unions, made necessary changes in their employment practices. Simultaneously, there was a growing recognition that even if personal and overt discrimination were ended, equal employment opportunity could still be denied; a "color-conscious" approach emphasizing the results of employment procedures was needed to overcome the present effects of past discrimination.[31] This experience led Federal contract compliance enforcement officials to require contractors to develop affirmative action programs that used "goals and timetables" to judge the results of the contractors' good-faith efforts to comply with Executive Order 11246.[32]

The contract compliance program currently[33] requires businesses and institutions that choose to contract with the Federal Government to have an affirmative action program,[34] the objective of which is equal employment opportunity. The Federal contract compliance program allows Federal contractors much flexibility in devising meaningful and specific procedures to bring about equal opportunity in the workplace. These procedures are contained in the contractor's affirmative action program, which the contractor itself develops. The program is based on "self-analysis" of the contractor's patterns of employment of minorities and women in all job categories.[35] This quantitative analysis helps assess the level of "utilization"[36] of minorities and women by comparing the contractor's employment of minorities and women with the proportion of minorities and women in the relevant available labor pool.[37] The contractor then undertakes a qualitative analysis to identify and change those employment practices that produce these statistical results.[38]

On the basis of this analysis, the contractor is required to develop "goals and timetables" for each job group in which minorities or women are underutilized.[39] Such standards are used to indicate success or failure of affirmative action programs in overcoming the underutilization of minorities and women.[40] Goals are not inflexible targets, and unlike quotas, they do not mandate that a specific number always be met.[41] They are objectives reflecting assessments of the percentage of minorities and women in the work force, the availability for employment of minorities and women with the requisite skills, and the existence of current or potential training programs that are available to prepare minorities and women for employment.[42] The government does not determine compliance with the Executive order solely by whether these targets are actually reached. If goals are not met within the time allotted, no sanctions are applied, as long as the contractor can demonstrate it has made "good faith efforts" to reach them.[43]

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[30] 3 C.F.R. 339 (1965), *reprinted in* 42 U.S.C. §2000e, at 1232 (1976). Executive Order No. 11246 was amended by Executive Order No. 11375 in 1967 to prohibit discrimination on the basis of sex. *See* 3 C.F.R. 684 (1967).

[31] See R. Nathan, *Jobs and Civil Rights* (prepared for the U.S. Commission on Civil Rights by the Brookings Institution, 1969), pp. 92–100; U.S., Commission on Civil Rights, *Federal Civil Rights Enforcement Effort* (1971), pp. 42, 50–55, 60.

[32] For a full discussion of the history of the Executive order program and its strengths and weaknesses, see U.S., Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974*, vol. 5, *To Eliminate Employment Discrimination* (1975), pp. 230–70.

[33] In the early 1970s detailed regulations were issued by the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor, the agency that enforces Executive Order No. 11246, giving more specific content to the general affirmative action requirement. 41 C.F.R. Part 60–2, known as Revised Order No. 4, was issued in 1970 and revised in 1971, and is applicable only to *nonconstruction* contractors. 41 C.F.R. Part 60–4 closely conforms the affirmative action requirements for *construction* contractors to those of Revised Order No. 4. See U.S., Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974*, vol. 5, *To Eliminate Employment Discrimination* (1975), pp. 230–70. The Department of Labor in the summer of 1981 proposed new regulations covering Federal contractors that make a number of changes in these regulations. 46 Fed. Reg. 42968, 42979 (Aug. 25, 1981). Included in the proposed regulations are new provisions for higher coverage thresholds, abbreviated affirmative action plans for small contractors, and the use of extended affirmative action plans for up to 5 years in some circumstances. The Department of Labor has also sought public comment on five areas affecting the contract compliance program in anticipation of future changes in its regulations. These five areas are (1) the method used to determine the "availability" of minorities and women for employment with nonconstruction contractors; (2) the appropriateness of backpay as a remedy; (3) the Executive order coverage of a Federal construction contractor's nonfederally funded construction projects; (4) the methods used to set goals for women and minorities in construction; and (5) the method used to determine and apply the concept of "job groups." 46 Fed. Reg. 36213 (July 14, 1981); 46 Fed. Reg. 42490 (Aug. 21, 1981).

[34] An affirmative action program is "a set of specific and result-oriented procedures to which a contractor commits itself to apply every good faith effort." 41 C.F.R. §60–2.10 (1980).

[35] *Id.* §§60–2.10 to 2.11; §60–2.13(d) and (g).

[36] *Id.*, §§60–2.11(b)(1) and (2).

[37] The availability analysis may vary depending on the industry involved or the location of the industry involved. For example, the regulations require the contractor to consider eight factors in determining the availability of minorities and women for jobs. 41 C.F.R. §60–2.11(b)(1) and (2). The regulations do not designate how much relevancy must be accorded each factor.

[38] *Id.* §60–2.24.

[39] *Id.* §60–2.12(h).

A contractor's good-faith efforts would be measured by the thoroughness of the contractor's self-analysis, the soundness of the contractor's procedures for increasing the utilization of minorities and females, and the extent to which attempts were made to carry out those procedures.[44] Contractors are not required to hire unqualified persons or to compromise demonstrably valid standards to meet the established goals. Indeed, the regulations repeatedly underline the importance of merit principles by instructing employers to recruit women and minorities "having requisite skills" and to make promotion decisions based only on "valid requirements" for the job.[45]

The Federal contract compliance program essentially uses a problem-remedy approach. It requires contractors to identify aspects of the employment process that produce underutilization and to take actions, including those that take account of race, sex, and national origin, to solve those problems. One court has listed some of the many causes of underutilization and the kinds of affirmative steps that can be taken, and it is worth quoting at length:

> Underutilization may be traced to failure of available women and minority workers to apply, for a variety of reasons, in the expected numbers. They may not be aware of job openings. If this is the problem, contacts may be established with local organizations, institutions, or individuals who are in a position to refer women and minority applicants; advantage may be taken of media and events through which potential women and minority applicants can be reached; and word-of-mouth recruiting by women and minority employees and applicants may be encouraged. Perhaps the contractor will discover that potential applicants are discouraged by the contractor's negative image among women workers or in the minority community. If so, the problem may be solved by designating minority liaison officers, or by widening dissemination of the contractor's fair employment policy and practices. Or deficiency in the flow of applications from women and minority workers may be attributable to persons other than the contractor—to labor unions or subcontractors, for example—whom the contractor can persuade to abandon exclusionary practices.
>
> If the contractor is attracting a balanced flow of applicants, underutilization may be the product of improper screening or selection processes. Facially objective job criteria that screen out women and minority workers disproportionately may prove to be irrelevant or only marginally related to job performance, and new and validated criteria can be substituted. Or the contractor may discover that hiring personnel entertain subjective biases (conscious or not) that can be corrected by instruction or training, or by removing biased officials from the hiring process.[46]

Under the regulations, contractors can ensure that their affirmative action plans are implemented by holding individual managers and employees responsible for carrying out company policy, by assigning specific responsibilities and duties under the plans, and by evaluating their employees' performance.[47]

Some critics of the Executive order program confuse goals and timetables with the procedures used to meet these objectives. Goals and timetables are routinely employed as administrative or management tools in various contexts because they are comprehensible and reviewable standards for assessing the effectiveness of new procedures.

Other critics of the Federal contract compliance program contend that the measures often needed to meet the established goals and timetables amount to illegal "preferential treatment" and unconstitutional "quota" systems for minorities and women. They object less to affirmative action plans containing numerical goals than to measures sometimes found within affirmative action plans requiring that a specified numerical proportion of qualified minorities and women to white males be chosen in order to meet the goals. These specific mechanisms virtually guarantee that among qualified applicants a designated ratio or percentage of qualified minorities or women will be selected until a set number or percentage of people in targeted job categories are minorities or women. While neither the Executive order nor its implementing regulations explicitly approve or disapprove ratio or percentage selection systems for the purpose of meeting designated goals, the Office of Federal Contract Compliance Programs has routinely negotiated and approved ratio and percentage selection systems where contractors have not made good-faith efforts or are charged with illegal discrimination.[48] Despite numerous challenges to its constitutionality, the courts have consistently upheld the legality of Executive Order No. 11246.[49]

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[40] *Id.* §60-2.1(a).

[41] *Id.* §60-2.12(e).

[42] *Id.* §60-2.11(b). Although goals are crucial to monitoring the progress of affirmative action plans, they are only one of many procedures that comprise such programs. The popular press often incorrectly uses the terms "goals" and "affirmative action" interchangeably. The distinction among goals, affirmative action plans, and quotas is discussed in Part C, "Goals, Quotas and 'Preferential Treatment'."

[43] *Id.* §60-2.15.

[44] Such procedures include recruiting through advertisements in minority and women's magazines, publicizing EEO plans in company literature and on bulletin boards, notifying minority and women's organizations of EEO policy, obtaining union cooperation in carrying out affirmative procedures, analyzing position descriptions for accuracy, establishing formal career counseling programs, and using appropriate employee selection procedures. *Id.* §§60-2.20 to 2.26.

[45] *Id.* §§60-2.13(j) and 2.20(3).

[46] Legal Aid Soc'y v. Brennan, 608 F.2d 1319, 1343 (9th Cir. 1979) (citations omitted).

[47] 41 C.F.R. §§60-2.13, 2.21, 2.22 (1979).

Affirmative action plans containing measures that implicitly or explicitly use race, sex, and national origin as criteria in decisionmaking are not confined to the Federal contract compliance program. The courts in Title VII cases have repeatedly ordered and approved ratio and percentage selection systems that regularly and predictably work to overcome a marked nonparticipation by minorities and women. Typical of this type of affirmative remedy is the plan in *Carter v. Gallagher,*[50] where a Federal court found that the Minneapolis Fire Department had illegally discriminated against minorities. The court ordered that 1 of every 3 employees hired by the department be a qualified minority person until at least 20 minority workers were employed. In other cases courts have also ordered the establishment of separate lists for minority and women eligibles and their selection from the top of each list in a proportion established by the court.[51]

Some courts that have upheld these and similar measures have not hesitated to call them "preferential" treatment or "quotas."[52] Other courts have termed them "goals,"[53] used the words "goals" and "quotas" interchangeably without apparent distinction,[54] or dismissed the debate that "goals" are legal and "quotas" are illegal as a "semantic dispute."[55]

Whatever they may be called, judicial experience has shown that ratio and percentage selection devices to attain numerical goals are appropriate in a variety of circumstances. Such measures have most often been ordered to assure compliance with legal requirements when less clear-cut steps have proven ineffective.[56] In addition, when no real basis exists for choosing among a large number of equally qualified people, ratio procedures may be a simpler and more efficient way to increase participation by minority and women workers than other, less specific methods. As a result they are frequently used in consent decrees, judicially approved settlements of cases where illegal discrimination has not been proven, but only alleged by one party and denied by the other.[57] Finally, the same rationale for choosing these practical methods to settle cases supports their implementation before a case is even filed.[58]

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[48] *See* EEOC v. American Tel. & Tel. Co., 365 F. Supp. 1105, 1115–16 (E.D. Pa. 1973); Dep't of Labor v. Uniroyal, Inc., No. OFCCP 1977-1 (BNA/DLR Apr. 16, 1980) (consent decree); Weber v. Kaiser Alumimum and Chem. Corp., 416 F. Supp 761, 766 (D. La. 1976), *aff'd,* 563 F.2d 216 (5th Cir. 1977), *rev'd sub nom.* United Steelworkers of America v. Weber, 443 U.S. 193 (1979).

[49] *See, e.g.,* Associated Gen. Contractors v. Altshuler, 490 F.2d 9, 16–17 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974); Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680, 684–85 (7th Cir. 1972); Contractors Ass'n v. Sec'y of Labor, 442 F.2d 159, 171–73 (3rd Cir. 1971), *cert. denied,* 404 U.S. 854 (1971); Legal Aid Soc'y of Alameda County v. Brennan, 608 F.2d 1319, 1341–43 (9th Cir. 1979) *(dictum),cert. denied,* 100 S. Ct. 3010 (1980); U.S. v. Mississippi Power and Light Co., 638 F.2d 899 (5th Cir. 1981), *cert. denied,* 50 U.S.L.W. 3271 (October 1981).

[50] 452 F.2d 315 (8th Cir.), *modified en banc,* 452 F.2d 327 (8th Cir. 1971), *cert. denied,* 406 U.S. 950 (1972).

[51] *E.g.,* United States v. City of Chicago, 549 F.2d 415, 436–37 (7th Cir.), *cert. denied,* 434 U.S. 875 (1977), *remedial order reconsidered and aff'd,* 631 F.2d 469 (7th Cir. 1980); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973), *cert. denied,* 421 U.S. 991 (1975); Boston Chapter NAACP v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied,* 421 U.S. 910 (1975); NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972).

[52] "[T]his court has held that such *preferential* relief violates neither the equal protection clause nor any provision of Title VII." United States v. City of Chicago, 549 F.2d 415, 437 (7th Cir.), *cert. denied,* 434 U.S. 875 (1977), *remedial order reconsidered and aff'd,* 631 F.2d 469 (7th Cir. 1980) (emphasis added) (citations omitted). "This court. . .has. . .sanctioned hiring *quotas* to cure past discrimination. . . ." Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1340 (2d Cir. 1973) (emphasis added) (citations omitted). "The use of *quota* relief in employment discrimination cases is bottomed on the chancellor's duty to eradicate the continuing effects of past unlawful practices." NAACP v. Allen, 493 F.2d 614, 621 (5th Cir. 1974) (emphasis added). *See also* United States v. City of Chicago, *supra* at 436; United States v. Masonry Contractors Ass'n, 497 F.2d 871, 877 (6th Cir. 1974).

[53] "We use 'goal' rather than 'quota' throughout this opinion for the reason that. . .the term 'quota' implies a permanence not associated with 'goal'." Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622, 628 n.3 (2d Cir. 1974).

[54] *E.g.,* Patterson v. Newspaper and Mail Deliverers' Union, 514 F.2d 767, 772–74 (2d Cir. 1975); EEOC v. American Tel. & Tel. Co., 556 F.2d 167, 177–80 (3d Cir. 1977).

[55] "We refuse to engage in any semantic dispute over the difference in meaning between 'goals' and 'targets' on the one hand and 'quotas' on the other." United States v. City of Miami, 614 F.2d 1322, 1335 n.26 (5th Cir. 1980). *See also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 288–89 n.26 (1978) (opinion of Powell, J.): "Petitioner [the Regents of the University of California] prefers to view [the special admissions program] as establishing a 'goal' of minority representation in the Medical School. Respondent [Bakke], echoing the courts below, labels it a 'racial quota.' This semantic distinction is beside the point. . . ."

It is these and other such explicit and straightforward affirmative uses of race, sex, and national origin to attain numerical goals that have drawn the most criticism.[59] The Supreme Court has consistently declined to hear cases challenging these remedial devices when ordered by the lower courts. Virtually all the Federal courts of appeal that have considered the legality of fixed numerical requirements in hiring and promotion have found them lawful when necessary to remedy proven discrimination.[60] These courts have also affirmed the legality of preferential remedies in consent decree cases, in which discrimination is only alleged and the dispute is settled by agreement of the parties prior to any judicial findings.[61]

The courts have formulated and permitted these remedies in situations where the interests of individual white male workers might be adversely affected.[62] The interests of white males have generally been considered in cases involving issues of promotion and seniority rather than hiring because:

> A hiring quota deals with the public at large, *none* of whose members can be identified individually in advance. A quota placed upon a small number of readily identifiable candidates for promotion is an entirely different matter. Both these men and the court know in advance that regardless of their qualifications and standing in a competitive examination, some of them may be bypassed for advancement solely because they are white.[63]

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[56] "[W]e. . .approve this course only because no other method was available for affording appropriate relief. . . ." Vulcan Soc'y v. Civil Serv. Comm'n, 490 F.2d 387, 398 (2d Cir. 1973); "[Q]uota relief was essential to make meaningful progress" as "no Negroes were hired in DPS support positions until the *Allen* court ordered affirmative relief. . . ." NAACP v. Allen, 493 F.2d 614, 620–21 (5th Cir. 1974). "[A]ffirmative hiring relief. . .is necessary. . .: a mere injunction against continued. . .discrimination was not effective." Morrow v. Dillard, 580 F.2d 1284, 1296 (5th Cir. 1978).

[57] *See e.g.*, United States v. City of Miami, 614 F.2d 1322, *rehearing granted*, 625 F.2d 1310 (5th Cir. 1980); United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980).

[58] *See United Steelworkers of America v. Weber*, discussed in the text accompanying notes 101–112, below.

[59] See Part C, "Goals, Quotas, and 'Preferential Treatment'."

[60] FIRST CIRCUIT: Boston Chapter NAACP v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); Associated Gen. Contractors v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); SECOND CIRCUIT: Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); Bridgeport Guardians, Inc., v. Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975); United States v. Wood, Wire & Metal Lathers Local 46, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); Vulcan Soc'y v. Civil Serv. Comm'n, 490 F.2d 387 (2d Cir. 1973); THIRD CIRCUIT: Erie Human Relations Comm'n v. Tullio, 493 F.2d 371 (3d Cir. 1974); Contractors Ass'n v. Sec'y of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971); FIFTH CIRCUIT: NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974) (en banc), *cert. denied*, 419 U.S. 895 (1974); Local 53, Int'l Ass'n of Heat and Frost Insulators and Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969); SIXTH CIRCUIT: United States v. Masonry Contractors Ass'n, 497 F.2d 871 (6th Cir. 1974); United States v. Local 212, IBEW, 472 F.2d 634 (6th Cir. 1973); Sims v. Sheet Metal Workers Local 65, 489 F.2d 1023 (6th Cir. 1973); United States v. Local 38, IBEW, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970); SEVENTH CIRCUIT: United States v. City of Chicago, 549 F.2d 415 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977), *remedial order reconsidered and aff'd*, 631 F.2d 469 (7th Cir. 1980); Crockett v. Green, 534 F.2d 715 (7th Cir. 1976); Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972); EIGHTH CIRCUIT: Setser v. Novack Investment Co., —F.2d—, No. 80-1100 (8th Cir., July 27, 1981) (en banc), [1981] 26 Empl. Prac. Dec. *p*31,995; Firefighters Institute for Racial Equality v. City of St. Louis, 588 F.2d 235 (8th Cir. 1978), *cert. denied*, 443 U.S. 904 (1979); United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973); Carter v. Gallagher, 452 F.2d 327 (8th Cir. 1971) (en banc), *cert. denied*, 406 U.S. 950 (1972); NINTH CIRCUIT: United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); TENTH CIRCUIT: United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 944 (10th Cir. 1979) (remanded with instructions for adoption of affirmative hiring plan).

The Fourth Circuit, although it has not ordered the use of ratio or percentage selection systems as remedies for proven employment discrimination, has stated that "hiring quotas should be imposed only in the most extraordinary circumstances and where there is a compelling need." United States v. County of Fairfax, Va., 629 F.2d 932, 942 (4th Cir. 1980), citing Sledge v. J.P. Stevens & Co., Inc., 585 F.2d 625, 646 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). *See also* White v. Paperboard Corp., 564 F.2d 1073, 1091 (4th Cir. 1977).

[61] EEOC v. Amer. Tel. and Tel. Co., 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); United States v. City of Miami, 614 F.2d 1322, *rehearing granted*, 625 F.2d 1310 (5th Cir. 1980); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); EEOC v. Contour Chair Lounge Co., 596 F.2d 809 (8th Cir. 1979).

[62] White males as a class, as distinguished from individual members of that class, are often aided by affirmative action plans. See note 112, below.

[63] Kirkland v. N.Y. State Dept. of Correctional Servs., 520 F.2d

Thus, in hiring cases the courts generally are not confronted with individuals whose present interest in employment will be adversely affected by racial or gender preferences. In the relatively few hiring cases that have raised the interests of white males, the lower courts have consistently denied such challenges where affirmative relief was necessary to overcome past discrimination against minorities and women.[64]

In cases involving seniority issues, where the victims of past discrimination were identifiable, the courts have approved relief in the form of an award of seniority retroactive to the date of the individual's job application, despite the adverse effect of such a remedy on the interests of some white male workers.[65] According to the Supreme Court, an award of the seniority the individuals would have earned but for the wrongful treatment is necessary for them to be "made whole" by obtaining their "rightful place" in the hierarchy of seniority.[66] The Supreme Court has ruled that, in general, "a sharing of the burden of the past discrimination is presumptively necessary"[67] and the "expectations" of "arguably innocent" white male employees cannot act as a bar to measures eliminating the present effects of past discrimination.[68]

Although not uniform in their standards for sanctioning relief in promotion cases, the Federal courts of appeal on numerous occasions have approved quota remedies to prevent a recurrence of discrimination, even where such remedies might favor persons who are not identifiable victims of discrimination.[69] Affirmative relief, therefore, including quotas and preferential treatment, cannot be denied simply because it may be detrimental to the interests of some white males.[70]

Voluntary Affirmative Action

Title VII of the Civil Rights Act has been interpreted to have two purposes: (1) "to make persons whole for injuries suffered on account of unlawful employment discrimination"[71] and (2) to "provide the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."[72] The latter purpose is the "primary" one,[73] for the obvious reason that voluntary changes eliminating discriminatory practices mean fewer people need to resort to the courts or enforcement agencies to be "made whole." Equal employment

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420, 429 (2d Cir. 1975), rehearingenbanc denied, 531 F.2d 5 (2d Cir. 1975) (emphasis added); accord, EEOC v. Local 638, Sheet Metal Workers' Int'l Ass'n, 532 F.2d 821, 828 (2d Cir. 1976).

[64] "This court. . .has. . .sanctioned *hiring* quotas to cure past discrimination." Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1340 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975) (emphasis added); EEOC v. Local 638, Sheet Metal Workers' Int'l Ass'n, 532 F.2d 821, 828 (2d Cir. 1976). *See also, e.g.*, United States v. Local 212, IBEW, 472 F.2d 634 (6th Cir. 1973); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971); Ass'n of Heat and Frost Insulators & Asbestos Workers v. Volger, 407 F.2d 1047 (5th Cir. 1969).

[65] Franks v. Bowman Trans. Co., Inc., 424 U.S. 747, 776–778 (1976).

[66] *Id.* at 767–68.

[67] *Id.* at 777.

[68] *Id.* at 774.

> Our holding is that in exercising their equitable powers, district courts should take as their starting point the presumption in favor of rightful-place seniority relief, and proceed with further legal analysis from that point; and that such relief may not be denied on the abstract basis of adverse impact upon interests of other employees but rather only on the basis of unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases. *Id.* at 779, n.41.

[69] EEOC v. American Tel. & Tel. Co., 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); United States v. City of Chicago, 549 F.2d 415 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977), *remedial order reconsidered and aff'd*, 631 F.2d 469 (7th Cir. 1980); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). The Second Circuit, however, upholds the use of quotas only in those cases involving a "clear-cut pattern of long-continued and egregious racial discrimination." Kirkland v. New York State Dept. of Correctional Servs., 520 F.2d 420, 427 (2d Cir.), *rehearing en banc denied*, 531 F.2d 5 (2d Cir. 1975). *Accord, e.g.*, Ass'n Against Discrimination in Employment v. City of Bridgeport, 594 F.2d 306, 310 (2d. Cir. 1979), *remedial order reconsidered and aff'd in part, remanded for modification in part*, 647 F.2d 256 (2d Cir. 1981); EEOC v. Local 638, Sheet Metal Workers' Int'l Ass'n, 532 F. 2d 821, 828 (2d Cir. 1976). The Kirkland two-fold test in effect rules out quota relief in promotion cases in the Second Circuit, because in such cases some identifiable white men would almost always suffer "reverse discrimiantion." *See* text accompanying note 63 above. The question of quota relief has yet to be decided by an *en banc* panel, and the *Kirkland* test and has been the subject of sharp differences of opinon among the members of the Second Circuit Court. *See cases cited and discussed in* Ass'n Against Discrimination in Employment v. City of Bridgeport, 647 F.2d 256, 279 (2d Cir. 1981).

[70] This perspective is consistent with the Supreme Court's holding in United Steelworkers of America v. Weber, 443 U.S. 193, 208 (1979), that affirmative relief for minorities and women is permissible provided suclr relief does not "unnecessarily trammel the interests" of white workers. *Weber* is discussed in the text accompanying notes 101–112.

[71] Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975). *Accord*, Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 364 (1977).

[72] *Id.* at 417–18, *quoting* United States v. N.L. Indus., Inc., 479 F.2d 354, 379 (8th Cir. 1973).

[73] *Id.* at 417.

law, in particular, and civil rights law, in general, impose legal obligations and liabilities while encouraging voluntary actions beyond those minimal legal requirements to accomplish as far as possible the policy objectives of the law.[74]

This distinction, between compliance with minimum legal requirements and voluntary actions to accomplish maximum policy objectives, is crucial, because civil rights law does not make illegal all aspects of discriminatory processes. In employment, for example, where other institutions have deprived minorities and women from getting the skills, experience, or credentials actually needed to perform particular jobs, employers and unions are under no legal duty to undertake special recruiting, training, or other programs to overcome their underemployment of minorities and women with such backgrounds.[75] A collective-bargaining agreement may lawfully perpetuate the employer's past discrimination by requiring that recently hired employees, who were the only minorities and women hired by the employer, be the first to be laid off, as long as such "last hired, first fired" provisions were negotiated without any intent to discriminate against minorities and women.[76]

The distinction between *de jure* (intentional) and *de facto* (unintentional) school segregation[77] is another example of how the law does not require the elimination of all manifestations of discriminatory processes. The 14th amendment prohibits only school segregation arising from purposeful or intentional acts by governmental authorities.[78] If segregated schools cannot be traced to such deliberate acts, they are considered "racially imbalanced," but constitutional.[79] The Supreme Court, however, has stated that school authorities may choose as a matter of policy to eliminate such racial imbalance, even when not required to do so, by prescribing a ratio of minority to majority students reflecting the overall makeup of the school system.[80]

These voluntary affirmative efforts to further the national policy to eliminate all vestiges of discrimination have themselves been attacked as violating civil rights law. Nowhere was this controversy given more public attention than in the area of academic admissions policy.[81]

The Supreme Court of the United States first considered the issue in *Regents of the University of California v. Bakke.*[82] The Medical School of the University of California at Davis was confronted, as were other institutions of higher education, with extraordinarily low rates of minority admissions. The school's first class had three Asians, but no blacks, Mexican Americans, or American Indians. To overcome this virtual exclusion of minorities, the school in 1970 implemented a special admissions program that, in effect, reserved 16 of 100 available openings for qualified minorities. A separate admissions committee reviewed applications for admission to these openings. Alan Bakke, a white male, alleged that his exclusion from consideration for any of these 16 places and the admission of minority applicants with lower academic credentials, as measured by standardized tests and undergraduate grade point average, discriminated against him on the basis of race in violation of the 14th amendment and Title VI of the Civil Rights Act of 1964.

Because neither Bakke nor the university introduced any evidence of constitutional or statutory violations, the courts all agreed that the medical school had violated no law that would obligate it to develop a special admissions program. The exclusion of minorities was not the result of illegal discrimination, but of "societal discrimination," which the university described as "the effects of persistent and pervasive discrimination against racial minorities."[83] The issue was profound: Without evidence of illegal discrimination against minorities by the party taking affirmative action, are race-conscious remedial programs constitutional?

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[74] *See generally* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 364 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in part, dissenting in part): "[O]ur society and jurisprudence have always stressed the value of voluntary efforts to further the objectives of the law. Judicial intervention is a last resort to achieve cessation of illegal conduct or the remedying of its effects rather than a prerequisite to action."

[75] The Uniform Guidelines on Employee Selection Procedures encourage but do not require such voluntary actions. 29 C.F.R. §1607 (1979).

[76] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). *But see* Oliver v. Kalamazoo Bd. of Educ., 23 FEP Cases 1677 (W.D. Mich. Sept. 30, 1980), *appeal docketed,* No. 80–1717 (6th Cir. Oct. 6, 1980).

[77] *See* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

[78] *Id.* at 208.

[79] *Id.;* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 17–18 (1971).

[80] 402 U.S. at 16; McDaniel v. Barresi, 402 U.S. 39 (1971).

[81] The Commission has examined affirmative admissions in higher education in *Toward Equal Educational Opportunity: Affirmative Admissions Programs at Law and Medical Schools* (1978).

[82] 438 U.S. 265 (1978). The constitutionality of affirmative admissions policies had been challenged earlier in DeFunis v. Odegaard, 416 U.S. 312 (1974). The Court ruled that case moot, however, because the plaintiff had been admitted to and was graduating from the law school whose admissions procedures he had challenged.

The nine Supreme Court Justices wrote six separate opinions. Two opinions were supported by four Justices each, but they reached opposing results. The ninth and deciding vote was cast by Justice Powell, who used reasoning distinctly different from that of the other Justices. The outcome was two different five-Justice majorities. One ruled the Davis plan illegal and ordered Bakke admitted to the school; the other set out standards and rationales for lawful affirmative admissions plans.[84]

The opinion authored by Justice Stevens, and joined by Chief Justice Burger and Justices Stewart and Rehnquist,[85] narrowed its focus to Bakke's statutory claim, thereby sidestepping the constitutional questions discussed in the other Justices' opinions. Title VI prohibits the exclusion of persons on the basis of race, color, or national origin from programs that receive Federal funds, including that of the Davis Medical School. Because the medical school conceded that Bakke's denial of admission resulted from the affirmative admissions plan, these Justices concluded that the university had violated the plain language of Title VI of the Civil Rights Act of 1964. Their opinion, however, specifically declined to address both the constitutionality of the Davis program and "whether race can ever be used as a factor in an admissions decision."[86]

Four other members of the Court (Justices Brennan, White, Marshall, and Blackmun) issued a joint opinion finding the Davis program lawful under both Title VI and the Constitution.[87] Governmental bodies may adopt race-conscious programs for the purpose of overcoming the present effects of their own past discrimination or of societal discrimination,[88] if the program is reasonable in light of this objective and does not stigmatize any group or disadvantage groups relatively unrepresented in the political process.[89]

Justice Powell's opinion,[90] joined fully by no other Justice, held that eliminating the effects of identified illegal or unconstitutional discrimination is a compelling justification for affirmative action. But unless governmental bodies have the authority to make findings of past unlawful discrimination, identify its effects, and then develop affirmative measures responsive to those findings, they may not make racial classifications favoring relatively victimized groups at the expense of innocent individuals.[91] Because the university did not have the requisite authority and could offer no other valid justification for its preferential treatment of minorities,[92] the affirmative admissions program could not be upheld.

Conceding the "regrettable fact. . .[of] societal discrimination in this country against various racial and ethnic groups,"[93] Justice Powell considered such discrimination "an amorphous concept of injury that may be ageless in its reach into the past,"[94] but distinguished it from "identifiable instances of past discrimination."[95] Apparently for Justice Powell, once discrimination is identified by a duly authorized governmental body, it is no longer "societal" and "amorphous" and may then be the basis for fashioning affirmative remedial measures.[96] Prior governmental findings of past discrimination would satisfy the condition that race-conscious measures must be subject to some form of institutional safeguard, which, according to Justice Powell, the 14th amendment requires. However, which governmental bodies are duly authorized to make the required findings, and how detailed and extensive these findings must be, remains unresolved.[97]

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[83] Reply Brief For Petitioner at 2, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[84] Due to the 4–1–4 division in the Court, the legal principles governing affirmative admissions cannot be decided in reference to any one opinion. Only those reasons or conclusions Justice Powell shares with four of the other Justices can be considered legally authoritative.

[85] 438 U.S. at 408 (Stevens, J., concurring in part, dissenting in part).

[86] *Id.* at 411.

[87] *Id.* at 324 (Brennan, White, Marshall, and Blackmun, *JJ.*, concurring in part, dissenting in part).

[88] "[A] state government may adopt race-conscious programs if the purpose. . .is to remove the disparate impact its actions might otherwise have and if. . .the disparate impact is itself the product of past discrimination, whether its own or that of society at large." *Id.* at 369.

[89] *Id.* at 369–74.

[90] *Id.* at 269.

[91] *Id.* at 307–10.

[92] Justice Powell noted possible justifications for Davis' program other than curing past statutory or constitutional violations. He indicated that a professional school might be able to justify race-conscious measures when its admissions process was based on standardized tests that were racially or culturally biased or if it could prove that the delivery of professional services to currently underserved minority communities required race-conscious responses. Davis, however, did not present sufficient evidence defending its special admissions procedures to justify its program on either of these bases. *Id.* at 306 n.43, 310–11.

[93] *Id.* at 296 n.36.

[94] *Id.* at 307.

[95] *Id.* at 308 n.44.

[96] *Id.* at 309 n.44. Justice Powell applied this analysis in Fullilove v. Klutznick, discussed in the text accompanying notes 114–18, below, and found constitutional a congressionally mandated 10 percent set-aside of funds for minority contractors.

Although Davis was unable to justify its admissions program on this basis, Justice Powell did find the desire to obtain a "diverse" student body a permissible goal. Such a program, however, must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight."[98] The Davis program favored racial and ethnic diversity over all other forms of diversity by means of an inflexible system that reserved a specific number of seats for minorities. Race, he ruled, can be one factor but not the sole factor considered in creating a diverse student body.[99]

Despite its ambiguities and its focus on illegal discrimination, Justice Powell's opinion leaves intact most graduate affirmative admissions programs. The result arrived at by the nine Justices permits professional schools to take those steps necessary to identify and dismantle the process of discrimination as it affects professional education.

After *Bakke*, the Court turned its attention to the legality of affirmative action as a voluntary remedy for employment discrimination.

As judicial decisions after *Griggs* increasingly clarified equal employment opportunity duties and responsibilities, those covered by equal employment opportunity laws began to find themselves in a difficult position. Whenever the numbers of minorities or women in various jobs on an employer's payroll were substantially lower than their numbers in the area's labor force, the employer and sometimes the union were subject under Title VII and other laws to lawsuits by minorities, women, and the Federal Government. This litigation could result in multimillion-dollar backpay judgments. To avoid such potential liability and to eliminate the discrimination suggested by the statistics, many employers and unions chose to implement affirmative action plans. Such plans, however, were sometimes challenged by white males claiming that the plans violated their rights under Title VII. Although conceding that an employer or union could lawfully remedy its own illegal acts against identified victims,[100] these white male litigants argued that, absent such illegal conduct, affirmative remedies were inconsistent with Title VII's antidiscrimination prohibitions.

In *United Steelworkers of America v. Weber*,[101] the Supreme Court grappled with this issue. In 1974 a private employer, Kaiser Aluminum & Chemical Corporation, and a union, United Steelworkers of America, negotiated an affirmative action plan designed to increase black participation in Kaiser's craft jobs from the preplan level of 2 percent to the level of black participation in the area's work force, which was approximately 39 percent. To accomplish this goal, the plan created an on-the-job training program that reserved 50 percent of the openings for black employees. This reservation of slots resulted in the selection of some black employees who had less seniority than some white employees who applied and were rejected for the training program. One white production employee, Brian Weber, challenged the plan.

By a 5 to 2 margin,[102] the Supreme Court ruled that the "racial preferences"[103] in the affirmative action plan were a lawful means for eliminating "old patterns of racial segregation and hierarchy."[104] As in *Bakke*, the Court in *Weber* was not confronted by allegations that the underrepresentation of minorities in craft jobs was caused by illegal actions attributable to either Kaiser or the Steelworkers union.[105] The Court cited numerous judicial and study findings of general exclusion of minorities from craft jobs by craft unions as the explanation for the

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[97] *See, e.g.*, E. Richard Larson, "Race Consciousness in Employment After *Bakke*,"*Harvard Civil Rights-Civil Liberties Law Review*, vol. 14 (1979), pp. 218–19.

[98] 438 U.S. at 317.

[99] *Id.* at 307.

[100] *See, e.g.*, Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).

[101] 443 U.S. 193 (1979).

[102] Justice Brennan wrote the majority opinion, joined by the same three Justices who co-authored the joint opinion in *Bakke* (White, Marshall, and Blackmun) and by Justice Stewart. Chief Justice Burger and Justice Rehnquist dissented. Justices Powell and Stevens did not participate for unexplained reasons.

[103] 443 U.S. at 200.

[104] *Id.* at 204.

[105] *Id.* at 200.

"manifest racial imbalance" in Kaiser's craft operations.[106]

The Court conceded that a literal interpretation of Title VII's prohibition against discrimination in employment based on race supports the argument that the challenged race-conscious plan illegally discriminated against white employees. But the Court decided that the purpose of the act and not its literal language determines the lawfulness of affirmative action plans. The legislative history of the act and the historical context from which the act arose compelled the conclusion, the Court held, that the primary purpose of Title VII was "to open employment opportunities for Negroes in occupations which have been traditionally closed to them."[107] The Court explained:

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long" constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.[108]

Minimal legal requirements—the need to identify some specific person or entity who could legally be faulted for causing discrimination—were not erected as bars to the policy objective of dismantling discriminatory processes.[109]

Having decided that Title VII encourages voluntary affirmative action by all private employers and unions, not only those legally responsible for discrimination, the Court in *Weber* then turned to the issue of the particular remedy that was used: a requirement that at least half of all employees admitted to the specially created craft training program be black until a specified percentage of all craft workers was black.[110] Its discussion of the plan in question, although brief, is instructive.

Declining to "define in detail the line of demarcation between permissible and impermissible affirmative action plans," the Court found the plan lawful, because "the plan does not *unnecessarily* trammel the interests of white employees."[111] This general characterization was then broken into three parts:

> [1] The plan does not require the discharge of white workers and their replacement with new black hires. [2] Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. [3] Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance. Preferential selection of craft trainees at the. . .plant will end as soon as the percentage of black skilled craft workers in the. . .plant approximates the percentage of blacks in the local labor force.[112]

Weber, therefore, permits affirmative classifications that may adversely affect the interests of white workers in limited ways when such measures are necessary to secure opportunities for those locked out of traditionally segregated jobs.

Affirmative Action Law

The decision in *Weber* was explicitly limited to private sector employers and unions covered by Title VII. Its rulings on the kinds of discrimination that they may voluntarily address ("manifest racial imbalance in traditionally segregated job categories") and the forms the remedies may take (plans may not "unnecessarily trammel" the interests of white employees) were deliberately restricted to statutory law. As a result, the Court avoided the constitutional question it had struggled with a year earlier in *Regents of the University of California v.*

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[106] *Id.* at 198 n.1. Among them was a U.S. Commission on Civil Rights report, *The Challenge Ahead, Equal Opportunity in Referral Unions* (1976).

[107] 443 U.S. at 203 (quoting remarks by Senator Humphrey).

[108] *Id.* at 204.

[109] The Equal Employment Opportunity Commission has issued comprehensive guidelines on voluntary affirmative action that embody the principles articulated in the *Weber* decision. Affirmative Action Guidelines, 29 C.F.R. §1608 (1979). These guidelines encourage those covered by Title VII (public and private employers, unions, and employment agencies) to engage in a three-step process (§1608.4) in implementing an affirmative action plan: (1) to undertake a "reasonable self-analysis" (§1608.4(a)) to identify discriminatory practices; (2) to determine if a "reasonable basis for concluding action is appropriate" exists (§§1608.3 and 1608.4(a)); and, if such a basis is found, then (3) to take "reasonable action," including the adoption of practices that recognize the race, sex, or national origin of applicants or employees (§1608.4(c)). If such procedures are followed and the plan is challenged as violating Title VII, the EEOC pursuant to special statutory powers (§1608.10) can certify the lawfulness of the plan. Such certification effectively insulates the plan from "reverse discrimination" claims.

[110] 443 U.S. at 208.

[111] *Id.* (emphasis added).

[112] *Id.* at 208–09 (citations omitted). The affirmative action plan in *Weber*, while negatively affecting some white workers, provided new opportunities for others. According to the Supreme Court, until the initiation of the plan in question, the employer hired only outside workers with several years of craft experience for its craftwork. *Id.* at 199. But for the training program created by the affirmative action plan, white workers who lacked such craft experience—including Brian Weber—would have had no opportunity to bid for craftwork.

Bakke: Are governmental actions that affirmatively use race, national origin, and sex[113] classifications constitutional under the equal protection clause of the 14th amendment?

That question was partially answered by the Court's most recent ruling supporting affirmative action. In *Fullilove v. Klutznick*,[114] the Court ruled constitutional a provision in the Public Works Employment Act of 1977 that required State or local governments, absent administrative waiver by the Department of Commerce, to use 10 percent of Federal funds granted for public works contracts to procure services or supplies from businesses owned or controlled by members of statutorily identified minority groups.[115] The 6 to 3 decision[116] removes any doubts regarding the power of Congress to mandate similar affirmative action programs where evidence supports the need for such measures.

As in *Bakke*, however, the Court was unable to agree upon constitutional standards governing affirmative action. There were three opinions forming the six-Justice majority. Chief Justice Burger's opinion, sharply limited to the distinct issue of congressional authority to pass legislation containing racial and ethnic classifications, held that congressional legislation may employ racial or ethnic criteria if it is "narrowly tailored" to remedy the present effects of past discrimination that impair or foreclose access by minorities to opportunities enjoyed by whites.[117] The opinions of Justice Powell and Justice Marshall simply applied the formulations they had previously set forth in *Bakke* and found the minority business enterprise program constitutional.[118]

The trilogy of Supreme Court affirmative action cases *(Bakke, Weber,* and *Fullilove)*, despite their limits as legal precedent, shows a strong commitment to affirmative action measures designed to eliminate all forms of discrimination, *de jure* or *de facto*, illegal or legal. Only *Bakke* lacked an unequivocal outcome encouraging affirmative action plans that include "preferential" treatment and "quotas." *Bakke*, however, leaves ample room for effective affirmative admissions efforts.

Because there is no single standard governing affirmative action to which a majority of the Justices on the Supreme Court of the United States subscribe, some legal questions remain.[119] Nonetheless, seven of the nine Justices have now approved the most vigorous sorts of affirmative action, although in different contexts, for different reasons, and with different standards.[120] In addition, a very strong pattern of judicial support for affirmative action is emerging in lower court opinions, particularly since *Weber.*[131]

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[113] Classifications based on sex have never been subject to "strict" judicial scrutiny, because sex, unlike race, has not been held to be a "suspect" classification. See Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971). Consequently, explicitly sex-based classifications identified as "compensatory" (that is, designed to achieve the important governmental interest of rectifying past discrimination against women) have not been strictly scrutinized and have withstood constitutional challenge. *See, e.g.*, Califano v. Webster, 430 U.S. 313 (1977); Kahn v. Shevin, 416 U.S. 351 (1974). However, where classifications based on sex have ostensibly been "compensatory," but in fact operated to disadvantage women, the classifications have been invalidated because they do not serve an important governmental interest. *See, e.g.*, Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

[114] 448 U.S. 448 (1980).

[115] The minority groups named in the statute are: "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." 42 U.S. §6705(f)(2) (1976 & Supp. III 1979).

[116] Chief Justice Burger's opinion was joined by Justices White and Powell; Justice Powell wrote a separate concurring opinion; Justice Marshall's concurring opinion was joined by Justices Brennan and Blackmun. Justice Stewart dissented, joined by Justice Rehnquist. Justice Stevens dissented separately.

[117] 448 U.S. 448, 473, 492 (1980).

[118] Justice Powell ruled that Congress had the authority to remedy "identified discrimination," had "reasonably concluded" that statutory and constitutional violations had been committed, and had chosen means that were equitable and reasonably necessary to redress the identified discrimination. *Id.* at 495. Justice Marshall, stating that the constitutional question "is not even a close one," found the program constitutional because it was designed to further the important governmental interest of remedying the present effects of past discrimination and used means substantially related to the achievement of this objective. *Id.* at 517.

[119] In Minnick v. California Dep't of Corrections, 157 Cal. Rptr. 260 (1979), *cert. dismissed*, 101 S. Ct. 2211 (1981), the Supreme Court of the United States had an opportunity to decide the constitutionality of a voluntary affirmative action plan instituted by a public employer. *Minnick* involved an unsuccessful challenge by white employees and their union to the affirmative action plan of the California Department of Corrections that assigned a "plus" to female and minority employees competing for promotion or transfer in order to overcome a history of discrimination within the department. The Court declined to hear the case because there were ambiguities in the record and because significant developments in the law had occurred since the lower court's ruling in the case had occurred prior to the *Bakke* decision. *Id.* at 2223.

[120] Four Supreme Court Justices in *Bakke* (Brennan, White, Marshall, and Blackmun) have found constitutional nonstigmatic quotas, ratios, set-asides, and preferential treatment based on race that remedy the present effects of past discrimination. *See* text accompanying notes 87–89, above. Justice Stewart joined these same four Justices in *Weber* to hold voluntary affimative action plans lawful in private sector employment. *See* text accompanying notes 102–112, above. A sixth Justice, Powell, approves of explicit racial classifications that are responsive to duly authorized governmental findings of statutory or constitutional civil rights violations. *See* text accompanying notes 90–99, above. Finally, Chief Justice Burger ruled in *Fullilove* that Congress has

Civil rights laws have not been set up as obstacles to tearing down the very process of discrimination they were enacted to dismantle. They have excluded only a narrow range of action (excessively rigid programs taken without adequate justification) from the scope of permissible affirmative activities. The current state of the law provides policymakers, both public and private, the flexibility needed to reach sensible solutions.

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the latitude to enact "narrowly tailored" racial classifications to eliminate the present effects of past discrimination. See text accompanying note 117, above.

[131] Setser v. Novack Investment Co., 657 F.2d 962 (8th Cir. 1981) (en banc); Local Union No. 35 of Int'l. Bhd. of Elec. Workers v. City of Hartford, 625 F.2d 416 (2d Cir. 1980), *cert. denied*, 101 S.Ct. 3148 (1981); Detroit Police Officers' Ass'n. v. Young, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 101 S.Ct. 3079 (1981); Baker v. City of Detroit, 483 F. Supp. 930 (E.D. Mich. 1979); Tangren v. Wackenhut Servs., Inc., 480 F. Supp. 539 (D. Nev. 1979) *aff'd*, No. 79-3796 (9th Cir. Oct. 5, 1981); Price v. Civil Serv. Comm'n., 161 Cal. Rptr. 475, 604 P.2d 1365 (1980), *cert. dismissed as moot*, 101 S.Ct. 57 (1980); Chmill v. City of Pittsburgh, 488 Pa. 470, 412 A.2d 860 (1980); Maehren v. City of Seattle, 92 Wash.2d 480, 599 P.2d 1255 (1979), *cert. denied*, 101 S.Ct. 3079 (1981); McDonald v. Hogness, 92 Wash. 431, 598 P.2d 707 (1979), *cert. denied*, 445 U.S. 962 (1980).

Part C

The Remedy: Affirmative Action

The introduction to this statement defined affirmative action to mean active efforts that take race, sex, and national origin into account for the purpose of remedying discrimination. It distinguished affirmative action plans, which use a wide range of antidiscrimination measures that may or may not take race, sex, and national origin into account, from the specific measures commonly occurring within such plans that implicitly or explicitly use race, sex, and national origin as criteria in decisionmaking.

The first part of this statement described discrimination as a process that perpetuates itself through the interaction of attitudes and actions of individuals and organizations. These beliefs and behaviors shape and are shaped by general social structures, such as education, employment, housing, and government. These elements together form processes that produce marked economic, political, and social inequalities between white males and the rest of the population. These inequalities, in turn, feed into the process that produced them by reinforcing discriminatory attitudes and actions.

The existence of this process makes truly neutral decisionmaking virtually impossible. The conduct of employers, guidance counselors, bankers, and others discussed in Part A is but one example of how decisions that seem to be neutral, and may even be motivated by good intentions, may nonetheless result in unequal opportunities for minorities and women. These "neutral" acts become part of a cyclical process that starts from, is evidenced by, and ends in continuing unequal results based on race, sex, and national origin.

The second part of this statement then explained that civil rights law in some cases requires and in other cases permits a full range of remedial measures that take race, sex, and national origin into account. Civil rights law facilitates rather than obstructs those affirmative efforts needed to dismantle discriminatory processes.

The final part of this statement applies its problem-remedy approach to some of the major concerns voiced by opponents and proponents of affirmative action. This approach presents a format for productive discussion of these concerns. Its aim is to help distinguish the proper use of affirmative action plans and measures that take race, sex, and national origin into account from their abuse.

Self-Analysis, Statistics, and Affirmative Action Plans

The starting point for affirmative action plans within the problem-remedy approach is a detailed examination of the ways in which the organization currently operates to perpetuate discriminatory processes. Treatment follows, not precedes, diagnosis.

Such an analysis identifies, as precisely as possible, the individuals, policies, practices, and procedures that work to support discrimination. Without that thorough investigation, an affirmative action plan risks bearing no relationship to the causes of discrimination and can become merely a rhetorical endorsement of equal opportunity that compiles aimless statistics and patronizes minorities and women. Such plans frequently prove counterproductive by arousing hostility in those otherwise sympathetic toward corrective efforts. But when based on a rigorous analysis identifying the activities that promote discrimination, affirmative action plans are comprehensive and systematic programs that use the tools of administration to dismantle discriminatory processes.

This examination is likely to be more accurate when performed by persons with an intimate knowledge of the organization and complete access to necessary information. Voluntary self-analysis, therefore, is the preferred means for uncovering discrimination.

In recent years, statistical procedures interpreting data based on race, sex, and national origin have been the dominant means for detecting the existence of discrimination.[1] Their use is premised on the idea that the absence of minorities and women from the economic, political, and social institutions of this country is an indicator that discrimination may exist. A useful and increasingly refined method for self-analysis, such procedures have also been subject to misunderstanding.

One such misunderstanding confuses statistical underrepresentation of minorities and women with discrimination itself. Such data are the best available warning signals that discriminatory processes may be operating. Statistics showing a disproportionately small number of minorities and women in given positions or areas strongly suggest that a discriminatory process is at work. But such *quantitative* manifestations of discrimination raise questions rather than settle them.[2] They call for further investigation into the *qualitative* actions and attitudes that produce the statistical profile.

Another misunderstanding of statistics has led to the rigid demand for statistically equal representation of all groups without regard to the presence or possible absence of discriminatory processes. Many people frequently leap from the misconception that unequal representation *always* means that discrimination has occurred to the correspondingly overstated position that equal representation is *always* required so that discrimination may be eliminated. This position reduces the use of statistics in affirmative action plans (in the form of numerical targets or "goals") to a "numbers game" that makes manipulation of data the primary element of the plan. It changes the objectives of affirmative action plans from dismantling discriminatory processes to assuring that various groups receive specified percentages of resources and opportunities. Such misunderstandings of statistics not only short circuit the critical task of self-analysis, but also imply the need for a remedy without identifying the discriminatory problem.

Once the activities that promote discrimination are identified, the task is then to put into effect measures that work against these discriminatory processes. As the first part of this statement has shown, discriminatory attitudes and actions can form patterns that reinforce discrimination. In such situations, sporadic or isolated measures that implicitly or explicitly use race, sex, and national origin as criteria in decisionmaking may make for some change, but are unlikely to be successful in the long run. An affirmative action *plan*—a systematic organizational effort that comprehensively responds to the discriminatory problems identified by the analysis of the organization's operations—is required. That plan will set realistic objectives for dismantling discriminatory processes as they occur within the organization. It will include, as methods for achieving these objectives, antidiscrimination measures, some of which will, and others which will not, take account of race, sex, and national origin.

The basic elements of an affirmative action plan include:

- The organization's written commitment to providing equal opportunity;
- Dissemination of this policy statement within the organization and to the surrounding community;
- Assignment to senior officials of adequate authority and resources to implement the affirmative action plan;
- Identification of areas of underutilization of minorities and women and analysis of the discriminatory barriers embedded in organizational decisionmaking;
- Specific measures designed to overcome the causes of underutilization and remove discriminatory barriers;

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[1] Gathering statistical data by race, sex, and national origin, which is almost universally practiced and well-established in the law, is a critical element in compliance efforts and program planning. For a full discussion on the collection and use of racial and ethnic data in Federal assistance programs and their legality, *see* U.S., Commission on Civil Rights, *To Know or Not to Know* (1973).

[2] The use of numerical evidence as a sign of discrimination and not discrimination itself is well-established. *See* text accompanying notes 4–21 in Part B.

- Monitoring systems to evaluate progress and to hold officials accountable for progress or the lack thereof; and
- Promotion of organizational and community support for the objectives of the plan by consolidating advances as they are achieved.[3]

In the employment context, the design and implementation of affirmative action plans involve unions as well as employers.[4] Unions have the authority to insist that employers bargain in good faith over the terms and conditions of employment (such as wages, promotion procedures, training, transfers, and seniority)[5] that affirmative action plans can affect. If unions exercise this collective-bargaining power to press for or acquiesce in discriminatory provisions, or to block nondiscriminatory ones, they may be liable to injured employees.[6] To encourage unions to use their power actively to oppose discrimination and to support affirmative action, the Equal Employment Opportunity Commission has adopted a policy resolution on collective bargaining.[7] That resolution commits EEOC to take into consideration, when deciding who to sue for discriminatory employment practices, the good-faith efforts of unions and employers to eliminate discrimination through collective bargaining.

Unions have the right to request and obtain from employers information on hiring, promotions, and job classification arrayed by race, sex, and national origin.[8] Union members have intimate, firsthand knowledge of plant practices. Unions, thus, are in an ideal position to help develop and implement affirmative action plans that will root out all manifestations of discrimination. Lacking employer cooperation, unions can use their considerable financial resources and legal expertise to inform employees of their legal rights and assist them in bringing legal actions.[9]

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[3] Both the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs of the Department of Labor have issued sound guidance materials to employers on how to conduct a self-analysis and develop affirmative action plans. U.S., Equal Employment Opportunity Commission, *Affirmative Action and Equal Employment: A Guidebook for Employers* (1974); U.S., Department of Labor, Office of Federal Contract Compliance, *Federal Contract Compliance Manual* (1979). The appendix to this statement also lists guidelines for designing, implementing, monitoring, and evaluating affirmative action plans in employment.

[4] This discussion focuses on the role of nonreferral unions as opposed to referral unions. The U.S. Commission on Civil Rights has published a study on the impact of referral unions on the employment of minorities and women. In that study, it was noted that referral unions "directly influence entry into a job or trade. . . .By referring individuals to employers for hiring and by selecting individuals for apprenticeship and membership, many referral unions directly determine the size of the labor force, the qualifications required by workers, and the selection of workers." U.S., Commission on Civil Rights, *The Challenge Ahead, Equal Opportunity in Referral Unions* (1976), p. 15 (emphasis omitted). Nonreferral unions, on the other hand, "have no direct influence, and perhaps little or no indirect influence on hiring." Such unions, however, "can have considerable influence on policies and practices that affect. . .the job advancement of workers already hired." This influence is exercised "through contract negotiations over wages, hours, and other conditions of employment; union policies toward grievance procedures; and union policies exercised during the day-to-day give-and-take that generally characterizes the union-company relationship." U.S., Commission on Civil Rights, *The Role of Nonreferral Unions in Promoting Equal Employment Opportunity*, Preface, forthcoming (hereafter cited as *Role of Nonreferral Unions*).

[5] *See Role of Nonreferral Unions*, pt. I, chap. 3.

[6] Ibid., pt. II, chap. 3. The law in the area of union liability for employer discrimination is still developing. The trend is toward imposing on unions an affirmative duty to end an employer's discriminatory practices. Employment discrimination laws require unions to take steps to encourage employers to eliminate discriminatory practices, and a union will be held liable for the natural consequences of a collective-bargaining agreement it signs. *See, e.g.*, Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1381 (5th Cir. 1974). One court has held that a union's Title VII obligation not to discriminate against the employees it represents is broader than simply refusing to sign overtly discriminatory agreements. Macklin v. Spector Freight Sys., Inc., 478 F.2d 979, 989 (D.C. Cir. 1973). Other courts have found a union's mere acquiescence in the discriminatory acts of an employer to be sufficient to subject the union to liability under Title VII. *See, e.g.*, EEOC v. Detroit Edison Co., 515 F.2d 301, 314 (6th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977); Patterson v. American Tobacco Co., 535 F.2d 257, 270 (4th Cir. 1976), *cert. denied*, 429 U.S. 920 (1976).

Confusion as to the legal responsibilities of unions may result from a unique relationship between nonreferral unions and employment practices. Such unions are liable under Title VII if they cause or attempt to cause discrimination. The finding of liability consists of a two-step process. First, the union must act or fail to act; and, secondly, the discriminatory practice must result from that action or passivity. Signing a collective-bargaining agreement containing a discriminatory provision has been found to be a sufficient connection to discrimination to make the union liable. Johnson v. Goodyear Tire and Rubber Co., *supra;* Parson v. Kaiser Aluminum and Chem. Corp., 575 F.2d 1374 (5th Cir. 1978), *cert. denied*, 441 U.S. 968 (1979); *see also* Donnell v. General Motors Corp., 576 F.2d 1292 (8th Cir. 1978) (union's role in ratifying rules and regulations governing employer-administered apprenticeship program could be enough to compel a finding of union liability). Once liability has been established, the good faith bargaining efforts of the union will be taken into account in determining the extent of the union's liability for its part in the discrimination. Burwell v. Eastern Air Lines, Inc., 458 F. Supp. 474, 502 (E.D. Va. 1978), *modified on other grounds*, 633 F.2d. 361 (4th Cir. 1980), *cert. denied*, 101 S. Ct. 1480 (1981). In addition confusion may result from the judicial attempt to reconcile the two different regulatory approaches underlying Title VII and the National Labor Relations Act (NLRA). The NLRA and labor law generally are concerned with the bargaining process in determining liability, whereas Title VII is more concerned with the result of the bargaining process regardless of motive. For discussions of case law on union liability under Title VII in the context of employer discrimination, *see Role of Nonreferral Unions*, pt. II, chap. 2 and chap. 3; David O. Simon, "Union Liability Under Title VII for Employer Discrimination," *Georgetown Law Journal*, vol. 68 (1980), p. 959; Note, "Union Liability for Employer Discrimination," *Harvard Law Review*, vol. 93 (1979), p. 702.

[7] U.S., Equal Employment Opportunity Commission, "Background Paper and Resolution to Encourage Voluntary Affirmative Action in Collective Bargaining," 65 DLR D-1 (Apr. 2, 1980). This resolution is discussed in *Role of Nonreferral Unions*, pt. II, chap. 3.

Goals, Quotas, and "Preferential Treatment"

As a Nation, we are committed to making our differences in skin color, gender, and ancestry sources of strength and beneficial diversity, not grounds for oppression or mindless uniformity. Consequently, agreement on the need to identify discrimination based on race, sex, and national origin and to eliminate it through an affirmative action plan is frequently, and often easily, reached. Few fair-minded persons argue with the objective of increasing the participation of minorities and women in those areas from which they historically have been excluded. Heated controversy occurs, however, over particular methods employed in affirmative action plans to achieve this common objective. The focal point of the controversy is usually those particular measures within affirmative action plans that explicitly take race, sex, and national origin into account in numerical terms. Those measures are popularly referred to as "goals," "quotas," or "preferential treatment."

These terms have dominated the debate over affirmative action, often obscuring issues rather than clarifying them. Many discussions fail to make the necessary distinctions, explained in the introduction to this statement, among affirmative action *plans*, the *measures* they implement that may use race, sex, and national origin as positive criteria in decisionmaking, and numerical *goals* that help assess the effectiveness of the plan's measures. The problem-remedy approach, the Commission believes, can help reorient this debate. It makes clear that the discrimination that exists within an organization forms the basis for the antidiscrimination measures that are implemented through an affirmative action plan. The problem-remedy approach stresses the nature and extent of discrimination and what measures will work best to eliminate such discrimination, not what word to use to describe those measures.

The civil rights community has labored hard to define the points at which measures that take account of race, sex, and national origin within affirmative action plans are essential or become objectionable. There is widespread acceptance of such measures as undertaking recruiting efforts, establishing special training programs, and reviewing selection procedures. On the other hand, firing whites or men to hire minorities or women, and choosing unqualified people simply to increase participation by minorities and women, are universally condemned practices. With respect to measures that do not fall neatly on either end of this spectrum, however, distinctions are far more difficult to draw. These distinctions are not made easier by calling acceptable measures "goals" and objectionable ones "quotas."

For example, as part of an affirmative action plan, an employer could use any one or all of the following: extensive recruiting of *qualified* minorities and women; revising selection procedures so as not to exclude *qualified* minorities and women; considering race, sex, and national origin as one of a number of positive factors in choosing among *qualified* applicants; specifying that among *qualified* applicants a certain ratio or percentage of minorities and women to white males will be selected. Similar measures taking race, sex, and national origin into account could be undertaken by colleges and universities in their admissions programs.

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[8] Westinghouse Electric Corp., 239 NLRB No. 19 (1978), 1978–79 CCH NLRB 15,191, *enf'd sub nom.* I.U.E. v. Westinghouse Electric Corp., 90 CCH Lab. Cas. par. 12,386 (D.C. Cir. 1980).

[9] One union, the International Union of Electrical, Radio, and Machine Workers (I.U.E.), has adopted a "Title VII Compliance Program" that stresses the elimination of systemic discrimination. *See* Winn Newman and Carole W. Wilson, "The Union Role in Affirmative Action," *Labor Law Journal*, vol. 32 (1981), pp. 323, 326–27. The I.U.E. program consists of the following elements: (1) an educational program for both staff and members; (2) a systematic review of the number and status of minority members and women at each plant; (3) a systematic review of collective-bargaining contracts and plant practices to determine whether specific kinds of discrimination exist; and (4) requests to employers for detailed information broken down by race, sex, and national origin, relating to hiring (including the job grade given to each new hire), promotion and upgrading policies, initial assignments, wage rates, segregation of job classifications and seniority, copies of the employer's affirmative action plan and work force analysis, and copies of information concerning the status of all charges filed against it under the Equal Pay Act, Title VII, Executive Order 11246, and State fair employment practices laws. If data indicate there has been discrimination, the I.U.E.: (1) requests bargaining with employers to eliminate the illegal practices; (2) files NLRB refusal-to-bargain charges against uncooperative employers; and (3) files Title VII charges and lawsuits under Title VII and complaints under Executive Order 11246.

These actions could all be taken to reach designated numerical objectives or goals set by an affirmative action plan. Although the establishment of goals, and timetables to meet them, provides for accountability by setting benchmarks for success, their presence or absence does not aid in choosing which measures to use to achieve the objective of equal opportunity. The critical question is, Which measures taking race, sex, and national origin into account should be used in which situations to reach the designated goals? The answer to this question, the Commission believes, is best found by analyzing the nature and extent of the discrimination confronting the organization.

Obviously, some selection procedures, such as those ordered by the courts that among qualified applicants choose a specific percentage of minorities and women to white males, have characteristics of a quota. But attaching this label to measures that explicitly use race, sex, and national origin as criteria in decisionmaking does not render them illegal. The preceding section of this statement explained that the lower courts have repeatedly ordered percentage and ratio selection techniques to remedy proven discrimination.[10] In *Weber* and *Fullilove*, the Supreme Court of the United States approved of measures that cannot easily evade the description of quotas.[11] In *Bakke*, four of nine Justices approved a medical school's "set-aside" program, arguing that any system that uses race, sex, or national origin as a factor in selection procedures is constitutionally no different from such a quota system.[12] A fifth Justice indicated that such a program would be legal under circumstances not present in that case.[13] Rigorous opposition to all quotas, therefore, does not aid in distinguishing when to use, or not use, these kinds of legally acceptable, and sometimes required, affirmative remedies.

A debate that hinges on whether a particular measure is a goal or a quota is unproductive, legally and as a matter of policy. It confuses the means for assessing progress under an affirmative action plan (goals) with the measures (quotas) that some, but not all, plans use to reach these goals. It loses sight of the problem of discrimination by arguing over what to label remedial measures. Whichever measures taking race, sex, and national origin into account may be included within affirmative action plans—from recruiting to openly stated percentage selection procedures, with or without specific numerical targets—depends, as a matter of law and policy, on the factual circumstances confronting the organization undertaking the affirmative action plan. The problem-remedy approach urges using the nature and extent of discrimination as the primary basis for deciding among possible remedies. The measure that most effectively remedies the identified discriminatory problem should be chosen.

By broadening the present field of competition for opportunities, affirmative action plans, like all antidiscrimination measures, function to decrease the privileges and prospects for success that some white males previously, and almost automatically, enjoyed. For example, a graduate school with a virtually all-white, male student body that extensively recruits minorities or women is likely to fill openings that otherwise would have gone to white men with minorities or women. A bank with its base in the white community that invests new energies and funds in minority housing and business markets necessarily has less available capital to channel to whites. A police force that has excluded minorities or women in the past and substitutes new promotion criteria for seniority will promote some recently hired minorities or women over more senior white male police officers.

Such affirmative efforts are easier to implement when new resources are available.[14] Additional openings, increased investment funds, and more jobs add to everyone's opportunities, and no one—neither white men nor minorities and women—has any better claim to these new resources than anyone else. Whether new resources become available, remain constant, or even diminish, however, decisions must be made. Frequently, the basic choice confronting organizations is between present activities that through discriminatory processes prefer white men and affirmative action plans that consciously work to eliminate such discrimination.

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[10] See notes 60 and 61 in Part B.

[11] See text accompanying notes 101–118 in Part B.

[12] Regents of the University of California v. Bakke, 438 U.S. 265, 378 (1978) (joint opinion of Brennan, Marshall, White, and Blackmun, JJ.), discussed in text accompanying notes 88–89.

[13] *Id.* at 272 (opinion of Powell, J.), discussed in text accompanying notes 90–99 in Part B.

[14] For example, in United Steelworkers of America v. Weber, discussed in Part B, "Voluntary Affirmative Action," the employer had hired for its craft jobs only workers with several years of experience doing such work. This hiring practice precluded its present employees who lacked these skills, which were nearly all of them, from obtaining these higher paying positions. 443 U.S. at 198. As part of an affirmative action plan, the employer agreed to pay the cost of an on-the-job training program, thereby opening craft jobs to white as well as minority employees.

The problem-remedy framework does *not* suggest that the purpose of affirmative action plans is to "prefer" certain groups over others. When discrimination is a current that carries along all but those who struggle against it, there can be no true "color blindness" or "neutrality." In such contexts, all antidiscrimination measures, whether or not they take race, sex, or national origin into account, will help some individuals and hinder others. To criticize such efforts on the ground that they constitute "preferential treatment" inaccurately implies unfairness by ignoring the need to dismantle processes that currently allocate opportunities discriminatorily.

Measures that take race, sex, and national origin into account intervene in a status quo that systematically disfavors minorities and women in order to provide them with increased opportunities. Experience has shown that in many circumstances such opportunities will not result without conscious efforts related to race, sex, and national origin. Although it is appropriate to debate which kinds of "preferential treatment" to use under what circumstances, the touchstone of the decision should be how the process of discrimination manifests itself and which remedial measures promise to be the most effective in dismantling it.

What distinguishes such "preferential treatment" attributable to affirmative action plans from quotas used in the past[15] is the fact that the lessened opportunities for white males are incidental, temporary, and not generated by prejudice against those who are excluded. The purpose of affirmative action plans is to eliminate, not perpetuate, practices stemming from ideas of racial, gender, and ethnic inferiority or superiority. Moreover, affirmative action plans occur in situations in which white males as a group already hold powerful positions. Federal law, Federal policy, and this Commission reject affirmative action when used, as were quotas in the past, to stigmatize and set a ceiling on the aspirations of entire groups of people.

Support for affirmative action to dismantle the process of discrimination does not mean insensitivity to the interests of white males. To the greatest extent possible, the costs of affirmative action should be borne by the decisionmakers who are responsible for discrimination, not by those who played no role in that process. In fashioning remedial relief for minorities and women, the courts have tried to avoid penalizing white male workers who were not responsible for the challenged discrimination. For example, rather than displace white male employees who were hired or promoted through discriminatory personnel actions, courts have directed that the victims of the discrimination be compensated at the rate they would have earned had they been selected, until such time as they can move into the position in question without displacing the incumbent.[16] The Supreme Court has noted the availability of this "front pay" remedy as one way of "shifting to the employer the burden of the past discrimination."[17]

In addition, the law prohibits "*unnecessarily* trammeling" the interests of white males,[18] thereby protecting the existing status of white males (as distinguished from their expectations based on past practices) from arbitrary affirmative action plans. Thus, there may be situations where minorities and women do not obtain the positions they might otherwise hold, because doing so would require displacing whites from their present jobs.[19] On the other hand, certain situations may require disappointing the expectations of some individual white males.[20]

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[15] *See, e.g.*, Nathan C. Belth, *A Promise To Keep: A Narrative of the American Encounter with Anti-Semitism* (New York: Times Books, 1979), pp. 96–110; Benjamin R. Epstein and A. Forster, *"Some of My Best Friends. . ."* (New York: Farrar, Straus, and Cudahy, 1962), pp. 143–58, 169–83, 220–22.

[16] Patterson v. American Tobacco Co., 535 F.2d 257, 269 (4th Cir. 1976), *cert. denied*, 429 U.S. 920 (1976), *remand aff'd in part, rev'd in part*, 586 F.2d 300 (4th Cir. 1978), *later appeal*, 634 F.2d 744 (4th Cir. 1978), *cert. granted*, 101 S.Ct. 3078 (1981). *See also*, Fitzgerald v. Sirloin Stockade, Inc., 624 F.2d 945, 956–57 (10th Cir. 1979) (court approved award of front pay as compensation in lieu of reinstatement to victim of sex discrimination); Hill v. Western Electric Co., Inc., 596 F.2d 99, 104 (4th Cir. 1979) (employees subjected to discrimination in job assignments on basis of race and sex were entitled to back and front pay provided they could show deprivation by reason of such discrimination).

[17] Franks v. Bowman Transportation Co., 424 U.S. 747, 777 n.38 (1976). *See also* McAleer v. American Tel. & Tel. Co., 416 F. Supp. 437 (D.D.C. 1976) (male employee who would have been promoted except for his gender because of court-approved affirmative action plan was not entitled to remedy of promotion, but was entitled to recover damages). *But see* Telephone Workers Union v. N.J. Bell Telephone Co., 450 F. Supp. 284, 298 (D.N.J. 1977) (court refrains from granting front pay). This future-oriented form of monetary compensation is supplementary to backpay, which compensates victims of unlawful discrimination in an effort to restore the victim to the position he or she would have been were it not for the unlawful discrimination. When a court awards backpay, the employer pays the victim for wages wrongfully denied in the past.

[18] United Steelworkers of America v. Weber, 443 U.S. 193, 208 (1979) (emphasis added), discussed in Part B, "Voluntary Affirmative Action."

This balance between the national interest in eliminating discrimination against minorities and women and the interests of individual white men is especially difficult when employers lay off workers. Historically, the groups hit first and hardest by recessions and depressions have been minorities and women. They were the last hired and the first fired. Today, employment provisions that call for layoffs on the basis of seniority can have the same result. Minorities and women will tend to have the lowest seniority and be laid off first and recalled last in companies that excluded them in the past. To break this historical cycle and prevent recently integrated work forces from returning to their prior segregated status, this Commission has recommended, and at least one court has approved, a proportional layoff procedure.[21] Under this system, separate seniority lists for minorities, women, and white males are drawn up solely for layoff purposes, and employees are laid off from each list according to their percentages in the employer's work force.[22] There are other methods that would preserve the opportunities created by affirmative action plans with less impact on white male workers, such as work sharing, inverse seniority systems, and various public policy changes in unemployment compensation.[23] If none of these or similar alternatives are pursued, the use of standard "last hired, first fired" procedures will mean that opportunities laboriously created in the 1970s may be destroyed during hard times in the 1980s.

In the short run, some white men will undoubtedly feel, and some may in fact be, deprived of certain opportunities as a result of affirmative action plans. Our civil rights laws, however, are a statement that such imagined or real deprivations cannot be allowed to block efforts to dismantle the process of discrimination.

Although affirmative action plans may adversely affect particular white men as *individuals*, they do not unfairly burden white men *as a group*. For example, Alan Bakke may have been denied admission to medical school because of an affirmative action program, but nearly three-quarters of those admitted were white.[24] Affirmative action plans reduce the share of white men as a group to what it would roughly be had there been no discrimination against minorities and women. In this sense, an affirmative action plan simply removes the unfair advantages that white males as a class enjoy due to past discrimination. Emphasis on the expectations of individual white men under the status quo downplays their position as a group and the discrimination experienced by minorities and women. Such emphasis also overlooks the fact that affirmative action plans often produce changes in our institutions that are beneficial to everyone, including white males. In eliminating the arbitrariness of some qualification standards, affirmative action plans can permit previously excluded white men to compete with minorities and women for jobs once closed to them all.[25] Court-ordered desegregation of school systems—which can be considered affirmative action plans for school systems—has revealed shortcomings in the education of all students and has led to improvements.[26] Employers have used the self-analysis required by affirmative action plans as a management tool for uncovering and changing general organizational deficiencies.[27]

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[19] "Bumping" relief (the replacing of white male workers with minority or women workers) may not be used to remedy past discrimination. *See, e.g.*, Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1976), *cert. denied*, 429 U.S. 920 (1976), *remand aff'd in part, rev'd in part*, 586 F.2d 300 (4th Cir. 1978), *later appeal*, 634 F.2d 744 (4th Cir. 1978), *cert. granted*, 101 S.Ct. 3078 (1981).

[20] *See* Franks v. Bowman Transportation Co., 424 U.S. 747, 774–77 (1976), and text accompanying notes 62–70 in Part B.

[21] U.S., Commission on Civil Rights, *Last Hired, First Fired: Layoffs and Civil Rights* (1977) (hereafter cited as *Last Hired, First Fired*;) Tangren v. Wackenhut Servs., Inc., 480 F. Supp. 539 (D. Nev. 1979), *aff'd* No. 79–3796 (9th Cir. Oct. 5, 1981).

[22] Because "last hired, first fired" provisions generally are legal (see text accompanying note 76 in Part B), proportional layoffs, while permissible, are not required by law. *But see* U.S., Equal Employment Opportunity Commission, "Layoffs and Equal Employment Opportunity," 45 Fed. Reg. 60832 (Sept. 12, 1980).

[23] Under work-sharing agreements, employees agree to divide work and receive a reduced salary in an effort to avoid or minimize layoffs. Inverse seniority permits the senior person rather than the junior person on the job to accept a temporary layoff with compensation and the right to return to the job at a later date. Changes in unemployment compensation include supplementing the wages of employees who work less than the normal 5-day workweek with tax-exempt unemployment insurance benefits for the fifth day. For a discussion of these methods of minimizing or avoiding layoffs, see *Last Hired, First Fired*, pp. 49–71.

[24] Regents of the University of California v. Bakke, 438 U.S. 265, 276 n.6 (opinion of Powell, J.)

[25] *See, e.g.*, note 14 above; and Griggs v. Duke Power Co., discussed in the text accompanying notes 14–20 in Part B.

Other Concerns

Serious civil rights enforcement efforts by the executive branch of the Federal Government have only been made during the last decade.[28] These efforts have been as controversial as the civil rights laws themselves. Those subject to regulation and those whom the regulations are designed to protect have both voiced criticism and concern about Federal enforcement procedures. In the area of employment, for example, employers complain that Federal agencies administering equal employment opportunity laws and regulations impose burdensome, duplicative, and inconsistent requirements; fail to provide technical assistance; and hire enforcement officials who are often uncooperative, hostile, and unaware of the problems of employers.[29] Community representatives find Federal agencies ineffective in achieving compliance, inadequate in informing citizens clearly and precisely how to avail themselves of the protection of the laws, and lacking adequate staff and resources.[30] The serious problems marring the Federal civil rights enforcement effort are matters of great concern. This statement aims to clarify the conceptual framework that guides these sometimes haphazard enforcement activities. By sharpening necessary distinctions, this statement seeks to eliminate needless friction and misunderstanding among those involved and, consequently, improve Federal civil rights enforcement efforts.

Perhaps the most serious charge against affirmative action is that it substitutes numerical equality for traditional criteria of merit in both employment and university admissions. Neither the Nation's laws nor this Commission calls for the lowering of valid standards. Affirmative action plans often require, however, the examination and sometimes the discarding of standards that, although traditionally believed to measure qualifications, in fact are not demonstrably related to successful performance as an employee or a student.[31] Whether conscious or unconscious, overt or subtle, intentional or unintentional, the use of such standards may deny opportunities to minorities or women, as well as others, for reasons unrelated to real merit.

It is sometimes mistakenly believed that civil rights law requires the selection of lesser qualified minorities and women over white men. The Supreme Court of the United States has held that Title VII of the Civil Rights Act of 1964 does not require that minorities and women receive "preferential treatment," only that they not be victimized by illegal discrimination.[32] Thus, if two applicants, one a minority or woman and the other a white man are, in fact, equally qualified for an available position, there is no general legal requirement that the employer *must* select the minority or woman.[33] Employment decisions based upon an evaluation of true merit are permissible even when they have an adverse impact on minorities and women. However, just as standards unrelated to job performance cannot be used to exclude minorities and women, restrictive criteria not applied to white men cannot be imposed on minorities or women. Under the Federal contractor compliance program, for example, an employer cannot now require that minority and women applicants possess qualifications that were not previously required of incumbent white men.[34] Nevertheless, less qualified persons need not be selected over persons who are, in fact, more qualified for a specific job.[35]

Civil rights law does not prohibit all arbitrary selection procedures. Unless the intent is to discriminate, arbitrary selection standards (those that do not measure necessary skills) are unlawful only if they build on past discrimination against minorities and women or the discriminatory acts of others. In *Griggs*,[36] for example, the North Carolina employer required as conditions of employment as a "coal handler" that job applicants pass written tests and have a high school diploma. As a result of segregated and inferior public education, relatively few blacks could meet these qualifications. The Court struck down the job requirements because they bore no relationship to job performance *and* they operated to exclude blacks victimized by *de jure* school segregation.

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[26] *See* U.S., Commission on Civil Rights, *Fulfilling the Letter and Spirit of the Law* (1976), pp. 152–53.

[27] *See, e.g.*, G.C. Pati and C.W. Reilly, "Reversing Discrimination: A Perspective," *Labor Law Journal*, vol. 29 (1978), p. 20.

[28] U.S., Commission on Civil Rights, *Civil Rights: A National, Not a Special Interest* (1981), p. 34. In 1973 the Commission found that the Federal Government's civil rights enforcement efforts were "so inadequate as to render the laws practically meaningless." *The Federal Civil Rights Enforcement Effort–A Reassessment* (1973), p. 1.

[29] *See* Report of 13 State Advisory Committees to the U.S. Commission on Civil Rights, *Promises and Perceptions: Federal Efforts to Eliminate Employment Discrimination Through Affirmative Action* (1981), pp. 16, 28, and 34.

[30] Ibid., pp. 14, 28.

[31] *See* text accompanying notes 14–20 in Part B.

[32] Texas Department of Community Affairs v. Burdine, 101 S.Ct. 1089 (1981).

[33] *Id.* at 1097.

[34] 41 C.F.R. §60–2.24(f)(5) (1980), which states in part: "Neither minority nor female employees should be required to possess higher qualifications than those of the least qualified incumbent."

[35] The *Federal Contract Compliance Manual* requires Department of Labor investigators to determine the reason why minorities and women who possessed qualifications equal to or greater than the least qualified nonminority or male selected were rejected. U.S., Department of Labor, Office of Federal Contract Compliance Programs, *Federal Contract Compliance Manual* (1979), §§3-190.5e and 3–190.6a4.

A more difficult issue arises when standards that accurately measure necessary skills disqualify more minorities and women than white men. Because of the pervasive and cumulative effects of discriminatory processes, few minorities and women may possess the experience or skills that certain positions demand. These valid standards, just like invalid ones, reinforce the economic, social, and political disadvantages caused by the discriminatory acts of others. In such situations, civil rights law does not require the selection of unqualified minorities and women. It does, however, encourage organizations and institutions to restructure jobs and develop new standards that are equally related to successful performance, but do not disproportionately exclude minorities and women,[37] or to develop training programs that give minorities and women opportunities denied them by other sectors of our society.[38] Affirmative action, therefore, while leading to the dismantling of the process of discrimination, need not and should not endanger valid standards of merit.

Another major distortion of the concept of affirmative action results from the faulty implementation of affirmative action plans.[39] University officials, for example, have inaccurately informed white male candidates, rejected for academic positions on the basis of their own qualifications, that their rejection was due to affirmative action requirements that had forced the university to select less qualified minorities or women.[40] Minorities have been urged to accept promotions to positions for which they lack the necessary skills, in which they then fail, and they are then blamed for their failure.[41] Minority or female "tokens" have been placed in situations where they face open hostility or lack of basic support, and the resulting isolation causes them to quit, which the employer then uses as a basis for not hiring more minorities and women.[42]

Affirmative action plans, regardless of how well they are implemented, are viewed by some as perpetuating the belief of minority and female inferiority. These critics contend that measures that take race, sex, and national origin into account, no matter how benign their purpose, "stigmatize" minorities and women in ways similar to previous invidious labels of inferiority, unfitness, and helplessness. According to its critics, affirmative action casts doubt on the legitimacy of the achievements of women and minorities by implying that these accomplishments were not earned by hard work and on the basis of merit.[43]

These alleged "stigmas," however, do not result from the concept of affirmative action itself. They predate the concept. They are caused by the prejudiced attitudes and offensive stereotypes our history of discrimination has produced. Arguments that affirmative action plans stigmatize minorities and women necessarily accept rather than contest existing discriminatory beliefs. Affirmative action plans, by disrupting the status quo that currently perpetuates stigmatizing attitudes, place minorities and women in competition with white men who before often had competed only among themselves.

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[36] Griggs v. Duke Power Company is discussed in detail in Part B, "Civil Rights Law and the Problem."

[37] *See* text accompanying notes 71–80 in Part B.

[38] *See* United Steelworkers of America v. Weber, 443 U.S. 193 (1979), discussed in text accompanying notes 101–112 in Part B.

[39] Two experts on affirmative action plans have written: "We are concerned that incredible ignorance of the laws and regulations, overreactions, limited budget commitment, and poor management are creating 'mongrel' affirmative action and EEO programs and causing more harm than anticipated. We are appalled at what is going on in institution after institution, time and time again in the name of EEO and AAP." Pati and Reilly, "Reversing Discrimination," pp. 9-10.

[40] J.S. Pottinger, "The Drive Toward Equality" in *Reverse Discrimination*, ed. B.R. Gross (Buffalo: Prometheus Books, 1977), pp. 41–49.

[41] *See* Pati and Reilly, "Reversing Discrimination," p. 21.

[42] "Tokenism" as a way of avoiding changing formal and informal discriminatory organizational rules (see text accompanying notes 19–33 in Part A) rather than creating a climate encouraging the involvement of minorities and women in the life of the organization, is discussed in detail in R.M. Kanter, *Men and Women of the Corporation* (New York: Basic Books, 1977), pp. 206–44; R.M. Kanter, "Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women," in *American Journal of Sociology* (1970), vol. 82 (1970), pp. 965–90.

[43] Thomas Sowell, "Affirmative Action Reconsidered," in *Reverse Discrimination*, ed. Barry R. Gross (Buffalo: Prometheus Books, 1977), pp. 113–32.

These plans jeopardize the relative advantages white men hold as a group because of their prior insulation from competition with minorities and women. Changes caused by affirmative action plans are more easily rationalized in accordance with existing prejudices portraying minorities and women as inferior and unqualified than with the nondiscriminatory attitudes the plans encourage.

Both critics and proponents of affirmative action acknowledge the difficulty of changing prejudiced attitudes. The arguments that affirmative action plans stigmatize minorities and women, however, use this difficulty to oppose affirmative action plans: There should be no affirmative action plans because their efforts to change discriminatory beliefs may exacerbate them. Such arguments only deserve attention when accompanied by concrete alternatives that overcome discrimination better than affirmative action plans. The Commission knows of no workable alternatives. Because of our understanding of the nature and extent of race, sex, and national origin discrimination, we are convinced that strict colorblind and gender-neutral approaches are foredoomed to failure.

Inept design and execution of affirmative action plans, of course, can "stigmatize" minorities and women. Affirmative action plans can feed perceptions of minority and female inferiority, for example, when they select unqualified or token minorities who are destined to fail, when they simply are statistical schemes for keeping litigators out of corporate treasuries, and when they do not restrain supervisors from acting on racist or sexist stereotypes. Faulty implementation of some plans, however, is no basis for labeling all affirmative action plans as stigmatizing. The appendix to this statement discusses at length how properly to create and carry out an effective affirmative action plan.

Affirmative action plans have been subject to abuse. If undertaken with little or no understanding of the nature of the problem they are designed to remedy, affirmative action plans can lead at best to mechanical compliance in a continuing climate of animosity among racial and ethnic groups and between men and women, and at worst to subversion of the plan itself.

"Group Entitlements"

Race, sex, and national origin statistics in affirmative action plans do not mean, as some have alleged, that certain "protected groups" are entitled to have their members represented in every area of society in a ratio proportional to their presence in society.[64] As this statement has repeated, numerical data showing results by race, sex, and national origin are quantitative warning signals that discrimination may exist. While highlighting the effects of actions, they cannot explain the qualitative acts, much less their motivation, that cause those effects. The Commission shares the frustration of Supreme Court Justice Thurgood Marshall, who set out similar distinctions in a dissenting opinion in a recent voting rights case:

> The plurality's response is that my approach amounts to nothing less than a constitutional requirement of proportional representation for groups. That assertion amounts to nothing more than a red herring: I explicitly reject the notion that the Constitution contains any such requirement. . . .[T]he distinction between a requirement of proportional representation and the discriminatory-effect test I espouse is by no means a difficult one, and it is hard for me to understand why the plurality insists on ignoring it.[65]

We reject the allegation that numerical aspects of affirmative action plans inevitably must work as a system of group entitlement that ignores individual abilities in order to apportion resources and opportunities like pieces of pie.

Individuals are discriminated against because they belong to groups, not because of their individual attributes. Consequently, the remedy for discrimination must respond to these "group wrongs." The issue is how. This statement has argued that when group wrongs pervade the social, political, economic, and ideological landscape, they become self-sustaining processes that only a special set of antidiscrimination techniques—affirmative action—can effectively dismantle. Such group wrongs simply overwhelm remedies that do not take group designations into account. Affirmative action is necessary, therefore, when two conditions exist: when members of identifiable groups are experiencing discrimination because of their group membership *and* the nature and extent of such discrimination pose barriers to equal opportunity that have evolved into self-sustaining processes.

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[64] Those who stress this view range from the most vocal opponents of affirmative action to those who claim that they, too, should be covered. *See, e.g.*, Brief of American Jewish Committee, American Jewish Congress, Hellenic Bar Association of Illinois, Italian American Foundation, Polish American Affairs Council, Polish American Educators Association, Ukrainian Congress Committee of America (Chicago Division), and Unico National, Amici Curiae at 32–33, in Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

[65] City of Mobile, Alabama v. Bolden, 446 U.S. 55, 122 (1980) (Marshall, J. dissenting). The plurality opinion was written by Justice Stewart, who was joined by Chief Justice Burger and Justices Rehnquist and Powell.

These are rational, factually ascertainable conditions, not arbitrary value judgments or unthinking entitlements to statistically measured group rights based on statistically measured group wrongs. The first condition exists when evidence shows that discrimination is occurring. The second condition is more difficult to determine, but it is still a factual matter. We suggest that discrimination has become a self-sustaining process requiring affirmative action plans to remedy it when the following four characteristics are present:

1. *A history of discrimination* has occurred against persons because of their membership in a group in the geographical and societal area in question;
2. *Prejudice* is evident in widespread attitudes and actions that currently disadvantage persons because of their group membership;
3. *Conditions of inequality* exist as indicated by statistical data in numerous areas of society for group members when compared to white men; and
4. *Antidiscrimination measures* that do not take race, sex, and national origin into account have proven ineffective in eliminating discriminatory barriers confronting group members.

These four categories of evidence focus on the time, depth, breadth, and/or intransigence of discrimination. Their presence demands that concern about discrimination extend beyond the more palpable forms of personal prejudice to those individual, organizational, and structural practices and policies that, although superficially neutral, will perpetuate discriminatory processes.[46]

The Federal Government, based on its experience in enforcing civil rights laws and administering Federal programs, collects and requires that others collect data on the following groups: American Indians, Alaskan Natives, Asian or Pacific Islanders, blacks, and Hispanics.[47] It is the Commission's belief that a systematic review of the individual, organizational, and structural attitudes and actions that members of these groups encounter would show that they generally experience discrimination as manifested in the four categories set forth above.

The conclusion that affirmative action is required to overcome the discrimination experienced by persons in certain groups does not in any way suggest that the kinds of discrimination suffered by others—particularly members of Euro-ethnic groups[48]—is more tolerable than that suffered by the groups noted above. The Commission firmly believes that active antidiscrimination efforts are needed to eliminate all forms of discrimination. The problem-remedy approach insists only that the remedy be tailored to the problem, not that the only remedy for discrimination is affirmative action to benefit certain groups.

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[46] The Small Business Administration (SBA), pursuant to congressional directive (15 U.S.C.A. §637(d)(3)(c) (Supp. 1981)), has developed a similar four-point test. In ascertaining whether a group has suffered chronic racial or ethnic prejudice or cultural bias, the SBA applies the following criteria: (1) if the group has suffered the effects of discriminatory practices or similar invidious circumstances over which its members have no control; (2) if the group has generally suffered from prejudice or bias; (3) if such conditions have resulted in economic deprivation for the group of the type that Congress has found exists for the groups named in Pub. L. No. 95–507; and (4) if such conditions have produced impediments in the business world for members of the group over which they have no control that are not common to all business people. 13 C.F.R. §124.1–1(c)(3)(iv)(B) (1981).
The test is used to determine whether members of a minority group, not specifically designated by Congress as socially disadvantaged, qualify for the section 8(a) program of the Small Business Act (15 U.S.C. §637(a) (Supp. 1981)). This program fosters business ownership by socially and economically disadvantaged persons. 13 C.F.R. §124.1(b) (1981). The groups specifically designated by Congress as socially disadvantaged are black Americans, Hispanic Americans, Native Americans, and Asian Pacific Americans. *See* 13 C.F.R. §124.1–1(c)(3)(ii) (1981), pursuant to 15 U.S.C.A. §637(d)(3)(c) (Supp. 1981).
For another four-point test to determine whether certain groups should be included in affirmative action plans, *see* Daniel C. Maguire, *A New American Justice: Ending the White Male Monopolies* (Garden City: Doubleday, 1980), pp. 129–68.

[47] Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting, Statistical Policy Handbook, *reprinted in* 43 Fed. Reg. 19,269 (1978). The data collection, of course, also includes whites and women within each category. The directive is careful to note the following: "These classifications should not be interpreted as being scientific or anthropological in nature, nor should they be viewed as determinants of eligibility for participation in any Federal program."

[48] The term "Euro-ethnic American" is an umbrella term, including persons from the various and unique ethnic, religious, and nationality groups of Eastern and Southern Europe. In January 1981 the Commission issued a "Statement on the Civil Rights Issues of Euro-Ethnic Americans" based on a consultation on this subject matter held a year earlier. In that statement, the Commission observed that due to the lack of statistical data of all kinds on Euro-ethnics, it has not been possible to assess the extent of the discrimination they may be experiencing, much less its varied forms and dynamics. The Commission urged appropriate Federal agencies to explore ways of gathering appropriate employment data. The Commission currently is doing research on Euro-ethnics in its "Ethnicity in Employment Study."

Arguments against affirmative action have been raised under the banner of "reverse discrimination." To be sure, there have been incidents of arbitrary action against white men because of their race or sex.[49] But the charge of "reverse discrimination," in essence, equates efforts to dismantle the process of discrimination with that process itself. Such an equation is profoundly and fundamentally incorrect.

Affirmative action plans are not attempts to establish a system of superiority for minorities and women, as our historic and ongoing discriminatory processes too often have done for white men. Nor are measures that take race, sex, and national origin into account designed to stigmatize white men, as do the abusive stereotypes of minorities and women that stem from past discrimination and persist in the present. Affirmative action plans end when nondiscriminatory processes replace discriminatory ones. Without affirmative intervention, discriminatory processes may never end.

Properly designed and administered affirmative action plans can create a climate of equality that supports all efforts to break down the structural, organizational, and personal barriers that perpetuate injustice. They can be comprehensive plans that combat all manifestations of the complex process of discrimination. In such a climate, differences among racial and ethnic groups and between men and women become simply differences, not badges that connote domination or subordination, superiority or inferiority.

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[49] See note 20 in Part B.

Statement by Commissioner Stephen Horn

"Affirmative action" is simply good personnel practice—long overdue. As with any concept, it can be misused.

So there is no mistake as to this Commissioner's views, I am opposed to quotas being applied in recruitment or advancement within a work force unless there has been a finding of intentional discrimination by a court of law or a legally constituted administrative body of the Federal or State government.

I am in favor of goals voluntarily arrived at which will provide that those recruited for and advanced in a particular work force will adequately reflect the qualified talent which exists in the relevant labor pool regardless of the race, sex, national origin, handicap, or age of the individual involved. I recognize that there is also an affirmative responsibility not only by the school systems and labor-management apprenticeship programs to provide a pool of candidates which reflects this diversity, but also by the employing organizations of our society—whether in business, labor, government, or nonprofit organizations—to train and work to upgrade individuals so that the work force will reflect such diversity.

Appendix

Guidelines for Effective Affirmative Action Plans

This appendix applies the problem-remedy approach set forth in the Commission's statement, Affirmative Action in the 1980s: Dismantling the Process of Discrimination, *to the design and implementation of affirmative action plans in employment. It demonstrates that recognizing how the process of employment discrimination operates is the critical first step in designing effective affirmative action plans. It provides general affirmative action planning guidelines that assume a genuine commitment to affirmative action as a strategy for organizations to eliminate discrimination. This appendix draws extensively from the proceedings of the Commission's consultation on its proposed statement,* Affirmative Action in the 1980s: Dismantling the Process of Discrimination, *held on March 11, 1981. Papers presented at the consultation as well as additional sources are cited in the bibliography attached to this appendix.*

Affirmative action plans are systematic efforts to implement equal employment opportunity policies by identifying and remedying race, sex, and national origin discrimination. Affirmative action plans are not isolated and sporadic remedial steps; they are deliberate organizational strategies for interrupting discriminatory processes and creating self-sustaining, nondiscriminatory processes.

An effective affirmative action plan has the support of the organization's top leaders, who commit the organization to the objective of equal employment opportunity. The plan first diagnoses those aspects of "business as usual" that erect discriminatory barriers to minorities and women. The plan examines both the numerical employment profile of the organization and the organizational policies and practices that produce the numerical profile. Guided by an understanding of the subtle and overt forms of discrimination within the organization, top managers instruct appropriate personnel to design and implement the affirmative action plan. The affirmative action plan establishes nondiscriminatory values and procedures and sets goals, accompanied by realistic timetables that measure progress under the plan. Having demonstrated an initial commitment to the affirmative action program, organizational leaders allocate adequate resources for these tasks and demonstrate continuing support for the plan by using their power to grant or withhold organizational rewards for effective implementation.

Affirmative action plans do not confine their efforts to identifying and "making whole" specific individual victims of discrimination; rather, they identify and change those discriminatory organizational practices and conditions that produce victims in the first place. Affirmative action plans are comprehensive instead of *ad hoc.* They combine an understanding of the discriminatory process, knowledge of the history, structure, dynamics, and even the "personality" of organizations, and strategies for effecting organizational change. They are not pat formulas that can be mechanically applied. They require the same skill, sensitivity, and creativity that go into any plan for introducing new organizational policies.

Because each organization is different, the specific patterns and dynamics of discrimination are different for each. Similarly, the repertoire of antidiscrimination techniques is as varied as the forms of discrimination. Although the techniques that would work most effectively differ from organization to organization, some basic principles remain the same.

Essential to the successful implementation of an affirmative action plan are:

1. Commitment of top leadership to create and carry out the affirmative action plan;
2. Extensive and accurate analysis of the organization's discriminatory problems;
3. Participation by all groups affected by the plan in identifying discriminatory problems and their remedies;
4. Comprehensive and well-integrated techniques and procedures for promoting equal employment opportunity throughout the organization;
5. Commitment of organizational leadership to overcome unforseen difficulties and organizational resistance; and
6. Means for defining and continually evaluating the effectiveness of the plan.

These general elements of affirmative action plans are directed specifically to reorienting organizational policies and practices away from discrimination and toward true equal opportunity.

Top Leadership Support

- **Top leadership uses its authority and organizational resources to support change.**
- **Top leadership is visibly and personally involved in designing, implementing, monitoring, and evaluating the affirmative action plan.**
- **Top leadership uses and supports qualified technical affirmative action experts in effecting organizational change.**

Affirmative action plans cannot produce thorough and lasting change without the support of top leaders of the organization. The reasons for such support may vary, and the consequences of these varying motivations may prove decisive. But whether that support comes from a sense of fair play, community pressure, the fear of litigation, or an understanding that discrimination saps productivity and reduces available human resources, the active and visible participation by top management and labor leadership in their organization's affirmative action plan is crucial. Their actions greatly influence the spirit and enthusiasm with which their organization implements the plan.

Management and labor leaders can tangibly express their commitment to the affirmative action plan by personally announcing, expressing support for, and participating in its implementation. They can establish themselves as positive role models. Chief executives can make their commitment known through newsletters, appearances at organizational meetings, and pressure on second-level executives. Underscoring their announced support, leaders can provide clear incentives for integrating equal employment opportunity policies into the practices of all levels of management. *They can explicitly link successful implementation of the affirmative action plan with organizational rewards, such as promotion and merit-pay increases, and penalize actions that obstruct the plan.*

Organizational leaders commonly delegate major responsibilities to equal employment opportunity (EEO) or affirmative action officers. Their task is not to implement the plan, but to assist the organization in creating the plan and then integrating it into the daily routine of the organization's officals. The organizational position and leadership roles of these key personnel are often subject to conflict and limitation. EEO officers may be seen by management as advocates for minorities and women, seen by minorities and women as representatives of management, and treated accordingly by each. In addition, all parties may perceive affirmative action personnel as advocates of the interests of one group over those of others. Affirmative action officers may be isolated from real decisionmaking power if they lack adequate access to top management. The resulting absence of authority can render impossible their already difficult mission. Another frequent problem occurs when top management does not view affirmative action officers as appropriate candidates for other important organizational positions. When chief executives overlook the skills of affirmative action officers, their positions become dead end jobs. Their lack of executive support and opportunity for professional mobility within the organization can undermine their commitment as well as their effectiveness. When affirmative action officers are placed in such isolated, no-win positions, the success of the entire program is jeopardized.

One way to assure that the organization takes equal employment efforts seriously and that affirmative action personnel have sufficient authority and motivation is to place promising line personnel temporarily into the staff position of affirmative action officer. In other cases, successful affirmative action officers may be rewarded by being placed in new positions with line responsibilities. Such appointments communicate to the organization that successful implementation is linked to organizational advancement.

Because the tools of management that are most effective in combatting discrimination are the same as those used in instituting new organizational policies in general, affirmative action officers should be well-schooled in organizational dynamics. All too often, affirmative action officers begin their work with little training or experience in management. Top leadership must carefully plan the training, functions, and position of affirmative action personnel. They must also commit the necessary support, access, and financial resources that go into any serious effort to implement new organizational policies.

Replacing discriminatory processes with nondiscriminatory ones is a long-term endeavor. Top leadership must pursue with patience the goal of making equal employment opportunity an accepted and integrated aspect of organizational practice.

Organizational Self-Analysis

- **Perform quantitative organizational diagnosis.**
- **Perform qualitative organizational diagnosis.**
- **Identify policies, procedures, and formal and informal processes that have discriminatory effects.**
- 1m **Identify the effect of the external environment on organizational practices and internal climate.**
- **Identify the effect of the internal climate of the organization on minorities and women.**

Thorough and specific organizational self-analysis leads to thorough and specific affirmative action plans. Although effective remedies can result from trial, error, and mangerial instinct, a clear diagnosis of problems is more likely to underlie an effective affirmative action plan.

Organizational self-analysis focuses on personnel decisions. It is these decisions that cause and perpetuate discrimination. Self-analysis gets to the human level by seeking to find out what it is actually like to be a part of the organization. It reviews the effect on minorities and women of such aspects of organizational procedure as: *recruitment* of potential employees; *selection* criteria in hiring (e.g., educational or experiential qualifications, application forms, interview procedures, testing); *promotion and transfer* procedures (e.g., career pathways, "fast tracking," seniority, training opportunities); *wage and salary* structure; *employment benefits; layoff procedures;* and *disciplinary and grievance* procedures. Most important in reviewing these factors is an understanding of the many ways, both intentional and unintentional, in which discrimination operates.

Part A of the Commission's statement on affirmative action, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination,* discusses at length how discrimination against minorities and women works. It describes race, sex, and national origin discrimination as self-sustaining processes of individual, organizational, and structural predispositions and policies that derive from past discrimination and perpetuate that discrimination, even unintentionally, into the present and, if unchecked, into the future. These processes are so deeply ingrained in the everyday actions of most organizations that it requires deliberate antidiscrimination strategies that take race, sex, and national origin into account to break this cycle of discrimination. But as the Commission emphasizes in the statement, more is required of such interventions than the mechanical creation of a new numerical balance. Attention to those processes within the organization that produce numerical results is crucial.

The literature on affirmative action plans is replete with numerical measures of work force composition. These quantitative techniques for describing and predicting female and minority employment patterns are essential to determine whether and where discrimination may be occurring. These analyses can go beyond comparing by occupational categories the percentages of minorities and women in the organization with their percentages in the relevant available labor pool. They can include statistical techniques that describe, in terms of race, sex, and national origin, such variables as the rapidity of promotions, the frequency and size of merit increases, the numbers and types of employees supervised, and wage rates. Such techniques are, however, insufficient by themselves. Numerical inequalities are the best signal that discrimination may be occurring; they do not identify the interrelated and sometimes subtle discriminatory processes that produce them.

To identify discriminatory processes accurately, organizational self-analysis requires both numerical (quantitative) and nonnumerical (qualitative) approaches. Describing and measuring the actual everyday beliefs and behaviors that produce disparate hiring and promotion rates is as important as examining the rates themselves.

The kinds of activities that contribute to an organization's statistical employment profile include: the formal practices and policies of the organization, the informal policies and practices of the organization, the external environment in which the organization exists, and the internal "climate" of the organization, which is largely the product of the three preceeding factors.

The Formal Rules

The formal rules and policies of the organization are the officially approved procedures of organizational life. They include the formal, hierarchical structure—the official chain of authority and responsibility—and the rules for making organizational decisions. There are many examples of the ways in which formal organizational rules have discriminated in the past. Today, however, explicit organizational rules that intentionally discriminate are rare. Today's discrimination is more frequently perpetuated by rules that are fair in form, but biased in effect. This situation requires sensitivity to rules that are superficially neutral, but nonetheless discriminatory. One example of such a rule is a hiring standard that requires certain amounts of education or experience to qualify for hiring or promotion. When such education or experience does not predict job success, and when disproportionately few minorities or women have such backgrounds, the rule discriminates without the compensating virtue of accurate performance prediction. Similarly, rules "protecting" women against the rigors of manual labor may bear no relationship to women's actual capabilities or to the actual requirements of the job.

By examining formal aspects of organizational decisionmaking that may be fair in form but that discriminate against minorities or women, the organization can set about instituting new, more rational, and nondiscriminatory policies.

The Informal Rules

The informal structures, rules, and procedures of organizations are sometimes more important than the formal ones in understanding discrimination. The informal rules and policies are unarticulated aspects of organizational life. They are not part of the organization's official decisionmaking structure, but are the informal practices that determine whether and how the formal rules are to be implemented. For example, an organization may have a carefully devised affirmative action plan that seeks to include minorities and women at all levels and in all jobs, while informal rules within the organization bar minorities from sales positions and women from outdoor work. Another organization may formally espouse a policy of aggressive recruitment of minorities and women at universities, while informally recruiters who are friends or former students of white male faculty may rely excessively upon the "old boy network" in their recruiting. Consequently, they may, even unintentionally, favor the white male proteges of their recruitment sources. Similarly, within the organization, white male managers may pass over minority or female subordinates while identifying young white male subordinates as candidates for the "fast track" within the organization. The fact that these white male candidates superficially conform more closely to the images of organizational leaders (who traditionally have been almost exclusively white men) disadvantages equally talented women and minorities.

Because such rules are informal and perhaps contradict the organization's official policy, they may be difficult to identify. Nonetheless, their importance should not be underestimated in analyzing a problem of discrimination.

The External Environment

Another factor that exerts considerable influence on an organization's affirmative action plan is the environment in which the organization exists. The best intended efforts to implement affirmative action plans can fail when structural discrimination in the external environment of the organization creates barriers to equal opportunity. Structural discrimination consists of the cumulative effect of those seemingly neutral aspects of everyday life, such as housing, education, and employment, that perpetuate past discrimination into the present and future. These external structural factors influence the labor market and, consequently, the organization's statistical employment profile, which may arouse suspicions of illegal discrimination.

Discriminatory conditions in such external sectors as housing and education may influence the implementation of affirmative action plans. For example, organizations located far from residential areas with high minority concentrations and without access to public transportation may receive fewer minority job applicants than organizational leaders or affirmative action staff might hope for. Although the organization may not be responsible for housing segregation or for the lack of public transportation, it will speed the implementation of its affirmative action plan by taking steps to remedy these problems. For example, transportation facilities such as carpools or vanpools can be arranged for employees unable to get to work by other means. Wherever possible such transportation arrangements should include employees from different neighborhoods. In this way the organization can encourage a climate that supports diversity.

Structural discrimination may hamper an organization's affirmative action plan when inadequate day care facilities prevent single parents, most often women, from seeking or maintaining employment. In such cases, the organization may address this problem by establishing onsite day care centers as part of an affirmative action plan.

Structural discrimination also may negatively influence the organization's internal climate. As much as they might like to, employees cannot leave the external environment behind when they enter the worksite. Employees bring with them the values and norms of the communities in which they live, and these values and norms in turn affect those of the organization. Top management must recognize that a successful affirmative action plan means the creation of a more culturally diverse work force than previously existed in most organizations. Learning to manage a more diverse work force becomes a task for management intent on improving the likelihood that an affirmative action plan will succeed.

Another factor in the external environment is the character of the signals emanating from government institutions and officials with respect to the importance of creating and effectively implementing comprehensive affirmative action plans. Such signals may change with the political tides and are poor guides for organizational decisionmaking. An organization that is truly committed to ending discrimination and increasing available human resources recognizes that an effective affirmative action plan is ultimately a matter of substituting rational and merit-based decisionmaking for biased and irrational processes that perpetuate discrimination. When an affirmative action plan is seen by top management as a method for improving the workplace environment for all employees, its justification becomes an internal matter of organizational self-interest.

The Organizational Climate

The organizational climate is the product of all those everyday policies and practices that create the internal psychology of an organization. It is influenced by the personalities of members of the organization, the formal and informal rules that make up the organization, and the external environment in which the organization operates. It consists of those factors within the organization that contribute to employee morale and job satisfaction as well as the ways tension and conflict are resolved within the organization. In sum, the organizational climate reflects "what it is like" to work in that organization. An organizational climate that is unfavorable to minorities and women will hinder an affirmative action plan, regardless of any formal commitment top management may express.

One major source of an unfavorable organizational climate for minorities and women is tokenism, the hiring of a small number of highly visible minorities or females as a concession to equal opportunity pressures. Tokenism communicates to white and male employees that the affirmative action plan is not a serious organizational commitment. Tokenism isolates minority and female employees, presenting them as showpieces who lack any real organizational credibility. Such a "fishbowl" existence often leads to such negative results as high rates of absenteeism and job turnover.

This is not meant to imply that if minorities and women cannot be hired in sufficiently large numbers to avoid the appearance of tokenism, they should not be hired at all. Affirmative action plans have to begin somewhere. Hiring small numbers of minorities and women in the initial stages of implementing an affirmative action plan can advance an organization's affirmative action objectives when these minorities and women are treated as competent and valued employees. Tokenism, after all, is a matter of organizational attitudes and actions as well as numbers. To create a nondiscriminatory environment, however, the organization should be committed to hiring enough minorities and women to influence and maintain the gains made through the affirmative action plan.

Other aspects of the organizational climate that may impede an affirmative action plan's success are organizational resistance and white and male backlash, both discussed below.

Minority and Female Participation

- **Solicit ideas from all personnel, especially minorities and women.**
- **Act upon minority and female suggestions.**
- **Give reasons if minority and female suggestions are not acted upon.**

Another task of organizational leadership is to encourage minority and female participation in affirmative action planning. Minorities and women already employed are the best authorities on what it is like to be a minority or a woman within that organization. As such, they are most likely to be able to identify the policies and practices that are discriminatory.

Organizational leaders should solicit the participation of minorities and women, as well as white male employees, at all levels of the organization. By working closely with such employees, organizational leaders can identify and responsibly address issues of organizational racism and sexism. When properly conducted, such activities can reduce stereotyping by all concerned. They can also promote more effective use of minorities and women in other organizational tasks by giving minorities and women greater opportunities to demonstrate competence and initiative within the organization. Most significantly, these activities help target the affirmative action plan to the specific forms of discrimination that minorities and women in the organization experience. An affirmative action plan that lacks the support of minority and female employees cannot take root.

Organizational leaders should solicit employee viewpoints in ways that inspire confidence. Employees must know that they will not be penalized for voicing their opinions, perceptions, and needs, even when these may be at odds with those of top management. Many organizations have used anonymous questionnaires in gathering such information. Other organizations have hired outside consultants to conduct confidential interviews or have encouraged the creation of minority and female task forces and advocacy groups within the organization. The methods vary from organization to organization. Which method works best depends on the specific characteristics of the organization.

Regardless of which method they use, organizational leaders must take seriously the information and advice employees offer. When appropriate, the organization should respond to employee suggestions. If suggestions are not acted upon, the reasons should be clearly stated. Unresponsiveness creates resentment and a sense of betrayal among employees.

Participation by employees in the early stages of affirmative action planning gives them a stake in the plan's success. The resulting interest of minority and female employees in the plan is especially important. Their support can foster informal activities, such as urging their friends to seek employment with the organization and encouraging them to stay. These activities are important byproducts of an effective affirmative action plan.

Techniques for Promoting Change

- **Determine specific points of intervention.**
- **Develop remedies.**
- **Assign priority to remedying each problem.**
- **Allocate necessary resources for implementing remedies.**
- **Implement program.**

An effective affirmative action plan is a long-term process like the process of discrimination it remedies. Affirmative action plans differ from organization to organization in order to provide the proper remedies for unique organizational problems. Nevertheless, some general areas in which discrimination frequently occurs can be identified, and the possible remedies then often become self-evident.

Examining the validity of hiring standards, for example, is an early step in diagnosing discrimination. Affirmative action plans remedy non-job-related and discriminatory standards by devising ones that more accurately reflect the requirements for successful performance. Of course, the specific details of each existing hiring standard and the specific details of the appropriate remedy will vary from organization to organization. Organizational self-analysis identifies those aspects of the organization's operations that should be changed and helps top management determine which remedies can be applied most easily and effectively. For these reasons, an affirmative action plan is not a magic wand to be waved over an amorphous and ill-defined problem, nor is it a list of step-by-step techniques to be rigidly applied across the board. Instead, an affirmative action plan is a dynamic intervention program that aims to replace self-sustaining discriminatory processes with nondiscriminatory ones. A primary technique for change, therefore, is a comprehensive analysis of behaviors that lead to underrepresentation.

An organization that wishes to promote more women to positions of organizational authority, for example, must determine what has prevented women from holding such positions in the past. In all likelihood a combination of factors, including disparate recruitment, selection, and promotion procedures, is responsible. Some of these factors may have greater influence than others, however, and self-analysis can determine their relative weights as well as help refine the types of remedies that may apply. For example, an organization which determines that adequate efforts have not been made to recruit women with the potential to fill high organizational positions can devote more resources to recruiting at women's colleges or through women's organizations. A different organization may determine that women do not apply for promotion because they do not learn of openings. In such a case, open posting of available jobs may help attract female applicants. In another organization, supervisors in predominantly female areas of one organization may be asked to nominate promising employees for promotion. In yet another organization, selection criteria may be redefined to give credit for relevant skills that employees develop outside the usual promotion pathways.

Although crucial, organizational self-analysis should not be a substitute for action. Some discriminatory problems may not be easily discovered, and an obsessive search for ever more finely detailed diagnosis may prove counterproductive. In such instances, trial and error may be the best technique for determining remedies. Most of the time, however, a sophisticated organizational self-analysis can reduce the expense and frustration that go along with insufficiently focused remedies.

In undertaking an affirmative action plan, employment statistics often provide the first clues as to whether and where discrimination may be occurring. High turnover of minorities and women in certain departments, for example, will alert affirmative action personnel and organizational leaders that a problem may exist in that department. Qualitative analysis may then determine whether such a problem exists and identify its specific nature. In one department, for example, high minority and female turnover may be caused by informal organizational practices, such as the exchange of inside information and the development of social relationships at luncheons or over cocktails, activities from which minorities and women may be excluded. In other departments, high minority and female turnover may be due to an organizational climate that is openly hostile to them. Managers and other employees may behave in an overtly racist or sexist manner, and minorities and females may prefer to leave the department or the organization rather than continue working under such conditions.

Clearly, the nature and extent of the problem will determine the nature and extent of the remedy. In the first case, where high minority and female turnover results from unintentionally exclusionary behavior, efforts can be made to include minorities and women in the informal information-sharing networks in which whites and males participate. In another case, it may be appropriate to encourage the creation of new formal, nonexclusionary networks. By sponsoring training sessions geared toward helping employees understand the subtle and perhaps unintentional ways in which discriminatory processes can operate, organizational leaders can underscore the expectation that qualified minorities and females will advance. Other training programs focusing on such issues as managing a diverse work force, conflict management, or communications skills may be necessary in other situations. In cases where high minority and female turnover is due to overt racial prejudice or sexism, the proper remedial technique may be race-relations training or the transfer or dismissal of prejudiced managers.

Although training programs have often proved useful, they should not substitute for necessary policy changes. The content of training programs should relate directly to organizational problems. Training should also include mechanisms and techniques for applying in the organization what is learned in the classroom. Furthermore, top management should support the application of these mechanisms and techniques. Even the best and most appropriate training programs are useless if there is no opportunity or support for applying what is learned. In other instances, problems of organizational discrimination are such that training programs are inappropriate, and in such cases more sophisticated organizational or job analysis may be required.

In one organization, for example, an analysis of the organizational factors that contributed to high turnover among recently hired female sales personnel led management to recognize that what they had thought was a problem of sexism among their customers was in reality an organizational problem. Management concluded that such practices as assigning female sales personnel to pursue competitors' clients, under the assumption that there would be nothing lost if the women failed, actually had the effect of assigning them to the most difficult potential clients while granting the most potentially successful clients to male sales personnel. Obviously, the organizational climate was not one in which female sales personnel enjoyed the same on-the-job opportunities as their male colleagues. This analysis paved the way for specific programs to increase female participation in the sales force and remove the causes for their high turnover rates. In addition, it led to a broader understanding of what went into sales work in that organization than had previously been recognized. The new information was put to use not only to retain saleswomen, but to develop more specific notions about how to train and deploy all potential salespeople in the future. Rather than applying rigid remedies without sensitivity to the subtleties of the discriminatory problem, this sophisticated self-analysis provided remedies tailored to the unique organizational problems that existed.

Overcoming Organizational Resistance and Other Difficulties

- **Identify the kinds of resistance.**
- **Identify and implement actions aimed at overcoming resistance.**
- **Identify and implement actions aimed at preventing future resistance.**
- **Maintain and improve the affirmative action plan despite economic setbacks.**

Efforts to institute new organizational policies inevitably face resistance of one kind or another. Developing new decisionmaking patterns and implementing new policies means giving up old ones that have become habitual and are seen as the normal way of doing things. The axiom that change never comes easily is especially true with regard to affirmative action plans.

The types of resistance to affirmative action plans are many and complex. They can range from organizational inertia and rigidity to deliberate sabotage and white and male backlash. In some organizations, resistance to affirmative action plans may take such forms as tokenism or efforts to "contain" the progress of minorities and women within limits acceptable to whites and men. In other organizations, resistance may take different forms, such as deliberately sabotaging or denying credit for work done by minority or female employees. Another symptom of resistance to affirmative action plans is the organizational isolation of affirmative action officers. Failing to provide affirmative action officers with enough financial, personnel, and training support services also may be expressions of organizational resistance to affirmative action plans.

Just as the symptoms of organizational resistance vary, the sources of such resistance vary as well. For example, because affirmative action plans often are designed at company headquarters, regional personnel may feel excluded from the planning process and may be uncertain about the company's commitment to affirmative action. This combination of resentment and uncertainty frequently leads to resistance on the part of regional managers. An affirmative action plan that is likely to succeed must take potential sources of resistance into account and must cope with them as early in the planning process as possible.

As is the case when seeking to identify the processes of organizational discrimination, the point in looking at resistance to affirmative action plans is not to find blameworthy parties to punish, but to gather the kind of sophisticated and comprehensive information necessary to promote successful change. Recognizing that resistance accompanies any major change in organizational policies, and being alert to the forms that resistance to affirmative action plans may take, can help organizational leaders and affirmative action personnel plan more effectively. Such an understanding also can help organizational leaders avoid interpreting resistance as failure and abandoning affirmative action plans before implementing them effectively.

One example of resistance that sabotaged an affirmative action program occurred in a municipal police department, which successfully recruited minority cadets only to see all of them fail or drop out of the training academy. Recruiting inadequately prepared candidates, or allowing discrimination in the training process, may both be signs of resistance. When such experiences are used as evidence that an affirmative action plan cannot succeed and to justify abandoning affirmative action efforts, then resistance has led to defeat. Organizations that recognize the likelihood of resistance and are prepared to allocate sufficient time, energy, and resources to overcome it are likely to avoid its negative consequences and be effective in combatting discrimination.

Just as internal resistance often impedes affirmative action plans, forces outside the organization may at times slow progress. Even the best designed and most comprehensive affirmative action plans are not immune from economic setbacks. Such setbacks may influence hiring, promotion, and the overall speed with which minorities and women can be integrated into the organization. Organizations can take various actions that will prevent economic setbacks from reversing past gains in employing minorities and women. Rather than lay off minority or female workers, who tend to have the least seniority because of past exclusion, organizations can devise parallel seniority lists solely for layoff purposes, reduce the workweek for all employees, encourage the early retirement of senior white male workers, or use other such devices to assure that minorities and women are not disproportionately affected.

Regardless of whether these alternatives are pursued, reductions in new opportunities do not justify abandoning affirmative action plans, which address the overall organizational climates as well as the statistical profiles of organizations. Moreover, organizations are always in flux. People are continually being hired and promoted, even during hard times. Despite their small numbers, minorities and women can thrive in an organization determined to create a climate of equality. Although an organization's affirmative action plans will be affected by and must respond to changes in the economic environment, economic reversals must not be allowed to serve as vehicles for organizational resistance to the effective implementation of affirmative action plans.

Means for Evaluating Progress

- **Use objective statistical measures.**
- **Use qualitative measures of organizational "climate" and behavior.**
- **Continually monitor progress of affirmative action interventions.**
- **Take appropriate action to respond to unforeseen events.**

A comprehensive affirmative action plan, growing out of a specific and detailed organizational self-analysis and the active support of organizational leaders, should have built-in indicators for judging success. Some of these indicators involve the qualitative aspects of an organizational climate that are often subtle and sometimes difficult to measure. Others lend themselves more readily to quantitative expression and evaluation.

Among the more easily measured organizational changes that suggest an affirmative action plan is successful are: increased number of minority and female job applicants, increased hiring and promotion of minority and female employees, long-term retention and advancement of minority and female employees, and long-term gains in organizational productivity.

The relatively clear-cut nature of statistical measures of work force composition and performance make them attractive as outcome criteria. But quantitative measures, although essential, are only part of the effort to evaluate the progress of affirmative action plans. Of equal importance are qualitative measures, such as frequent "soundings" of employee morale and other aspects of organizational climate. Through surveys, interviews, and other qualitative measures, the experiences of minorities and women as well as those of white male employees can be monitored continually. Numerical measures showing more equal outcomes are signs that discriminatory processes are being eliminated, but such measures do not identify or describe the workings of the new nondiscriminatory processes. Qualitative analyses are needed to determine whether new nondiscriminatory processes have been established that will continue as a routine part of the life of the organization when the affirmative action plan is withdrawn.

Affirmative action is a way of implementing national equal employment opportunity policy. It is a long-term process that has barely begun. The problem that affirmative action plans are designed to remedy has taken centuries to develop and resists quick and mechanical solutions. For women and minorities to be fully accepted in all jobs at all organizational levels, most organizations will need affirmative action plans designed to include minorities and women in sufficient numbers and with sufficient organizational backing so that a discriminatory organizational climate becomes nondiscriminatory. Only when such a climate has been established will a self-perpetuating process of equality take the place of the process of discrimination and bring to an end the need for affirmative action plans as we now know them.

"Affirmative Action" Under Reagan

Chester E. Finn, Jr.

IN a press conference on the anniversary of his inauguration, Ronald Reagan stated that "I have been on the side of opposition to bigotry and discrimination and prejudice, and long before it ever became a kind of national issue under the title of civil rights. And my life has been spent on that side."

Yet the policies and actions of Reagan's administration during its first fourteen months were widely perceived to be unsympathetic to civil-rights progress, if not overtly hostile to the interests of minorities and women. Certainly that is the view of leaders of major civil-rights organizations. The NAACP's Benjamin Hooks told a Senate subcommittee in late January that he could not point to "any action of this administration that would give any hope of comfort to minorities." The National Urban League opened the 1982 edition of its annual report on "The State of Black America" with the statement that "At no point in recent memory had the distance between the national government and black America been greater than it was in 1981, nor had the relationship between the two been more strained." The American Civil Liberties Union distributed a newsletter in February describing "a presidential administration whose hostility to individual rights is relentless." A lawyer with the National Women's Political Caucus says of Reagan that "his record is absolutely deplorable." Apart from an occasional expression of ironic gratitude to the President for galvanizing the sluggish civil-rights movement itself—"He's giving us the glue that's bringing us together," said one Urban League official—the White House evokes little but criticism from such spokesmen and their echoes among the editorial writers and columnists of the major metropolitan newspapers.

One cannot of course know whether Ronald Reagan has ever harbored an unkind impulse or prejudiced thought, but it is now possible to glimpse the outlines of his administration's civil-rights policies and to begin to appraise their execution. The policies, unfortunately, are not as clear as they should be after more than a year in office. Their implementation has been uneven on good days, indefensible on bad ones. What is most regrettable about the administration's two or three authentic blunders, however, is that they cloud, indeed may permanently have polluted, the atmosphere of good faith that is essential if the excesses and distortions committed in the name of "civil rights" in recent years are to be corrected and the concept itself restored to a place of honor and approbation.

That it does not occupy such a place today is due largely to conflict between two quite distinct ideas, both of which have carried the banner of "civil rights" since the mid-60's, and to mounting popular disapproval of some of the actions taken by the federal government in their name.

The first consists of purposeful efforts to bar discrimination against individuals on the basis of their race, religion, sex, physical condition, national origin, and other such characteristics. These efforts are rooted in the Enlightenment ideas that undergird American democracy; in the Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments to the Constitution; in the civil-rights legislation of the 1860's and 1870's; in a series of Supreme Court decisions beginning with *Brown* v. *Board of Education*; and, especially, in the Civil Rights Act of 1964, that great congressional mandate for equal individual opportunity within a color-blind society.

In pursuit of this goal, the federal government has constructed elaborate means of safeguarding individuals against discrimination based on the attributes of groups to which they belong and has thereby sought to equalize their opportunities to succeed—or to fail—as individuals. These safeguards, in the main, continue to enjoy wide public approval.

The second set of actions taken in the name of "civil rights," however, has consisted of efforts to better the condition of designated groups within the society by redistributing social, economic, political, and educational resources. The underlying rationale has been variously phrased, but always partakes of the concept of achieving parity among groups defined according to the same characteristics that are proscribed in the treatment of individuals.

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Although foreshadowed by FDR in the "second bill of rights" described in his 1944 State of the Union message, this, too, is primarily a legacy of the mid-1960's, especially of the federal War on Poverty with its dozens of "compensatory" spending programs, and of Executive Order 11246, issued by President Johnson in 1965. That celebrated document required the government and its private contractors to take "affirmative action" to "ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin." (Sex was added in 1967.) Every federal agency was ordered to "establish and maintain a positive program of equal employment opportunity" and the Secretary of Labor was empowered to adopt "such rules and regulations" as were necessary for government contractors to be pressed toward the same result.*

A few months earlier, Bayard Rustin had presciently observed that "The civil-rights movement is evolving from a protest movement into a full-fledged social movement—an evolution calling its very name into question. It is now concerned not merely with removing the barriers to full opportunity but with achieving the fact of equality."† Rustin itemized the problems facing blacks, problems which, "while conditioned by Jim Crow, do not vanish upon its demise. They are more deeply rooted in our socioeconomic order; they are the result of the total society's failure to meet not only the Negro's needs, but human needs generally."

Federal efforts to achieve "the fact of equality" were numerous and imaginative. Many of these sought to better the lot of the poor and disadvantaged in general, especially through the myriad social programs, ranging from Headstart to CETA to food stamps to adoption assistance, that were the building blocks of the contemporary welfare state. Others, however, responded to the demands of more limited groups—women, blacks, the handicapped, the elderly, Hispanic Americans, Native Americans—for divers benefits and services.

Even as the spending programs proliferated and grew, however, Washington developed several further strategies to apportion society's rewards more "equally."

The first was to eliminate such criteria as examinations for employment and tests for entry into selective schools that had the effect of distributing benefits unequally among groups even though the criteria were themselves objective or "colorblind."

The second was the "earmarking," "setting aside," or reserving of certain portions of federal money and other benefits for groups who would not have to compete for them through the processes that governed the allocation of the remainder.

The third was the creation of detailed regulations and procedures for non-federal entities (such as school systems and private employers) within the reach of federal policy that obliged them to make decisions in a race- (or sex-) conscious way.

It mattered little who occupied the Oval Office or which party controlled the executive branch. The Nixon administration, after all, introduced the concept of numerical hiring "goals and timetables," imposed the requirement that individual employers prepare written affirmative-action plans, and invented the "Philadelphia Plan," which amounted to a minority-hiring quota for federal construction contractors. During the brief tenure of Gerald Ford, a simple statutory prohibition against sex discrimination in federally-aided schools and colleges was translated into the voluminous Title IX regulations, intruding Washington into school dress codes, the offerings of university athletic departments, and, for a time, "father-son" and "mother-daughter" dinners. Ford's Office of Education also promulgated the "Lau Remedies," requiring school districts with twenty or more children who speak a language other than English to teach them in their primary language and to provide them with "bicultural" education as well.

But it was during the administration of Jimmy Carter that such "equalizing" strategies were most fully elaborated. This was due in part to the internal politics of the Democratic party that nominated him, for by 1976 the party of Thomas Jefferson had become a fractious assembly of groups that defined themselves by race, ethnicity, physical conditions, gender, and sexual orientation and that allotted delegate seats at its own convention acording to intricate ratios and quotas.

The administration that took office in 1977 set about to favor and reward these constituent groups by yielding to practically every one of their demands. Former Carter appointees in the executive agencies and the White House staff now reflect ruefully on their instructions not to turn away any group or movement that asserted rights or claims, however extravagant. In fact, of course, some—such as Catholics seeking aid for parochial schools—were turned away. But in the main, administration policy, as George Will put it, was "to divide the majestic national river into little racial and ethnic creeks," making the United States "less a nation than an angry menagerie of factions scrambling for preference in the government's allocation of entitlements."

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* The latent conflict between the color-consciousness of the executive order and the color-blindness of the previous year's Civil Rights Act continues to raise profound legal and constitutional questions about the extent of the President's authority in promulgating and enforcing the order. The Supreme Court's *Weber* decision quite unintentionally deepened those questions, as is incisively shown in a brilliant law note by Andree Kahn Blumstein, "Doing Good the Wrong Way: The Case for Delimiting Presidential Power Under Executive Order No. 11246," *Vanderbilt Law Review*, Vol. 33:921, 1980.

† "From Protest to Politics: The Future of the Civil Rights Movement," COMMENTARY, February 1965.

In that spirit, and pursuant to a one-paragraph congressional ban on discrimination against the handicapped, the Carter administration promulgated hundreds of pages of regulations mandating that subway stations and 19th-century college laboratory buildings alike be "retrofitted" for wheelchair use, notwithstanding the multibillion dollar cost—little or none of it reimbursed by Washington.

The civil-service "reforms" that Carter pressed through Congress radically changed the basis of the federal government's own "affirmative-action" plans. Prior to 1978, those plans rested—as do private-sector plans even now—on the concept of "under-utilization," defined by the government as the presence of "fewer minorities or women in a particular job group than would reasonably be expected by their availability." That construction at least allowed agency heads and the Civil Service Commission to base their "goals and timetables" on the distribution within particular geographic locations of minority-group members and women possessing the skills and qualifications needed for specific jobs in the federal service.

The 1978 reforms, however, replaced "under-utilization" with "underrepresentation," defined as "a situation in which the number of members of a minority-group designation . . . within a category of civil-service employment constitutes a lower percentage of the total number of employees within the employment category than the percentage that the minority constituted within the labor force of the United States. . . ." This wiped out all consideration of individual qualifications and of local job-market conditions; it said, in effect, that no government official could rest until every "designated" minority was represented in every grade and classification of federal employment in every agency in exact proportion to its incidence in the adult population of the United States as a whole: the most explicit, exacting, and inflexible quota system of all.

In its final weeks, the Carter administration also agreed to scrap the principal test that the government routinely administered to judge the qualifications of persons seeking to enter the civil service.* The reason was that minority-group members often failed the examination, which meant it purportedly had an "adverse impact" on them. So much for merit in the public sector.

As for non-federal employers, the Carter administration also made great "progress." Under Executive Order 11246 and its cousins, the enforcement of contract compliance had been handled by agencies with at least some general knowledge of the institutional character of their own contractors and the nature of the pertinent labor pools. Carter now consolidated the entire endeavor in the Labor Department and greatly enlarged its Office of Federal Contract Compliance Programs (OFCCP)—a zealous agency with a single responsibility and just one set of outside constituencies, namely, the groups whose interests are advanced by its enforcement efforts.

That agency set about with great vigor to expand the scope and reach of its activities. It came to rely heavily on the "back-pay" sanction, whereby an employer found to have been insufficiently ardent about affirmative-action goals could be compelled to grant up to five years' pay as compensation to those who supposedly would have earned it had he acted differently at an earlier date. It welcomed hundreds of complaints against employers from civil-rights organizations generally, and women's groups particularly, thereby effectively enlisting them as scouts and informants.

A few blocks away, the Equal Employment Opportunity Commission (EEOC), firmly led by Eleanor Holmes Norton, set out both to eliminate the huge backlog of uninvestigated discrimination complaints by individuals and to step up its self-generated anti-discrimination and affirmative-action efforts. One of its principal endeavors was to convince employers that they did not have to worry about charges of "reverse discrimination" if they gave preference to minority-group members and women. Offering its own interpretation of the history of the 1964 Civil Rights Act, the Commission published in the Federal Register its confident belief "that by the enactment of Title VII Congress did not intend to expose those who comply with the Act to charges that they are violating the very statute they are seeking to implement. Such a result would immobilize or reduce the efforts of many who would otherwise take action to improve the opportunities of minorities and women. . . ."

The Commission then set forth an ingenious Catch-22 in which persons who thought themselves victims of "reverse discrimination" could expect no help from the EEOC. For, after announcing that "These guidelines constitute the Commission's interpretation of Title VII and will be applied in the processing of claims of discrimination," the Commissioners explained that employers engaged in the work-force analysis that is part of affirmative action need not "establish a violation of Title VII" so long as they find that their past practices "have or tend to have an adverse effect on employment opportunities of members of previously excluded groups" or "result in disproportionate treatment." Race- and sex-conscious actions taken to end the disproportionality would not be held by the EEOC to constitute discrimination. Hence, anyone who felt himself victimized by reverse discrimination would have to look elsewhere for redress—and the EEOC would cheerfully arm the employer with evidence that in its view he had acted lawfully.

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* See Walter Berns, "Let Me Call You Quota, Sweetheart," COMMENTARY, May 1981.

The Carter administration also accelerated the government's efforts to set aside various pots of federal funds for the exclusive use of "minority contractors." A 95-page document published by the Commerce Department in early 1980 listed 25 major programs of "business contract opportunities" and explained that "most of these . . . are solely for minority business." The centerpiece was the "Section 8(a) Program" under which the Small Business Administration arranges for itself and other federal agencies to bypass the usual procurement procedures (including competitive bidding) in order to award contracts to minority firms. By the end of the Carter administration, nearly $2 billion a year was being spent in this manner, and it was clear that the idea had barely begun to tap the creativity of the executive branch. In March 1980, for example, the Department of Transportation, with no legislative sanction at all, issued a regulation stipulating that general contractors bidding on the department's many lush construction projects (including highways, airports, and mass transit) would have to assure the government that at least 10 percent of the value of the work would be sub-contracted to minority companies.

None of this, however, could have occurred without judicial sanction. The question was how to make sure that the courts would not fall back on the principles of "equal protection" and "nondiscrimination" to deny preferential treatment, set-asides, and quotas, whether undertaken by the government itself or by corporations, universities, and others acting with its encouragement.

That was an open question when Jimmy Carter assumed the Presidency, but not when he left it. For during those four years, the Supreme Court of the United States, following the lengthy briefs and fervent pleadings of Carter's Justice Department, gave its blessing to race-consciousness, set-asides, and quotas. The background and reasoning of the three key decisions, *Bakke*, *Weber*, and *Fullilove*, have been thoroughly examined in these pages and elsewhere.* But it is essential to recall that in the realm of civil-rights litigation, the courts have regularly paid careful attention to the policies, action, and legal reasoning of the executive branch, and have often allowed themselves to be led by it. Through 1980, there was little question in what direction they were being led.

THUS Ronald Reagan assumed office after a decade and a half in which the Presidency had vigorously sought to advance group interests through regulation, judicial interpretation, and government expenditure, and in which policy conflicts between group interests and individual rights, on the one hand, and between group interests and evenhanded national standards, on the other, were almost always resolved in favor of the interested groups.

Well before the 1980 election, one could see ample evidence of popular and congressional dissatisfaction. On Capitol Hill, the House of Representatives repeatedly voted to ban school busing, employment quotas, and other involuntary or coercive federal "enforcement" efforts. Poll after poll revealed that these votes conformed to public opinion. For even as indices of individual prejudice steadily declined, and support for such voluntary programs as compensatory education and job training remained high, the American people expressed mounting displeasure with group favoritism. A 1977 Gallup survey, for example, found that only 11 percent of all respondents (including just 12 percent of women and 30 percent of nonwhites) condoned "preferential treatment in getting jobs and places in college," while 82 percent of all men, 80 percent of women, and 55 percent of nonwhites believed that "ability, as determined by test scores, should be the main consideration."

This did not deter the Democratic party. "[M]uch more remains to be done," said its 1980 platform:

> An effective affirmative-action program is an essential component of our commitment to expanding civil-rights protections. The federal government must be a model for private employers, making special efforts in recruitment, training, and promotion to aid minority Americans in overcoming both the historic patterns and the historic burdens of discrimination. . . . Our commitment to civil rights embraces not only a commitment to legal equality, but a commitment to economic justice as well. It embraces a recognition of the right of every citizen—Black and Hispanic, American Indian and Alaska Native, Asian/Pacific Americans, and the majority who are women—to a fair share in our economy.

But this time the Republican alternative was clearly different. The voters, for once, were to have a choice. The 1980 GOP platform stated that:

> The truths we hold and the values we share affirm that no individual should be victimized by unfair discrimination because of race, sex, advanced age, physical handicap, difference of national origin or religion, or economic circumstance. However, equal opportunity should not be jeopardized by bureaucratic regulations and decisions which rely on quotas, ratios, and

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* See William J. Bennett and Terry Eastland, "Why Bakke Won't End Reverse Discrimination," September 1978; Carl Cohen, "Why Racial Preference is Illegal and Immoral," June 1979, and "Justice Debased: The Weber Decision," September 1979; and the remarkable 122-page insert that Senator Orrin Hatch placed in the *Congressional Record* on September 3, 1980.

numerical requirements to exclude some individuals in favor of others, thereby rendering such regulations and decisions inherently discriminatory.

As is well known, the party—and Reagan himself—also promised to shrink the welfare state, to ease the burden of regulation on employers and other institutions in the society, and to emphasize economic revitalization as the surest route to individual and group betterment. "Faster growth, higher incomes, and plentiful jobs," said the platform, "are exactly what the unemployed, the underprivileged, and minorities have been seeking for many years."

Immediately after the election, various task forces and transition teams undertook to convert these principles and goals into specific policy prescriptions. The most comprehensive of these were embodied in the Heritage Foundation's celebrated 1093-page volume, *Mandate for Leadership*. This was not an official document, to be sure, but was widely and accurately regarded as the clearest statement of the new administration's proper agenda as seen through the eyes of Washington-savvy "Reaganites."

The Heritage document was especially clear about affirmative action, which "runs counter to American ideals" and "should be jettisoned as soon as it is politically possible to do so." While Title VII of the Civil Rights Act, barring employment discrimination, should be scrupulously enforced, the section of Executive Order 11246 requiring affirmative action by government contractors should be replaced by language banning both discrimination *and* preferential treatment, and employers should be forbidden to "maintain any records indicating the race, creed, color, sex, religion, or national origin of any applicant or employee." The Heritage recommendations, in short, were that "color-blindness" should again become the standard for employers, admissions offices, and federal agencies alike; and that "discrimination" should again be defined as a willful action, not a statistical imbalance.

Just as civil-rights policy comprised only a modest fraction of the multitudinous recommendations of *Mandate for Leadership*, so has it filled a relatively small space on the new administration's agenda. Yet it resists isolation. For as individual rights have been displaced by group interests, all governmental actions affecting the economic well-being, status, and power of identifiable groups have come to be viewed and debated as civil-rights issues. Of course it is expedient for any group to marshal its crusade for advantage behind the noble banner of civil rights. But it would also be unrealistic not to recognize that reduced federal social spending and high unemployment strike particularly hard at those whose well-being in fact depends on public-sector programs or—by virtue of being marginally employed in the private sector—on general prosperity.

There can be no doubt that Ronald Reagan's relations with civil-rights leaders, with their allies in the labor movement, and perhaps even with editorial writers of the New York *Times* would be warmer if he were not seeking to cut food stamps, to turn welfare over to the states, and to eliminate CETA in the middle of a severe recession. To be sure, as Rustin observed seventeen long years ago, these issues are "not civil rights, strictly speaking, but social and economic conditions," and it is well to resist the temptation to confuse them. But that is no small task in the best of times, and Reagan's social and economic policies make it more difficult, not least for himself, as callousness and indifference vie with kindliness and decency in the still hazy image the nation is trying to draw of the man it elected to lead it.

THE first clues a new administration gives as to the directions it will actually take after assuming office are often hidden in its personnel decisions. Here, with respect to both the symbolism and the substance of civil rights, the Reagan team enjoyed one triumph (the nomination of Sandra Day O'Connor to the Supreme Court), made one blunder, and fell into a trap.

The blunder occurred so fast that few noticed. Barely four weeks after inauguration day, Attorney General William French Smith announced that the new administration would abide by rather than contest the agreement Carter had made to jettison the PACE examination that the government used to gauge the abilities of applicants for civil-service jobs. Although the new administration won minor modifications in the consent decree, the decision not to join the fundamental issue of principle suggested that Reagan's people were unwilling to defend the concept of merit in the face of unequal test results. The special irony of this decision, as Donald J. Devine, the director of the Office of Personnel Management, observed several months later, "is that there is presently no 'adverse impact' upon minority-group members in filling PACE-covered positions."

The administration seemed a bit sheepish. The Attorney General acknowledged that the "revised decree does not achieve an ideal result or reflect the framework that might have been devised had this administration been in control of the litigation from the outset." Devine was blunter. He expressed "great reluctance" at having to carry out the agreement, and predicted that "the costs of implementation will be very high."

The personnel trap the administration fell into may have been unavoidable. Reagan's predecessors had encouraged civil-rights leaders to judge their commitment to equal opportunity by the number of minority-group members and women they appointed to policy-making positions in the executive branch. Embedded in this type of categorical hiring are the immediate benefit to the individuals selected, the symbolic reward of the groups they represent, and the suggestion that the policies they shape will somehow be more attentive to the long-term interests of those groups than would the actions of white males.

This practice matured during Jimmy Carter's tenure, too, and created something of a backlash. A wry joke circulating in education circles, for example, as the enormous political superstructure of the new Department of Education was staffed with Carter appointees, held that each of the dozen assistant secretaries could hire four deputies so long as at least one of these was a woman, one a black, and one a Hispanic.

The Reagan administration did not go so far, but fell into the trap nevertheless. Rather than stating firmly that race, sex, and ethnicity would have no bearing whatsoever on personnel selection, the White House began circulating lists that identified presidential appointees by those very characteristics. Thus one learned that, as of December 3, 1981, out of some 2,865 non-career positions filled by that time, President Reagan had appointed 877 women, 80 Hispanics (many of them, of course, also women), and 130 blacks. In fact, that was a pretty good record, and many of the individuals appeared to be excellent, but merit seemed less important than their role as pawns on an affirmative-action chessboard.

The big chessboard, however, is not federal employment but the thousands of private employers and millions of employees whose moves are governed by affirmative-action rules made in Washington. Along with compulsory busing, this is the area of civil-rights enforcement that has stirred the greatest controversy, incurred the deepest resentment, and come closest to substituting group entitlements for individual rights. Here, surely, Ronald Reagan's unambiguous ideology, the explicit policies of his party, and the mandate conferred by his landslide victory would lead to historic changes in the assumptions governing employment decisions. What was obviously needed was a clear statement of principle, a consistent government-wide policy, and a commitment to hunt down quotas in every tangled thicket of regulation, enforcement procedure, and litigation until none remained.

This, unfortunately, is not what happened in 1981. From its early months, the administration seemed unable to decide whether federally-mandated race- and sex-conscious employment practices were an issue of principle or a problem of paperwork.

The Justice Department generally took the high road. "While well intended," Attorney General Smith told the American Law Institute in May, "quotas invariably have the practical effect of placing inflexible restraints on the opportunities afforded one race in an effort to remedy past discrimination against another. They stigmatize the beneficiaries. . . ."

William Bradford Reynolds, the Assistant Attorney General for Civil Rights, was eloquent and specific in his maiden appearance before a Congressional subcommittee in September:

> We no longer will insist upon or in any respect support the use of quotas or any other numerical or statistical formulae designed to provide to non-victims of discrimination preferential treatment based on race, sex, national origin, or religion. To pursue any other course is, in our view, unsound as a matter of law and unwise as a matter of policy.

After recounting the evolution of federal equal-employment-opportunity doctrine from nondiscrimination to "goals and timetables," he summed up:

> By elevating the rights of groups over the rights of individuals, racial preferences . . . are at war with the American ideal of equal opportunity for each person to achieve whatever his or her industry and talents warrant. . . . Nor is there any moral justification for such an approach. Separate treatment of people in the field of employment, based on nothing more than personal characteristics of race or gender, is as offensive to standards of human decency today as it was some 84 years ago when countenanced under *Plessy* v. *Ferguson*.

The Justice Department, therefore, would embrace "the principle of equal opportunity without preference in the field of public and private employment" but "in no way intends to relax its commitment to remedy proven discrimination."[*]

The policies and actions of the Justice Department are consequential, to be sure. It is the government's principal litigator, it decides which cases to prosecute on what grounds, it formulates the remedies that Washington seeks from the courts, and during the Carter administration it was the author of the legal brief which urged the Supreme Court to sanction race-conscious university-admissions policies, race-conscious funding set-asides, and race-conscious decisions by private employers. At the very end of his term, Carter also gave the Attorney General the power to "coordinate" the civil-rights activities of all executive-branch agencies, though as yet this vague authority has not really been tested.

But the Justice Department does not write the regulations governing affirmative action by federal contractors, nor does it police compliance with them. Lyndon Johnson had entrusted that authority to the Secretary of Labor, and Jimmy Carter consolidated the entire enforcement bureaucracy in the Labor Department. That vast enterprise now consists of almost 1,500 civil servants who monitor the employment practices of some 17,000 corporations, universities, and other contractors with more than 26 million workers. Because an employer with facilities in more than one labor market must maintain a separate affirmative-action plan for each, approximately 108,000 such plans are now required, and these must ordinarily be updated annually. A two-inch-thick manual explains how. There are five protected classes: women, American Indians and Eskimos, Asian or Pacific Islanders, non-Hispanic blacks, and Hispanics. Each contractor must survey his own employees and the available labor pool at each facility in relation to each job classification and its necessary qualifications (also organized in federal categories) and, where "underutilization" is detected, must establish and gain Labor Department approval for numerical "goals and timetables" to correct it. But these efforts are not permitted to result in the employment of one minority group to the disadvantage of others, or in the employment of one sex within a minority group to the disadvantage of the other. And so on and on.

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[*] The Justice Department, particularly its Civil Rights Division, is now the focus of criticism by activists inside and outside the government who are displeased with Reagan administration civil-rights policies. Staff attorneys regularly leak copies of documents thought to be damaging, and a number of them have publicly threatened to resign in protest. .(Their boss, Assistant Attorney General Reynolds, replied that they were most welcome to do so.)

The burden on employers, of course, is heavy. At a recent Senate hearing, the general counsel of Johns Hopkins University displayed a 2½-foot stack of documents weighing 65 pounds that her university had produced in compliance with OFCCP requirements. The process is manifestly costly and sometimes patently absurd (as when half of a Hispanic assistant professor of German must be hired to meet a "goal"). The basic issue, however, is not burden but principle: should the federal government ever require employers who have not engaged in discriminatory acts to meet quotas based on racial, ethnic, and gender classifications that are themselves proscribed by law?

One expected the Reagan administration's answer to be a resounding no and that its earliest actions would include, as the Heritage Foundation and various task forces had urged, replacement of the executive-order language mandating "affirmative action" by a flat ban on quotas, ratios, and preferences.

BUT while a suspension of "midnight regulations" did prevent some new and yet more exacting procedures devised in the last hours of the Carter administration from going into effect, it was many months before the new administration's own intentions began to emerge from the Labor Department. And when they did it was instantly apparent that the issue of affirmative action was being construed as simply a problem of excessive paper work. The first indication was contained in Labor Secretary Donovan's remarks to the National Press Club in late April, accurately characterized in the *Wall Street Journal* headline the next day: "Labor Department Will Take It Easy In Job-Bias Fight: Secretary Donovan Vows to 'Get Off Peoples' Backs,' Cut Down the Paperwork." For the Secretary had, indeed, stated that "The President and I are firmly behind affirmative action" but want to take enforcement "out of the arena of push-pull-slap-punch" and "to cut down on the damn paperwork." He mentioned that a department task force was reviewing the problem.

The results of that review, unveiled in late August, were by then predictable. Rather than sweeping away the entire concept of goals and timetables, the proposed new regulations simply reduced the number of businesses that would be required to establish them, the number of forms that would have to be completed, and the frequency with which affirmative-action plans would have to be updated. In addition, the concept of absolute statistical parity was replaced by a somewhat looser standard: precise hiring goals and timetables would henceforth only be required when the "utilization" of women and minorities was less than 80 percent of their "availability."

These new regulations are not yet in force, as the usual public comment period was extended for additional months. In the meantime, seemingly no one is satisfied with the administration's pragmatic approach. Eleanor Smeal of the National Organization for Women called it "another major setback . . . for equality for women." Carol Grossman of the Women's Equity Action League expressed alarm that the higher threshold levels (government contracts of $1 million rather than $50,000, 250 employees rather that 50) would exempt "some of the largest educational institutions in this country." But the U.S. Chamber of Commerce stated that the proposed changes did not go nearly far enough; the Chamber's position, its spokesman said, was that "voluntary use of goals, timetables, and good-faith efforts" should replace mandatory requirements.

In its report card on the administration's first year, the Heritage Foundation also expressed considerable displeasure with the OFCCP. That agency "attempted some modest changes in its regulations," the Heritage writer noted, but this was "patchwork" that "does not address the real problems with contract-compliance programs. . . . OFCCP is continuing to view itself as a purely punitive agency. It has failed to follow [the previous Heritage] recomendations. . . ."

The Labor Department is continuing to review the voluminous comments elicited by its proposed procedures, and will not be ready to put revised regulations into effect before late spring. When it does, those familiar with the current deliberations say, the "threshold" will again be lowered somewhat, meaning that more contractors will be subject to affimative action, and while "voluntary" compliance will be "encouraged," there will be no backing away from the concept of compulsory hiring goals and timetables.

It is little wonder that civil-rights groups and the Heritage Foundation are both perturbed. For it appears that the bureaucracy has kept control of an issue of fundamental principle and is treating it as if it were just another federal program in need of technical refinement, marginal recalibration, and political compromise. Race- and gender-based employment quotas will continue to be required of thousands of universities, corporations, and others that hold federal contracts. Seemingly the only issue in dispute is how many thousands.

ALTHOUGH the Labor Department may have lost sight of the underlying policy issue in affirmative action, critics of the administration have not. Shortly before Arthur S. Flemming was dismissed by the President, the U.S. Commission on Civil Rights that he chaired published a lengthy "statement" entitled *Affirmative Action in the 1980's: Dismantling the Process of Discrimination*. This document bears careful attention, for it undertakes nothing less than the permanent recodification of civil-rights doctrine.

No longer is "discrimination" to be construed as specific actions, inactions, and decisions by which individuals are denied specific rights or benefits that they would have received were it not for such immutable characteristics as race or sex. The new definition is altogether different. "Discriminatory actions," in the view of the Civil Rights Commission,

> are not only pervasive, occurring in every sector of society, but also cumulative, with effects limited neither to the time nor the particular structural area in which they occur. This process of discrimination, therefore, extends across generations, across organizations, and across social structures in self-reinforcing cycles. . . . Discrimination against minorities and women should now be viewed as an interlocking process involving the attitudes and actions of individuals and the organizations and social structures that guide individual behavior. That process, started by past events, now routinely bestows privileges, favors, and advantages on white males and imposes disadvantages and penalties on minorities and women. This process is also self-perpetuating. . . .

Not even the law can be allowed to stand in the way of progress. Although itself charged by the 1964 Civil Rights Act to "serve as a national clearinghouse for information in respect to denials of equal protection of the laws . . . ," the Commission now holds that "because civil-rights laws do not prohibit all forms of discrimination," because there may be "practical difficulties in establishing that a legal violation has, in fact, occurred," and because, "despite consistently unequal results, some discrimination is entirely lawful," then, "if civil-rights laws are interpreted to restrict the use of affirmative action to those acts that are or may be illegal, they can put beyond remedial reach essential components of the process of discrimination."

The Commission cannot accept that possibility. Therefore it is necessary either to go entirely outside the law, to what it terms "voluntary affirmative action," or to interpret the laws more generously. Conveniently, the Supreme Court has simplified both tasks. As the Commission exultantly explains, "The trilogy of Supreme Court affirmative-action cases (*Bakke*, *Weber*, and *Fullilove*), despite their limits as legal precedent, shows a strong commitment to affirmative-action measures designed to eliminate all forms of discrimination, *de jure* or *de facto*, illegal or legal. Only *Bakke* lacked an unequivocal outcome encouraging affirmative-action plans that include 'preferential' treatment and 'quotas.' *Bakke*, however, leaves ample room for effective affirmative-action efforts."

The reasoning is extraordinary. Anything, past or present, public or private, legal or illegal, that tends to work to the benefit of white males constitutes discrimination. Any actions taken to eliminate discrimination must be deemed either to be required by law or, at least, not forbidden by law. Such actions will normally include preferential treatment and quotas. But not to worry. For "when discrimination is a current that carries along all but those who struggle against it, there can be no true 'color-blindness' or 'neutrality.' In such contexts, all anti-discrimination measures, whether or not they take race, sex, or national origin into account, will help some individuals and hinder others. To criticize such efforts on the ground that they constitute 'preferential treatment' inaccurately implies unfairness. . . ."

It is small wonder that President Reagan asked for Chairman Flemming's resignation at about the time this report became public.* Not only were the Commission's views diametrically opposed to the principles of nondiscrimination that Reagan and his party had pledged to support during their markedly successful 1980 campaign; they also reversed the principles enunciated by liberal Democrats when Congress passed the 1964 Civil Rights

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* Mr. Reagan proposed to replace Flemming with Clarence M. Pendleton, former president of the San Diego Urban League, who is black, and to replace Commission Vice Chairman Stephen Horn with Mary Louise Smith, former chairman of the Republican National Committee, who is white. The administration's third candidate for the six-member Civil Rights Commission was to have been B. Sam Hart, an evangelical minister from Philadelphia, who is black, but Hart's name was withdrawn, ostensibly because of irregularities in his personal financial affairs. It was also the case, however, that Hart's views stirred considerable controversy within the civil-rights community and on Capitol Hill, for the President had had the audacity to pick a person who disapproved of busing and quotas and who stated that "I do not consider homosexuality a civil-rights issue."

Act. As Justice Rehnquist recalled in his brilliant dissent to the *Weber* decision, such active participants in those deliberations as Emmanuel Celler, chairman of the House Judiciary Committee, and Hubert Humphrey, floor manager for the bill in the Senate, repeatedly insisted that nothing in the legislation would permit any policy save color-blindness. "Contrary to the allegations of some opponents," Senator Humphrey said, "there is nothing in it that will give any power to the [Equal Employment Opportunity] Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial 'quota' or to achieve a certain racial balance. That bugaboo has been brought up a dozen times; but it is nonexistent." Senator Thomas Kuchel added that "Employers and labor organizations could not discriminate in favor of or against a person because of his race, his religion, or his national origin. In such matters . . . the bill now before us . . . is color-blind."

Now it can be argued, as the Civil Rights Commission does, that this is all water long since passed over the dam: that the legislative history of the 1964 legislation has been superseded by the Supreme Court's blessing of race-consciousness in *Bakke*, of minority set-asides in *Fullilove*, and of "voluntary" affirmative-action programs that entail reverse discrimination in *Weber*. But the Court did not *require* race-consciousness, set-asides, or quotas; it merely said they were not forbidden. Besides, the Court may be persuaded to change its mind. There is ample scope for a President who knows what he thinks and who acts on the basis of his convictions to take specific actions to restore the definition of civil rights to the doctrine of nondiscrimination; to ask Congress to take complementary actions; and to go back to the judiciary with briefs very different from those the Carter administration submitted in the major cases of the previous four years.

But it is not clear that the Reagan administration has any such resolve. One need not dwell overmuch on the President's own confusion, when asked in a December press conference what he thought of the *Weber* decision. For the reporter explained only that this concerned a "voluntary agreement to conduct affirmative-action programs for training minorities and moving them up in the workforce," and made no mention of quotas or reverse discrimination. Reagan remarked that "if this is something that simply allows the training and the bringing up so there are more opportunities for them, in voluntary agreement between the union and management, I can't see any fault with that. I'm for that." This elicited a cheer from the New York *Times*, but embarrassed White House aides explained later that "the President and the Department of Justice find this racial quota unacceptable," and that Assistant Attorney General Reynolds had indeed spoken for Reagan when he said that the *Weber* case was "wrongly decided" and that the Justice Department would seek to persuade the Supreme Court to reverse itself in another case. Perhaps one day it will.

But there have been enough other instances of confusion and embarrassment. The worst disarray was to be found at the Equal Employment Opportunity Commission, whose acting chairman told Congress in October that he disapproved of the Labor Department's proposal to reduce the number of federal contractors required to file affirmative-action plans. Indeed, he opposed any lessening of vigilance or narrowing of scope. Yet a few months later, the EEOC's own new general counsel instructed staff attorneys to switch their emphasis from "class-action" lawsuits to individual suits, and to confine the employer's liability in sex-harassment cases to situations where management is itself accused of such harassment rather than—as in the current situation—holding the employer responsible for harassment of one employee by another.

In the meantime, the White House had nominated to be the next EEOC chairman a man whose only qualifications were his color (black) and his party affiliation (Republican). Faced with bitter protests from civil-rights groups, and mounting congressional opposition, the administration was forced to withdraw the nomination in February. (The young black attorney subsequently nominated is quite able indeed.)

Turf fights and bickering have also characterized the relationship between the Education and Justice Departments. Secretary Bell made two sensible proposals intended both to reduce the regulatory burden on colleges and universities and to curb harassment of them in the name of "civil rights." He suggested that Title IX, barring sex discrimination by federally-aided schools and colleges, was meant by Congress to cover only the treatment of students, not of employees, an interpretation that has some support in the legislative history and that has been sustained by some lower courts. He also urged the administration to assert that federal aid to college students did not constitute aid to the institutions they attended—an interpretation that would spare about 1,000 colleges and universities from compliance with the major aid-based civil-rights regulations (though not from others, such as Title VII, that apply to all employers). But in both instances, Justice said no, and the White House sided with it.

Common sense and Republican principle did prevail in most school and college desegregation cases. A number of protracted and acrimonious lawsuits involving state colleges and universities were settled through mediation and negotiation (though this administration, like its predecessors, has maintained the schizophrenic policy of requiring black and white colleges to integrate while spending hundreds of millions of dollars a year to assist "traditionally black" colleges to maintain their distinctive institutional identities). And the executive branch has repeatedly signaled its opposition to mandatory busing at the grade-school level.

Finally, it seemed, federal officials were unafraid to acknowledge what most people had long known: involuntary pupil transfers for the sake of racial balance often do more harm than good. "[I]n many communities where courts have implemented busing plans," Attorney General Smith told the American Law Institute,

> resegregation has occurred. In some instances upwardly mobile whites and blacks have merely chosen to leave the urban environment. In other instances, a concern for the quality of the schools their children attend has caused parents to move beyond the reach of busing orders. Other parents have chosen to enroll their children in private schools that they consider better able to provide a quality education. The desertion of our cities' school system has sometimes eliminated any chance of achieving racial balance even if intra-city busing were ordered.

Assistant Attorney General Reynolds advised a Senate subcommittee in mid-October that in future school-segregation cases, the Justice Department would "define the violation precisely and seek to limit the remedy only to those schools in which racial imbalance is the product of intentionally segregative acts of state officials." And even in those instances, while seeking "removal of all state-enforced racial barriers to open access to public schools," the Department would abjure compulsory busing. "We are not going to compel children who don't choose to have an integrated education to have one," Reynolds bluntly explained to a House subcommittee on November 19, and Justice appears to have followed this doctrine, most recently by approving a voluntary desegregation plan for Chicago.

Reynolds did, however, urge Congress, then pondering an array of anti-busing bills and court-limiting measures, "not to draft the statutory prohibition so broadly that it bans as well other desegregation techniques" such as "involuntary transfers of teachers to break up state-created racially identifiable faculties." That, of course, implies the race-conscious assignment of teachers to schools as a *remedy* for segregation. And it recalled the one large inconsistency in Reynolds's testimony on employment discrimination the previous month. Then he had suggested that, while the Justice Department would not ask courts to order employers to use anything but "fair and nondiscriminatory selection procedures" in deciding whom to hire, the government would "seek percentage *recruitment* goals for monitoring purposes. . . . These recruitment goals will be related to the percentage of minority or female applicants that might be expected to result under a nondiscriminatory employment policy" (emphasis added).

If governmental race consciousness is unconstitutional, and if constancy is a virtue, one can infer from Reynolds's willingness to seek statistical recruitment goals, and his openness to race-conscious teacher assignments, that the nation's senior civil-rights enforcer has not entirely clarified the principles that undergird his department's policies and actions.

UNFORTUNATELY, this is not uncharacteristic of the Reagan administration's overall handling of civil-rights issues during its first year: a fitful and uneven process, in which the nation's long slide into color-coded policies and group entitlements was somewhat slowed but hardly stopped by an administration that seemed uncertain whether it really wanted to apply the brakes and not altogether sure where to find them.

In one excruciating instance, however, Reagan hit the wrong pedal and hit it hard. This, of course, was his decision to grant tax exemptions to segregated private schools. Although he attempted to recoup a few days later by asking Congress to outlaw such exemptions, and later still by asking the Supreme Court to resolve the matter, much harm was done. The problem is not that many private schools engage in racial discrimination as a matter of policy. The Internal Revenue Service is aware of only about 100 such institutions among more than 20,000 private schools. The problem, rather, is that in this instance the administration indicated its willingness to tolerate overt racial discrimination against individuals by institutions that, while unmistakably private, are nevertheless seeking favorable treatment from Washington. This was no case of group entitlements, of government-mandated equality of result, or of requiring preferential treatment for those previously disadvantaged by their sex or color. It was purely and simply a matter of old-fashioned racism and of what the government's policy ought to be toward those few schools that openly deny admission to black youngsters on account of their color.

No matter that Congress had never written a law specifically stating that such schools could not obtain tax exemptions. The Reagan administration inherited eleven years of court-sanctioned precedent. True, it also inherited a lively dispute about how to *enforce* the ban—how, for example, to handle a school that professed not to discriminate but that had only white students in attendance—and an even livelier debate occasioned by a handful of fundamentalist schools that assert a religious basis for their discriminatory practices. But there was no need to reverse the underlying policy. Worse, the decision to do so resurrected the ghost of Jim Crow. It signaled that perhaps the administration is not really color-blind, an impression reinforced by subsequent documentary evidence that the White House had yielded to heavy pressure from Mississippi's Trent Lott and other Southern Congressmen acting on behalf of all-white private schools that had in fact been founded as refuges from public-school desegregation. Although the President had the grace to acknowledge that the whole issue was badly handled, it did lasting damage to his administration's credibility in the field of civil rights, as well as to the nation's image of private education.

THE administration inflicted another wound on itself with clumsy and irresolute handling of the delicate voting-rights legislation.* Because the right to vote is at once the most elemental of civil rights and the one with the most direct impact on elected officials, attention began to focus on it more than a year before the August 1982 expiration of portions of the existing federal law. But the administration refrained from taking a clear position on several complex issues when the House of Representatives considered them in the spring and summer of 1981. Not until the House overwhelmingly approved its version in October did the administration begin to get specific, and throughout the autumn the papers carried frequent reports of internecine warfare among Reagan's advisers. This generated considerable suspicion among civil-rights groups, which were also beginning to accuse the Justice Department of yielding to political pressure in its handling of voting-rights cases under the existing law, an allegation that administration officials, of course, vehemently denied.

With exquisitely bad timing, the administration finally chose to state its position on key details of the voting-rights bill to a Senate committee in late January 1982, in the midst of the controversy over private-school tax exemptions. Thus when Senator Kennedy declaimed that the administration faced a "crisis of confidence" in its handling of women and minority rights, and Attorney General Smith responded that "the President doesn't have a discriminatory bone in his body," the hearing room full of civil-rights activists erupted into laughter.

The major issue now in dispute, however, is grave indeed, and deserves solemn attention. The President would have been well-advised to spell out his position on it earlier. The question is whether an action is "discriminatory" only when it can be shown that the actor intended to discriminate, or whether an action with unequal effects or consequences can reasonably be termed "discriminatory" without reference to motivation or intent.

This is a familiar debate in school-segregation and employment-discrimination cases, but it did not enter the domain of voting rights until 1980 when the Supreme Court held that neither the Fifteenth Amendment nor the existing Voting Rights Act barred electoral arrangements that were adopted without discriminatory intent even if their practical effect was to dilute the black vote in a particular community. At issue in the 1980 case was the constitutionality of the "at large" election that Mobile, Alabama has used to select its city commissioners since 1911. Although the population of Mobile is more than one-third black, no black had ever won election to the commission. Regrettable though this may be, Justice Stewart wrote, the Fifteenth Amendment "imposes but one limitation on the powers of the states. It forbids them to discriminate against Negroes in matters having to do with voting. . . . [R]acially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation," and the lower court had found that Mobile's black citizens "register and vote without hindrance." The Fifteenth Amendment, Stewart said, "does not entail the right to have Negro candidates elected."

Civil-rights leaders strongly objected to this decision, contending that it is virtually impossible to prove "intent," particularly with respect to local arrangements made decades earlier. They prevailed upon the House of Representatives to amend the Voting Rights Act to make explicit that plaintiffs need only prove discriminatory or unequal effects. (Another 1980 Supreme Court decision held that Congress has the power to adopt such a standard.) But critics of this change, now concentrating their efforts on the Senate, contend that the "effects" standard is tantamount to imposing racial quotas on election outcomes. It could mean, they say, that a community in which blacks comprise 20 percent of the electorate would be violating the law unless 20 percent of those elected to public office were also black. This, they suggest, might lead to federally-imposed "proportional representation" in local and state elections and would, contends Senator Orrin Hatch, "turn this country upside down."

President Reagan appears to agree with that view. In his December 17, 1981 press conference, he said that "the effect rule could lead to the type of thing in which effect could be judged if there was some disproportion in the number of public officials who were elected at any governmental level. . . . You could come down to where all of society had to have an actual quota system." Attorney General Smith testified on January 27, 1982 that "quotas would be the end result" and that "the only ultimate logical result would be proportional representation." A number of distinguished legal scholars have separately arrived at much the same conclusion.

The bill itself provides that "the fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation." But all parties agree that an "effects" test in the statute would make it far easier for civil-rights attorneys to prove discrimination and that actual election results, rather than simply electoral arrangements and voter participation, would be factors in subsequent litigation.

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* See Walter Berns, "Voting Rights and Wrongs," in last month's COMMENTARY.

This is an authentically difficult issue, for the right to vote is basic; vigorous and successful voter participation by minority groups is the surest and least controversial means of enhancing their power and improving their condition; and it is indeed difficult to prove discriminatory intent in cases such as these. Yet it is also the case that to concentrate on "effects" is to move from equality of opportunity to equality of results; from colorblindness to color-consciousness; from nondiscrimination to something resembling quotas.

As it happens, the renewal of the Voting Rights Act is the first significant civil-rights legislation to move through Congress since the mid-70's. It is the first since *Bakke*, *Weber*, and *Fullilove* sensitized the nation to the issues of quotas, set-asides, preferential treatment, and reverse discrimination. Certainly it is the first since the political and ideological upheaval of 1980. And it entails a major role reversal. For nearly all civil-rights "advances" of recent years have been made by the federal judiciary in partnership with the executive branch, often to the dismay of the Congress. Here we have a markedly different sequence: a traditional definition of discrimination by the Supreme Court followed by a major effort in the Congress to give voting rights a broader construction and to make their violation far easier to prove.

This, then, is a significant event as well as a fundamental issue, and it is regrettable that the Reagan administration dithered and equivocated for so long. It is a shame that the administration's previous policies and actions were so erratic as to call into question both its opposition to quotas and its devotion to nondiscrimination. And it is unfortunate that the present debate over "intent" and "effects" in connection with the Voting Rights Act binds the two issues so tightly. For if hard cases, as the lawyers say, make bad law, so too does a pair of unpalatable options often lead to troublesome policy decisions.

WHITHER civil rights under Ronald Reagan? As with foreign affairs, it seems to depend more than it should on what day it is, who is in charge of a particular decision, what constituency is raising the loudest ruckus, and which agency is responsible for formulating the alternatives and executing the decision. The most ideological administration in recent history seems not to have its ideas sorted out, almost as if it had not realized that avoiding the Orwellian future so lovingly described by the Civil Rights Commission requires a coherent, alternative vision, a steady hand, personnel of unimpeachable character and competence, and the courage to rebuff all who seek governmental sanction for discriminatory practices, whether their intentions are benevolent or malign.

Even within the President's party, and well before the private-school and voting-rights contretemps, Elizabeth Drew reports that "several Republican politicians in Congress and elsewhere—the South included—were troubled by the administration's treatment of blacks. They saw an administration that, in its policies explicitly covering race and in its cutbacks in social programs, appeared to be systematically removing the props from under blacks." At the same time, one hears denunciations of the administration from tough-minded critics on the Right who accuse it of following a pattern of appeasement, muddle-headedness, and business-as-usual.

It is tempting to conclude that an administration that has managed to anger and disappoint its most conservative supporters as well as the most militant of civil-rights activists might be doing something right. But civil rights at home, like human rights abroad, is not a policy domain that takes well to pragmatism, compromise, or vacillation. It demands firm ideas, constancy, and high principle. Else the "angry menagerie" of which George F. Will wrote may grow angrier, and the prospect of reuniting the nation around shared ideals ever more remote.

Brian Weber never volunteered.

'Voluntary' Quotas

The disarming simplicity with which the Supreme Court rejected Brian Weber's "reverse discrimination" claim took the legal community by surprise. In less than 13 pages of printed opinion—about half of which was taken up by summarizing the facts of the case, by several long footnotes, and by chunks of quotation from the *Congressional Record*—Justice William Brennan made a single, seemingly elementary, point on behalf of the five justices who comprised the Court majority. He said that in enacting the equal employment provisions of the Civil Rights Act 15 years ago, Congress could not have meant to forbid private employers—the group whose racial discrimination the law was aimed at—from "voluntarily" eliminating "traditional patterns of racial segregation." The training program Weber had challenged was "race-conscious." It set aside half its places for black applicants. But since it was an employer's "voluntary" effort to correct racial imbalance, Congress would not have wished to condemn it.

Congress's intention in 1964 was all-important. Unlike the famous *Bakke* case of last year, the *Weber* case did not present a constitutional problem. Only government agencies must obey the Fourteenth Amendment's guarantee of equal protection of the laws, which forbids racial discrimination. When a state institution, like the University of California Medical School at Davis in the *Bakke* case, engages in racial discrimination, its practices are controlled by the Constitution. But when a private employer like Kaiser Aluminum hires, fires, or promotes people, its employment decisions are not governed by constitutional standards. Only if a law enacted by Congress or a state legislature makes such conduct unlawful can private racial discrimination be successfully fought in court.

As proof that the 1964 Congress wanted employers to act "voluntarily" to end racial discrimination, even by race-conscious affirmative action, Justice Brennan quoted the report of the House committee that

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considered and approved the civil rights law. These representatives said they hoped that the law would "create an atmosphere conducive to voluntary or local resolution of other forms of discrimination." The Court's *Weber* opinion repeatedly described the issue posed by Kaiser's half-and-half racial quota as whether "voluntary, race-conscious affirmative action" by private employers is permissible. The words "voluntary" or "voluntarily" appear in the text no less than 11 times, an extraordinary refrain in such a brief decision.

"Voluntary" private activity that serves a desirable social goal endorsed by Congress is, of course, commendable, and only a Congress bereft of its senses would prohibit it. If, after enactment of the 1964 Civil Rights Act, a private employer had chosen to contribute a large sum of money for educating and training minority victims of employment discrimination, such a gesture would have been "voluntary" and plainly in service of the legislative goal. Similarly, if an employer broadened its recruitment effort, at its own expense, in order to encourage minority applicants for jobs, this would have been a "voluntary" program to achieve the objectives of the Civil Rights Act.

But there are gnawing differences between these hypothetical expressions of voluntarism and Kaiser's training program. These differences make one wonder whether the term "voluntary" is applicable here at all. The first troubling question is whether Kaiser and the United Steelworkers Union (which together made the program part of their labor contract) truly started this affirmative action plan out of the goodness of their hearts. Justice Rehnquist's dissenting opinion notes that the Office of Federal Contract Compliance had put substantial pressure on Kaiser in 1974 "to increase minority representation in craft positions at its various plants." Wishing to head off discrimination claims by minority employees, Kaiser and the union then developed the craft training program with a temporary 50 percent racial quota. Threats of enforcement by government agencies and the possibility of expensive litigation undercut the image of true voluntariness.

There is a more fundamental problem with the description of Kaiser's training program as "voluntary." Who, exactly, is doing the volunteering? When an employer spends its money to enlarge its work force, to bolster its recruitment, or to provide training programs, the employer is entitled to credit for having taken a "voluntary" step. But when the employer hires A instead of B, or when it assigns a black applicant to a training program in place of a white applicant, the employer suffers no loss. The rejected applicant is the one who has sacrificed for the universally beneficial objective. What difference should it make whether the employer, to whom the matter may be one of total indifference, has rejected that applicant "voluntarily" or by force of law?

This demonstrates the glibness with which the Court disposed of Brian Weber's claim, and the uselessness of its notion that an employer's "voluntary" affirmative action to overcome discrimination should be treated differently from a legally compelled remedy for racial discrimination. The fact that Kaiser Aluminum and the United Steelworkers "voluntarily" gave away Brian Weber's otherwise rightful place in line for on-the-job craft training should not affect Weber's legal rights. Before the Supreme Court spoke, Weber lawfully could have been displaced in favor of a black applicant only if certain conditions had been met—if Kaiser had been found to have discriminated against minorities, and if it had been determined that a quota system was necessary and appropriate to remedy past discrimination. The *Weber* decision sweeps away these prerequisites.

A more narrow rejection of Weber's claim was expected because the Court's ruling seems to conflict squarely with opinions expressed in 1964 by congressional supporters of the Civil Rights Act, who were trying to persuade their colleagues and the country that the law would not be used to throw whites out of jobs in order to achieve "racial balance." Courts have long recognized that laws against race-conscious actions designed to arrive at racial balance do not prohibit racial selection when it is needed to correct deliberate racial discrimination. An employer which has illegally discriminated for years may not, when it is finally ensnared by the law, begin at square one. It must redress the damage done by its own past illegal conduct. This obligation applies even though discrimination on account of race is prohibited, and correcting an employer's past injustices may mean rejecting white applicants solely because of their race.

One of the most consistently liberal judges on the Appeals Court which ruled on the *Weber* case did not find it as easy to reject Weber's claim as the Supreme Court did. Judge John Minor Wisdom dissented from the lower court's ruling in Weber's favor (which the Supreme Court overturned), but he marked off the lines for permissible affirmative action far more cautiously than the Supreme Court did. In Judge Wisdom's view, a program like the one started by Kaiser and the Steelworkers may be used to exclude white applicants like Brian Weber only if there is some basis in fact for treating it as a specific remedy for an employer's history of discrimination. Wisdom also emphasized that the union, which is supposed to speak for all the employees and presumably is controlled by the white majority, believed that this kind of remedial program was necessary. In the same vein, the brief filed by the Department of Justice argued that Kaiser's program might well have been compelled by judicial decree if it had not been initiated by the employer and the union.

The Supreme Court's opinion was tied to no such lifelines. It has been viewed by black groups, in the initial glow of victory, as a sweeping vindication of affirmative action. But the lack of any meaningful limitation is an invitation to future lawsuits. It is not hard to imagine situations in which an employer's "voluntary" sacrifice of the rights of its white employees would shock most judges. The Court was careful to avoid placing its seal of approval on all conceivable plans. It noted that the Kaiser plan was only temporary, that it did not contemplate the discharge of white workers, and that it did not totally bar whites from on-the-job craft training. How lines might be drawn in the future to exclude "voluntary" plans with any of these features remains a mystery.

Nathan Lewin

Commentary

Living with Quotas

Joseph Adelson

SEVERAL MONTHS ago, former President Gerald Ford spoke to a political-science class at my university. During the question period that followed he was asked for his views on the Bakke case, and replied that he was opposed to "arbitrary numerical quotas." Thereupon the class broke into what the local newspaper termed "vociferous applause."

A few days later I was interviewed by a young journalist who thought the story might be worth pursuing. He had himself been so disbelieving of the original press account that he had sought out and listened to the tape made during the former President's appearance. Sure enough, he told me, the applause had been enthusiastic, so much so that he would describe it as turbulent. He was dumbfounded. Is that what the students really felt? At Michigan—of all places—the founding campus of SDS? What did it mean? Was I as surprised as he was? I told him I would not have expected the students to have made public their private feelings, but was not at all surprised by the direction and intensity of those feelings; that most students in my experience have come to despise "affirmative action" because of the double standards it imposed, and which victimized them; furthermore, that most of the faculty I knew were equally scornful because of the duplicities these programs have come to involve; and that to my certain knowledge many in the administration hoped, in private, that the Court would hold for Bakke and thus rescue them from their own cant. And *that*, I said, was the story he ought to write. He ought to reflect upon his own surprise, and recognize that the press had made almost no effort to discover whether racial-preference programs—after nearly a decade in place—had in fact fulfilled their promises, and what faculty and students now thought about them. Why such indifference to reality? What was at work, I suggested, was a strong wish not to know, to sustain a state of self-deception.

At this my interviewer became noticeably morose. He told me he felt very ambivalent about the problem. He had himself been in graduate school several years earlier, had been disturbed by the poor quality of minority students then enrolled; on the other hand, he could see no alternative except to admit many such students in the hope that some of them would make it. So he could not bring himself to write that story. Perhaps someone else could; perhaps I could. And with that we returned to the story he wanted to write, a "changing mood of the campus" piece.

NOTE THAT the key term in this anecdote is *doubleness*. The journalist describes himself as ambivalent (of mixed or double feelings). The students resent the double standard, and the faculty feel themselves forced into duplicity (double dealing). The administration is troubled by its hypocrisy (double facedness). These and other dualities dominate the history of affirmative action and in a sense fittingly, since these programs have from the beginning been haunted by an unacknowledged ambiguity or doubleness of purpose—whether to expand opportunity, or to compensate for prior injustice. The major means chosen has been a double-track system of admissions. Unable to confess to these contradictions, those in charge of racial-preference programs find themselves using deceptive or ambiguous language—that is, of mixed or double meaning: most commonly, the word "goal" when "quota" is meant, or, as will be evident later, the word "qualified" when in fact "marginal" or "unqualified" is correct. To sustain these deceptions, or to keep them hidden, other dualities come into play: the world is divided between insiders and outsiders, those who are and are not privy to secret information; or a schism develops between public and private discourse, the first tending toward blandness and boosterism, the second toward rumor and innuendo. The ultimate effect is a corruption both of language and conduct.

Does that seem overstated? Yet consider that in a milieu like the university, where one is customarily buried in statistics, it is generally difficult to obtain accurate information on the comparative credentials of majority and minority students, or on the relative attrition rates of the two groups, or on the costs—many of them hidden—that these programs entail. Since any good news is an immediate stimulus for publicity and self-congratulation, one tends to assume, in most cases correctly,

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that no news is bad news. The subordinating of information to policy is something we have become accustomed to in other domains of public life, but it takes some getting used to at the university, and it has had a troubling effect on the way its members regard themselves and relate to each other.

An example: last summer a professor I know was called by a law firm and asked whether he could obtain some data on his university's medical school's admissions policies. The firm was preparing an amicus brief for the then-forthcoming Bakke hearing before the Supreme Court, and wanted to argue that objective credentials—test scores, grade point—were in fact valid predictors of achievement in medical school. Though it was generally held by expert sources that this was so, they had been unable to find enough published evidence, despite a thorough search of the literature, and were now fairly sure it was being suppressed. Perhaps as an insider he could obtain data pertaining to his own medical school. The professor thought he could; he remembered that an old friend of his had connections there and would no doubt have the information. He called upon the friend who first asked him, suspiciously, which side he was on, then told him, bitterly, that he did not think the data would be released, and that one ought to expect to get the runaround from the medical school. Not that one could trust the figures in any case, since the admissions dean was known to put the best face on things. There were only two sure ways to get the data—to threaten to sue if it were not released, but since that would take time, a more expedient means would be to find a Deep Throat, someone at the medical school who had access to the information and would be willing to steal it!

FINDING both these alternatives too troubling to contemplate, the professor thereupon arranged an informal, off-the-record interview with the admissions dean, representing himself as sympathetic but concerned, and thus inducing the dean to unburden himself. The dean depicted himself as a beleaguered man, caught between the university administration, which kept urging him to keep the minority numbers up, and the medical-school faculty, which kept wanting him to keep the standards up. The trouble was that the administration was not being realistic about what level of intellectual quality was required to complete medical school these days. He had some serious questions about many of the minority students he was admitting, perhaps as many as half. Some of them he knew would not be able to make it through, and he felt sorry for what would happen to them. But he was even more worried about those who would just manage to get through and were, as he saw it, doomed to a career of marginal competence. Medicine became every day more technical, more demanding; and he doubted that they could keep up. It was not a matter of race. During the 50's the medical schools had so few really good applicants that they accepted and pushed through many white students of low quality. And what had happened to them? The dean was convinced that this was the group now giving medicine its rotten public image, through malpractice suits and Medicaid ripoffs. And at that point, he launched into what the professor later characterized as "lurid medical detail."

It is tempting to linger over those details, since stories of incompetence—real, imagined, or prospective—form a familiar genre of academic gossip; yet in doing so we would ignore what may be far more significant—the skewed relationships among colleagues which this anecdote reveals: false assumptions, misunderstood motives, an atmosphere of mistrust and paranoia which comes to infect almost everyone involved. It is the ambience of a novel of intrigue—Eric Ambler, let us say. The professor, an innocent, embarks upon what seems to be a simple enough errand of discovery, and is quickly drawn into the suspicions of the milieu. A friend, hitherto open, at first mistrusts him, then, assured of his loyalty, warns him to expect thwarting and deceit, and hence feels it legitimate to deceive in return. (The friend, it will later turn out, is deceived in another sense, in that he misunderstands the dean's public statements, thinking they reflect his actual sentiments, which turns out not to be quite the case.) The professor, in hopes of evoking honesty from the dean, engages in some deceit of his own, simulating a sympathy he does not really feel. The dean reveals himself to be a deeply divided person, seeing himself compelled to offer entirely different messages to different audiences, telling the university administration one thing: "We're doing the best we can"; the medical-school faculty another: "Do the best you can, and I'll try to limit the damages"; the outside world still another: "Standards are not going down, you can count on that"; and apparently sympathetic insiders yet another: *"Caveat emptor."*

What are we to make of the admissions dean? We may think of him as a divided, indeed fragmented soul, but it is unlikely that he would agree. Though he sees himself as subjected to contradictory pressures, he probably does not recognize the degree of inner division he must maintain. Nor would he accept our judgment that such extraordinary differences between public and private discourse amount to a form of fraud; he would be offended, or hurt, by that charge, since it does not take into account his sincere belief in racial equality. One is led ultimately to the idea that everyone is right—the dean is indeed divided, and to be so eases the practice of duplicity, itself in the service of an undeniable good.

In this sense, the dean's contradictions, internal and external, are no different from those experienced by anyone who must serve the inherently divided, confused, ambivalent aims of a racial quota system—they are merely more visible, more dramatic, because of the peculiarly salient position he occupies. What strikes me as more important is that similar divisions, similar deceptions have now become commonplace, almost a habit of mind, so taken for granted as to escape notice. Another example: we are now at a faculty dinner party and one of the guests, looking like the cat who swallowed the canary, announces that he has managed to secure from the dean of his college a "slot," that is, permission to appoint an assistant professor—a rare opportunity given the privations we share. He is head of the search committee and is overwhelmed by the range and depth of talent available. There are several hundred applicants, and at least fifty seem good enough to warrant a closer look. The problem the committee will have is narrowing that number down to the handful who will be invited to visit—no simple task since a number of them—all younger than thirty—already have substantial bibliographies and burgeoning national reputations.

At this point another guest asks him whether there were any minority candidates, and if so what did they look like. He is startled by the question, then recovers, and says something like: "Oh yes, there was I believe—uh—one—and she was—oh—somewhere well below the midpoint." As he tells us this his face breaks into an astonishing sequence of expressions—first a slight closing of the eyes, almost a wink; then a sardonic half-smile; then the sudden assumption of the most solemn gravity. It is over in a moment, so quickly that no one else there, I suspect, caught that quick sequence, and I imagine I would not have seen it myself had I not at that time been pondering whether to write this essay. The final phase of that sequence—the solemn expression of sincerity—will be seen again, and more than once, certainly when he informs the departmental meeting of the committee's search for a candidate, of its success, and of the *earnest efforts* to find suitable minority candidates. It may also be seen in a later colloquy with the dean, wherein those efforts are again described, and in that conversation several persons will be present—my friend addressing the dean, the dean nodding gravely, my friend half-winking, half-smiling, to signal his detachment from and acceptance of the ritual, and the dean winking back. In that exchange they are signaling their submission to the improbabilities and absurdities of academic hiring in the era of affirmative action: the improbability that there is an undiscovered abundance of minority talent, that diligent search will uncover it, that bureaucratic monitoring (carried out by failed or mediocre academics) is necessary to insure the diligence of that search, because—*credo quia absurdum*—the modern university, that most liberal of American institutions, and beyond that devoted fanatically to the celebration of achievement, is nevertheless so steeped in racial bigotry that it cannot be trusted to recognize and overcome it independently.

In my view, it is the university's failure to resist that last, malicious idea, the idea of its bigotry, which is a major source of its current loss of dignity and self-respect.[*] But to return now to the professor and the dean, we may observe that the interchange between them, marked by acquiescence and inner disavowal, by a seeming acceptance of the forms and an aloof contempt for them, involves an internalization of dissent and thus its inhibition. Dissent is kept "inside," either inside the self, or inside the dialogue (as in the hinting and winking among "insiders") or within the "system," whatever that may be at the moment—the committee, the department, the college.

By keeping potential dissent confined to the family, one also keeps the secrets which occasion and sustain that dissent, in this case the illusions and falsehoods which have gathered around university quota systems. I have over time become convinced that this is not merely the effect of keeping dissent inside, but its unconscious intention. One is permitted to take a critical position about affirmative action as long as this is done on the grounds of high principle; but one produces consternation and panic through a descent to mere information. Several months ago I mentioned to a colleague of mine that I had collected some data which suggested the essential futility of our own well-regarded efforts in affirmative action, and that I was planning to bring these dolorous findings to the attention of our faculty. My friend looked at me in genuine horror and urged me not to do it, saying that many of our colleagues become agitated when confronted with unpleasant facts about our quota system.

I decided not to do it, no doubt prudently; but if you think my colleague's alarm overdone, consider the truly curious case of Dr. Bernard Davis of the Harvard Medical School. To remind you: Dr. Davis is a distinguished medical scientist who was one day overcome by an aberrancy of candor. It led him to write an editorial for the *New England Journal of Medicine*, in which he worried about a possible erosion of standards due to affirmative action. Having read the editorial a dozen times, I can attest that there is nothing in the least provocative about it, that it is cautious and sober to a fault. But it was Dr. Davis's error to cite a specific example, involving the waiving of requirements for a minority student, and it was that concreteness, one may imagine, that led the press to pick up the story. From that moment on, all of Dr. Davis's scrupulosity of tone was of no avail, since he had "gone public" (however fortuitously) and had offered a datum. He was thereupon the object of demonstrations, denunciations, and a motion of censure brought against him by the more thuggish elements of the Harvard medical faculty, many of them no doubt Life Members of the ACLU.*

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[*] What is worse, the university masochistically subsidizes its own defamation, in its sponsorship of affirmative-action *apparatchiks* whose sole métier is the propagation of witless charges of racism and the like. Here is one of our own, addressing the multitudes: "There is no way a white male professor will bring a minority person into his class." Here is another: "The old-boy network has always worked . . . there is really no affirmative-action program." All this, mind you, at a university which submits—meekly, obsequiously—to the most outrageous demands made upon it in the name of affirmative action. We still await the day when the leadership of a major university defends itself or its faculty against such derogation. The failure to do so both reflects and contributes to the university's loss of self-confidence.

The gravamen of the charge directed against Dr. Davis is not merely that his concerns found their way into the press, but that once made known they tended to mislead the public, who would mistake the part for the whole, and would be led to distrust all minority medical students and physicians because of statements—either true or false in substance—which apply only to some. It is certainly true that the public is uneasy about possible minority incompetence; and it is also true that the competent—such as my own current group of minority students—are thereby unfairly burdened. But the distrust felt by the public is due not to the breaking of the silence, but to the silence itself. The unvarying diet of sanctimony and false reassurances purveyed by our educational leaders has in the end produced an almost complete cynicism, not only in the university, but in the public at large. Those youngsters applauding Gerald Ford have parents and friends and neighbors living in the real world, and the word gets out that the official pieties are not to be believed. What *is* believed is hard to say: it seems to be the usual mixture of truths and exaggerations and some falsehoods; but on balance—and it grieves me to say so—the uninformed gossip of the public is far closer to the truth than all the press releases issued by all the law- and medical-school deans in all America.

II

I SPOKE earlier about the illusions and falsehoods which have gathered around the topic of affirmative action. The vast outpouring of writing prompted by the Bakke hearing has made these more evident than before, in that the arguments offered for reverse discrimination have involved the reiteration of certain ideas about the quota systems—how they work, whom they work for, and what their long-range effects have been. We find that in particular three central statements recur: (1) that whatever one may feel about the moral worth of these programs, they enjoy the merit of success; (2) that those being helped are the disadvantaged; and (3) that those favored are fully qualified for the programs they enter and fall short only in modest and easily remedied ways. I want to take up these assumptions and show that each of them is open to serious question, that the realities are far more complex.

1. *Are quotas successful?* In the course of arguing with any proponent of racial preference systems, one is likely to find, sooner or later, that the trump card offered is the argument from results. Triumphantly: "Whether you like it or not, the fact is that it *works*!" Or beseechingly: "I don't see what else we can do—it's the *only* thing that will work." Here is Father Hesburgh of Notre Dame, in a letter commending an article by McGeorge Bundy, telling us that the "embryonic effort of a decade has multiplied by a factor of ten or more the number of minority students now preparing nationwide to be doctors or lawyers." That is an inflated figure, as such figures often are, but let it stand. Let us accept that there has been a substantial rise in the number of minority students enrolled—from 2 to 3 per cent before affirmative action to about 9 per cent today.

That is indeed an impressive increase, if we can bring ourselves to believe it—that is, to believe not merely the numbers but also what they are meant to imply: that the increase in those preparing will translate into an equivalent increase in those being graduated; that those graduated are fully competent; that the rise is due to quotas themselves; and that nothing else will work.

Note first that these figures almost always tell us the proportions admitted or enrolled, and rarely the percentages who are graduated. We know how many are in the pipeline, but not how many emerge, and it is no longer quite the secret it once was that there is often a considerable gap between those numbers. To take an example close to home: my own training program in clinical psychology adopted in the early years an ambitious one-third minority quota, and in order to meet it admitted students recklessly. The attrition rate has been extremely high: of those admitted in those early years, at most one in five will achieve the doctorate (compared with two-thirds of those admitted regularly). We brandish one statistic, the large percentage of minority students admitted and enrolled, and conceal, even from ourselves, the fairly complete failure to carry students through the doctorate. Nor do we comment on the

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*There is an excellent account of the Davis incident, by J.W. Foster, in the *New Republic*, July 17, 1976.

cruel loss of time and self-esteem suffered by the students involved; all of them would have succeeded elsewhere, but were misplaced in our program, drawn there only to satisfy political demands and our own moral vanity. Somewhat similar patterns have been reported for many law schools where, at least in the past, the proportion of minority students graduating is substantially lower than those enrolling, and the percentage of those who pass the state bar exams is lower still, at times shockingly low.

Yet I would not want to lean heavily on these or other examples. To do so is only to add to the general mindlessness, wherein statistics when available are torn out of context, or otherwise used to dissemble and deceive. In particular one must take skeptically the news that things are going swimmingly at Harvard Law and Stanford Medical and MIT Economics and the like. Elite schools and programs, once they put their minds to it, can command the best of everything, and their successes in minority training tell us nothing at all about what is happening elsewhere. This country's educational institutions are so diverse, and so variously organized, that it is nearly impossible to discern what any given set of figures actually means. I know of two nearby law schools: one is elite, admits selectively, and fails hardly anyone. Another is non-elite, admits more generously, yet fails a large percentage. There is no easy way one can compare their statistics of "success" or aggregate them; nor do national statistics tell us much unless we have some sense of what levels of competence those figures represent. The only thing we can say with confidence is that the statistics of "success" bandied about are inflated to an unknown degree.

What is even more troubling than the inflation is the tacit assumption that all improvements in minority enrollment are due only to the quota programs. We have here the characteristic mindset of the New Class of foundation executives, university presidents, bureaucrats, and publicists who simply cannot bring themselves to understand that good things can happen without the benefit of their intervention. One would never suspect, in reading the reams of anti-Bakke writing, that minorities—and especially blacks—have during the last generation accomplished, partly through the vagaries of history and partly through their own exertions, an amazing series of transformations: from agrarian to urban, from poverty to the beginnings of economic stability, from dispossession to modernity. One would never imagine that these profound demographic changes may account for the largest part of the increased representation of minority students in higher education. None of this is evident in Father Hesburgh's letter, which asserts that "for only ten years now have we provided a modicum of equal educational opportunity . . ." etc., etc. That is *de haut en bas*, the voice of the good Father tending a mute and faithful flock, or of the foundation chief dispensing largesse to those he deems worthy. It simply does not correspond to the realities of an energetic and clamorous democratic culture, in which *we* do not provide for *them*, but in which all of us strive, compete, negotiate, accommodate, succeed, fail, rise and fall and rise again.

2. *Do quotas help the disadvantaged?* One afternoon several years ago, while serving on our admissions committee, I came across the applications of two young women. One was an ambassador's daughter who had been educated in private secondary schools, and was attending a most prestigious Ivy League university. The other might have stepped out of a Harriet Arnow novel. She had been born in Appalachia, the daughter of a poor farmer. The farm failed, the family moved north, her father died, the family survived on welfare and odd jobs, she married young, bore a child, was divorced, began attending a municipal university and ultimately was graduated with an excellent record. With respect to objective measurements—test scores and the like—these two young women were more or less evenly matched. It was the ambassador's daughter who, being black, was offered an invitation (which she did not ultimately accept, having a surfeit to choose from); the welfare child, being white, was not admitted, did not come close.

This anecdote has been chosen to illustrate as succinctly as possible the moral problems inherent in any system which provides privileges by race alone, and which will not recognize other bases of disadvantage. Either one must argue that race is the only stigmatizing American condition, an argument sometimes made but not commonly accepted; or else one must assume that race and class are essentially identical, which is simply not the case. And it is least likely to be the case at the higher reaches of higher education, given the strong association between social class and scholastic competence, an association which seems to be universal. This past year our admissions committee decided to give some attention to the socioeconomic status of all plausible candidates. What we found was startling: of the five minority "finalists," three were attending elite private colleges, and two were at selective state universities. Only one had received scholarship help. Three of the five came from affluent—not merely comfortable—families, and one of these gave every evidence of being rich. The committee member who interviewed most of them reported back to our faculty, somewhat ruefully, that their average family income was considerably higher than that enjoyed by the faculty itself.

The luck of the draw that year may have given us an unusually well-to-do group—I suspect it did—but the fact remains that during the last few years almost all of the minority students in our program have appeared to be of middle-class background, to judge by dress, speech, and quality of sensibility. They are talented and likable and interesting; they are well-schooled; they will succeed in getting their degrees. But it is pointless to pretend that they are disadvantaged, or that their presence introduces any diversity to our program except in the most superficial fashion. Nor does one find them all that interested, as a group, in specifically minority problems (nor do I think they ought to be), especially after they have been admitted to graduate training, and can relax and discover what really interests them.

The interaction between class and race is an issue which has yet to be addressed seriously by most commentators on affirmative action, not to mention its bureaucrats. Any intelligent analysis of the issue will have to begin by recognizing the aforementioned relationship between being middle class and being competent scholastically. Hence a policy of preferential admissions which favors the disadvantaged—of any race or ethnic group—will involve a high rate of failure; conversely, any attempt to choose minority students likely to succeed means a preference for the middle class among them. What has happened, I think, is that the strong departments and schools—such as my own—having viewed the wreckage of their earlier efforts to favor the economically deprived, have now decided to recruit those more likely to succeed, which in practice means middle-class minority students. Hence a program which began as an effort to remedy disadvantage has become increasingly a program which most helps those minority youngers who least need help.

5. *Are the students qualified?* I have kept for last the most difficult question of all, the meaning and use of the term "qualified." The question is so difficult emotionally that only a genuinely self-confident minority scholar, like Thomas Sowell, can deal with it in a straightforward way. It is also difficult conceptually, since the term is intrinsically a matter of context—when we use the word we ordinarily specify when and how and for what purposes and compared to whom. Given these sources of ambiguity, it makes one uneasy to observe the shrillness with which the idea is advanced that minority students chosen for professional training are "entirely qualified." A few nights ago I watched a television debate on the Bakke case in which an old warhorse of the old liberalism insisted that the minority students chosen ahead of Bakke were *qualified*—he stressed the word, almost shouted it. What made him think so, he was asked. Well, the doctors who chose them thought so, otherwise they would not have been chosen. And having uttered that tautology, he broke into a smile of seraphic self-satisfaction.

WHAT lies behind all this blustering, all this shrillness, is an intention to rewrite the common understanding of what it means to possess adequate academic qualifications. A subsidiary intention is to depict academics as rigid, hard-hearted pedants who for the sake of a few measly points on this or that meaningless test refuse to offer a helping hand to deserving minority students. Yet the differences are not trivial. Were they trivial there would be no issue, since it is hard to imagine many teachers or students becoming indignant or concerned about the difference between an A— or a B+ level of achievement, or between a Graduate Record Examination score of 650 as against 600. The differences we worry about are large and at times enormous, so much so as to raise issues which go beyond the issue of fairness to the larger question of whether the public is being responsibly served. It is rather ironic to note that the more sophisticated moral arguments in favor of reverse discrimination have emphasized "the common good," yet it is precisely that common good which a feckless reliance upon quotas is liable to injure.

One of the unexpected byproducts of the Bakke case is that it liberated data on medical-school admissions held closely or concealed. These findings are especially important in that they refer to the medical school Bakke sued—the University of California at Davis, a run-of-the-mill institution—rather than to Harvard or Johns Hopkins and the like, which can choose from among the very best minority applicants. The findings from the Davis medical school may in that sense be more representative, and what they tell us is simply distressing. Students admitted under a quota to the school had an undergraduate grade-point average in the B— to C range. You will not grasp what these figures say without being aware of the current level of grade inflation at American universities. For example, the typical student at my university graduates with a B+ average, and a good (though not brilliant) one will graduate with an A—. The minority students admitted to the Davis medical school were at the very bottom of the grade distribution; in an era of honest grading, most of them would have been at the D level or below. A friend of mine, deeply sympathetic to affirmative action, looked over the table of grades and test scores I provided for him, groaned, and said, "My Lord. If that's who they let in, whom do they keep out?"

These are painful matters to read and to write about, yet anyone confronting the Davis medical statistics for the first time, as I myself did a few weeks ago, and can construe from his own experience what they mean, will likely find himself overcome with dismay. It is deplorable that these data have received almost no attention in the press; that the university presidents and deans who have access to this information keep silent; that students so marginal are encouraged to enter medical training; and that as a consequence the able minority student inevitably comes under suspicion.

When quota programs in higher education first went into effect, thoughtful critics warned that the logic of the situation would ultimately compel an extension of quota-mindedness into all other areas of public life, and not merely by infection and example. They reasoned that marginal students, once recruited and enrolled, would tend to be passed through educational programs—at least in many cases—and then be unable to compete equally in an open market for talent. Hence new systems of preferment would be established and sustained. That is just what has happened. The emerging solution, which we see in faculty hiring and elsewhere, is to set aside, tacitly, certain positions as "minority" slots. Thus we reach the final and most wretched duality of all—a two-tier system of categories, involving on the one hand "real jobs" for which serious candidates compete seriously, and on the other, "minority jobs" which are set aside as a sop either to conscience or, more often these days, to the demands of the government bureaucracies. The corrupt means chosen to achieve the virtuous aim of integration ends in imposing, for the first time, segregated statuses within the university.

At this writing, the ultimate fate of racial preference systems remains unclear, pending the Court's decision on Bakke. Most lawyers I speak to believe the Court will rule as narrowly as possible, and if it does we can expect the struggle to continue, even to intensify, and to be fought via legislation and popular initiative. On the other hand, the Court may hold for Bakke on broad constitutional grounds, and the quota issue will fade away, to be remembered only as one of the many unpleasant episodes of the 70's. Yet even so we would be left with the most disturbing questions about how social policy is made in this country.

The rapid conversion of "affirmative action" to bureaucratically mandated quotas has taken place despite specific congressional intentions to the contrary, despite its overwhelming rejection in public-opinion polls, despite the solemn disavowals of President Carter both before and after his election, and despite a body of legal doctrine presumably removing race as an acceptable criterion for preferment. None of this has made the slightest difference. Congress is paralyzed. The President, characteristically, waffles and then yields. Some of our most prominent legal theorists promptly discover that, on second thought, a little racial discrimination is just what the country needs, as long as it is understood to be for our own good, and carried out by high-minded folk. Those folk turn out to be revenants from the Great Society—McGeorge Bundy, Joseph Califano, and the like—who seem bent on repeating all of the errors of that era, who are still unable to grasp that sheer energy and mere good will do not in themselves accomplish wise policy, and that authoritarian means, however well meant, will not achieve democratic ends. A thwarted and resentful public seems to understand this perfectly; it is only our leadership which cannot.

Loading the Economy

ORRIN HATCH

> It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.
>
> Paragraph 703(d) of Title VII of the 1964 Civil Rights Act.

The spread of affirmative action since the passage of the Civil Rights Act in 1964 has been an event without precedent in American history. With astonishing speed, federal and state agencies have asserted the right to impose racial quotas on virtually every area of American life. Even a tiny academic institution like Hillsdale College in Michigan, with a faultless tradition of social progressivism and an established policy of refusing federal monies, is menaced on the ingenious grounds that, since some of its students get veterans' benefits, it is in receipt of federal funds.[1] All of this is in flagrant breach of the letter and the spirit of the Civil Rights Act, as specifically established in congressional debate at the time of its passage. The legalistic casuistry indulged in by the liberal plurality on the Supreme Court in order to give at least limited endorsement of affirmative action in the *Weber* case has not unreasonably been described as "the most horrendous decision in U.S. Supreme Court history since the Dred Scott case"[2] (by Professor Sidney Hook), as a violation of the separation of powers (by Chief

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[1] "H.E.W.-ing at Hillsdale," *Regulation*, Jan./Feb. 1979. The case is currently under appeal.

[2] *Measure*, Sept./Oct. 1979, p. 1.

Justice Burger) and as "Orwellian" (by Justice Rehnquist)[3]. More significant still, affirmative action is a reversion to a society of status from the ideal of a society of free contract, equal protection and individual freedom which inspired the framers of the Civil Rights Act and ultimately of the American Republic itself.

The legality, or otherwise, of affirmative action will keep lawyers employed for many years. Cultural historians (and possibly psychologists) will make reputations explaining the reluctance of press and politicians to oppose its development, or really to notice that it was going on at all. However, since affirmative action is indeed going on, without benefit of law or legislators, a more immediate concern ought to be what its practical effect is likely to be. Typically, this turns out to be the least studied aspect of all.

Some economists have done work on the effects of affirmative action upon the relevant "protected class."[4] This has generally been pessimistic. Such evidence as is available suggests that the programs fail, either because of absolute lack of candidates, or extensive changes and other factors in the economy, or high attrition rates. Intuitively, we might suppose the effect would be similar to tariffs, inducing a local and relative prosperity at the expense of overall welfare. This prosperity would probably be less in absolute terms than might have been the case if the economic system had been permitted to work freely. But a recent survey by the Library of Congress was unable to discover anything substantial from academe on its overall or macroeconomic impact. In fact, the major empirical study was done as part of a survey of all government regulation by public accountants Arthur Andersen & Co. for the Business Roundtable;[5] and the most helpful theoretical discussion of regulation was published by an arm of the American Management Association.[6] As far as I can tell, all recent Ph.D. theses on the subject have concentrated on its sociological or educational aspects, or on the effect on the "protected class." Considering how large affirmative action looms on the campus (see below), this is a distinct case of the dog that didn't bark in the night. It can only darken the suspicions of those already depressed by such news items as the plans of Ohio State University officials to buy their own airliner, because enough of them make lobbying trips to Washington to fill three flights a week.[7] However, given this absence of academic interest, perhaps a U.S. Senator might at least growl in the direction of affirmative action's economic impact, and the questions such a study would raise.

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[3] Justices Burger and Rehnquist's dissents to *Weber*, both of unusual ferocity.

[4] Andrea H. Beller, "The Economics of Enforcement of an Antidiscrimination Law: Title VII of the Civil Rights Act of 1964," *Journal of Law and Economics*, Vol. 21, Oct. 1978; and the work of Thomas Sowell of UCLA.

[5] *Cost of Government Regulation*, "Study for the Business Roundtable: A Study of the Direct Incremental Costs Incurred by 48 Companies in Complying with the Regulation of 6 Federal Agencies in 1977," Arthur Andersen & Co., March 1979.

Quotas or Bust

Because most people would rather not think about affirmative action, there is considerable confusion about what it means, not unrelated to the frantic logic-chopping indulged in by its proponents when under pressure. For my present purposes, I want to emphasize that *affirmative action means quotas* or it means nothing. It means discrimination on the basis of race and sex. It does not mean remedial education, special programs for the disadvantaged, or any of the other methods by which we could, and to some extent do, help minorities. It has nothing to do with equal opportunity, although its chief enforcement agency is misleadingly called the Equal Employment Opportunity Commission (EEOC). Affirmative action is about equality of results, statistically measured. Its proponents have made great efforts of casuistry to distinguish between quotas and "goals," "targets," "timetables," and so on. All such distinctions dissolve in practice, particularly when the enforcers are feeling confident about the balance of power on the Supreme Court.[8]

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[6] Murry L. Weidenbaum, *The Future of Business Regulation: Private Action and Public Demand* (New York: American Management Assoc., 1979). Professor Weidenbaum, admittedly, is Director of the Center for the Study of American Business of Washington University in St. Louis.

[7] *Toledo Blade*, Feb. 16, 1980. Ohio State University receives some $63 million in federal aid each year.

One example makes this point irrefutable. In 1973, American Telephone & Telegraph signed a consent decree including substantial affirmative action programs. This pioneer in the employment of women had been backed up against a wall by the EEOC solely because the paucity of women in its higher reaches was regarded as *prima facie* evidence of discrimination. A.T. & T. didn't agree, but it didn't want to take on the federal government in a long court battle either, so it tried to compromise. The targets it tried to meet were of a volume and complexity to delight a bureaucrat's heart. In 1975, the federal government announced A. T. & T. wasn't doing well enough, and made it sign a "supplemental order."

> The sternness of the government's approach to the supplemental order convinced A.T. & T. that it was dealing not with goals, as it had previously assumed, but with quotas (a proposition some government people involved do not concede). Says Don Liebers [the A.T. & T. executive concerned]: "The order made it rather clear that the name of the game was achieving targets."

After that, A.T. & T. became a superachiever. . .[9] Anyone temporarily confused by the affirmative action lobby's shell game should ask himself: Am I supposed to take notice of race, sex, etc.? Or not? He will find the answer (yes, on our terms) nowhere appears in the Civil Rights Act. It is the economic impact of this answer that is the subject of this article.

How the Market Erodes Discrimination

The concept of a free market is valuable not simply as a description of reality, but as an analytical tool. It helps us put discrimination in context. In a system where all actors are free to pursue their own interests, there is an inexorable tendency for everyone to receive the marginal value of his labor. In other words, you will ultimately be paid approximately what your work is worth. The free market undermines all distinctions that are not based on this economic reality. If you belong to some unpopular group, employers may begin paying you less than average, as a matter of tradition. But precisely because they will make more money off you than off more popular but expensive groups, you will come into demand, and your wages will be bid up. Ultimately, you will be paid the average, or even more than that if you happen to be more efficient. The only way this can be prevented is if the state legislates unequal wages or bans you from certain occupations, as has happened in South Africa. Private employers cannot effectively do it, because their attempts at collusion are undermined by market forces just as their attempts to form cartels collapse, unless supported by public policy, tariffs or some other constraint on freedom. *Discrimination is costly*. That is why the South African business community is generally critical of *apartheid*.

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[8] Which is pretty confident. Joseph L. Rauh, Jr., in "The Supreme Court: A Body Politic," *The Washington Post*, March 5, 1980, comments on the term " 'Equal protection of the laws.' . . . The issues of . . . preference of blacks in jobs . . . are hardly resolved by reference to those five little words, and the Justices quite naturally apply their own ideologies."

[9] Carol J. Loomis, "A.T.& T. in the Throes of 'Equal Employment,' " *Fortune*, Jan. 15, 1979.

Two qualifications must be made, however. First, there is no reason why your marginal value should be the same as that of anyone else. Even apart from any question of innate aptitude, different cultures have different attitudes to work and leisure. If you regularly spend the summer living on a beach in Yucatan, your earning capacity will be outpaced by your brother who works and goes to night school all year round, although you might be happier. Secondly, even when your marginal value is the same, it may take time to get paid it. Traditions do not dissolve overnight, although experience in America indicates that where money is concerned, they erode remarkably quickly.

In fact, the American experience is that relying on the market system has been enormously successful in integrating diverse groups, often historically hostile to each other. Groups frequently subjected to majority disapproval, such as Jews and Asians, have nevertheless emerged with incomes significantly above the average. The cash nexus is a noble thing. You don't have to like the man who mends your shoes, but you and he can exchange goods and services to your mutual advantage. The pursuit of material gain has so remorselessly worn down all social distinctions that, for example, the position of women in American life had already been revolutionized, seen in a longer perspective, before the EEOC sprang forth.

The point of the 1964 Civil Rights Act was merely to hurry this process along, particularly in the area of race, by forbidding certain types of public discrimination. The philosophy behind it was that, once entry to the market was freed of artificial constraints like institutionalized discrimination, it would solve this problem as it had all others.

If you leave people alone, they will tend to employ those who do the best job, and the overall production of wealth will be maximized. But if you don't leave people alone, they cannot do this, and inefficiencies will develop. Wealth will not be maximized. This is exactly the effect of affirmative action.

The Independent Immigrant

Even Massachusetts Institute of Technology Nobel laureate Paul Samuelson, father of the famous textbook, missed this point in commenting on the Bakke decision. Professor Samuelson compared the arrival of blacks on the labor market with the arrival of immigrants in the nineteenth century. Immigration was opposed by "charter-member Yankees," he said, because they were afraid of losing their jobs. But in fact

> . . . the economic system . . . is *not* a zero-sum game. . . When a country gains new manpower from the excess of births over deaths or from immigration and increased female participation, its same land and complement of capita assets can produce a larger pie . . . Neither the "poor whites" nor other groups in the community have to fear particularly that out of *their* economic hides will have to come any advance achieved by black Americans, native Indian Americans, Americans of Mexican descent or other minority groups.[10]

This is wrong, even on its own terms, as a defense of affirmative action. "Poor whites" had excellent reasons to fear that they would be undercut in the short run. In the long run, as Professor Samuelson might normally argue, echoing Lord Keynes, we are all dead – although overall welfare will indeed expand. But more important, the U.S. absorbed the great wave of immigration at the end of the last century because the immi-

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10. Paul A. Samuelson, "Economics of Discrimination," *Newsweek*, July 10, 1978.

grants were employed in the sectors of the economy that needed them – often concentrated at first in the least desirable areas. Under affirmative action, however, the newcomers would be inserted into each area of activity in proportion to their overall numbers, and not because of their skills or because they represent a more efficient use of resources. (This is literally what is happening with the Spanish-surnamed protected class, whose numbers are currently increasing through substantial legal and illegal immigration.) In these circumstances, we cannot be sure that "new manpower" would produce a "larger pie." It might, as we shall see, produce a smaller pie as well as denying some people jobs they might otherwise have occupied. It would be more accurate to look at affirmative action as a tax, whereby resources are transferred directly to the protected classes. But it is a peculiarly debilitating tax, because it interferes with the productive enterprise's ability to take decisions by reducing its internal efficiency. Most taxes are a burden to be shouldered. This one is also an enfeebling drug.

Inefficiency in Triplicate

The true nature of affirmative action can be seen in one of the rare reports from the front line, which appeared in the *Washington Star*, albeit in the Business & Finance section:

> Dante DiGaetano's business is so small that he has no office and no secretary – just one carpenter and two laborers.
>
> But the Labor Department has ordered him to take a series of 43 continuing administrative actions which could occupy a sizable office force because, under a recent government contract, 5% of the four laborers working for him and his subcontractors were not women.

As usual, Mr. DiGaetano had signed a conciliation agreement rather than abandon his contract or fight the government in court.

> As a result of signing the order, DiGaetano has been ordered to maintain a written equal opportunity policy, appoint an EEO officer with a written job description, include EEO policy in company manuals, maintain records of encouragement of minority and female employees to seek promotion and keep a record of annual reviews by those employees for promotional opportunities.

He must also keep a current listing of recruitment sources for minority and female craft workers, copies of letters to employment groups specifying employment opportunities, files of all responses to these letters and records of contacts with minority and women's community organizations, recruitment sources, schools and training organizations.

Further, DiGaetano must have copies of newsletters and annual reports that include EEO policy, copies of letters to unions and training programs requesting assistance in meeting EEO duties, copies of letters sent at least every six months to all recruiting sources stating EEO policy and copies of advertising with EEO statements.

In addition, the conciliation agreement stipulates that he must maintain records that parties and picnics have been posted and are open to all employees, have separate toilets and changing facilities for male and female employees and provide documentation that all foremen maintain a working environment free of harassment.

On top of this, DiGaetano must submit a monthly "employment utilization report," a quarterly report on minority and female applicants, job offers, new hires, terminations and layoffs and a report stating the date upon which each of the other 42 requirements was met.[11]

My colleague, Senator Richard S. Schweiker of Pennsylvania, complained to Labor Secretary F. Ray Marshall about this situation. Mr. Marshall replied that Mr. DiGaetano had only himself to blame. He hadn't submitted his "monthly Employment Utilization Reports, Form CC257." Mr. Marshall added that although this case was unusual, it was too difficult on administrative grounds for his agents to take note of the size of their victims.

A society which allows this sort of harassment is, in an important sense, no longer free. Beyond that, it is not even efficient. Obviously, the heightened threshold of fixed costs is going to exclude smaller contractors from such fields. But the impact on the major contractors is perhaps worse. They survive, but waste much of their assets on bookkeeping, and other compliance activities. Additionally, they are no longer dedicated to the pursuit of profit, with its continuous, systematic pressure against waste and error. This is partly because they are now staffed by people who, by definition, are not the ones who would have been selected had the principle of merit been applied. Also, the whole ethos of the organization has been altered, from commerce to politics. We are witnessing a cultural conquest of the corporate sector by the bureaucracy. And for future developments, we need look no further than the bail-out last fall by Congress of the Chrysler Corporation. Congress here chose to support a failing corporation, and thus perpetuate a concomitant misallocation of resources throughout the economic system, in large part because the bureaucracy felt that the corporation had complied with its regulations and was a "good corporate citizen." One frequently-used argument was that Chrysler was a major employer of minorities. Thus we are intervening to foster inefficiency, and intervening yet further when its consequences become unavoidable. It looks ominously like what the Victorians called the Primrose Path.

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[11] *Washington Star*, Feb. 21, 1980.

An Economic Impact Statement

Measuring the economic impact of affirmative action regulations is easier than that of (say) the Environmental Protection Agency's activities because they are clearly a form of consumption. The EPA is often justified on the grounds that its regulations merely bring home to the economic decision-maker the "social costs," or "externalities," that the price system fails to detect. These include the cost to the community of washing the soot from factories out of its hair and so on. The concept is debateable, but it does not concern us here. The EEOC has sometimes been credited with opening up new pools of labor that corporations somehow contrived to ignore, and occasionally with hastening the breakdown of traditional barriers to labor mobility. But in the context of the market's endless search for efficiency, these anomalies would have been eliminated anyway, leaving only the question of whether they were worth the expenditure compelled by law. Affirmative action is a net cost to the economy. On the whole, its advocates have defended their policies in terms of social justice. And this is a more reasonable position. No one, after all, expects the state to profit from the money it expends on looking after the aged.

Measuring the costs of regulation is not an easy task. In the case of Dante DiGaetano, for example, it is possible to quantify the incremental expenditures he is now forced to make – hiring an EEO officer, secretaries, posting letters, and so on. It is more difficult to assess the changes in his way of working – including the time he himself must divert from other activities. And the true dynamic effects – the opportunity cost of all this expense and effort, the diminution of competition, inefficiencies due to the employment and promotion of marginal labor and the consequent demoralization of good workers – can only be a matter of conjecture, although they are clearly the most important of all. No measurement can be made, for example, of the cost to the entire economy of a decision not to terminate a bad worker because he or she belongs to some category required to satisfy government inspectors, a near-universal phenomenon in contemporary America. It is safe to say, however, that the dynamic effects of affirmative action are some considerable multiple of the static costs.[12]

Unearned Increments

The Arthur Andersen study resolved this problem by counting only such incremental costs as could be exhaustively documented. Under this minimal definition, the 48 companies which were examined proved to have spent some $217 million to comply with EEO regulations in 1977. The greater proportion of these, some 96%, were operating and administrative costs which recur annually. The companies noted that the full impact of treating the handicapped as a "protected class" had not yet

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[12] This three-fold division follows Weidenbaum, *op. cit.*, pp. 11-33. Arthur Andersen combined the second and third category as follows:

INCREMENTAL COSTS	(Measured in Study)
COSTS OF SECONDARY EFFECTS NOT MEASURED IN STUDY	Loss of Productivity Investment Disincentive International Competitiveness Lost Opportunity Construction Delays Inflation Resource Misallocation Shortage of Supplies

been felt in 1977.[13]

Since these 48 companies represent only 5% of the U.S. workforce, excluding military, government and agricultural employees, it would be logical to conclude that costs across the entire sector are $217 million x 20 = $4.34 billion. Any shortfall resulting from the crudeness of this measure is amply compensated by the fact that it does not include the effect of state and local government demands, or specialized federal activities such as the fair housing laws.

The figure is also not inconsistent with the estimate made by Robert DeFina of the Center for the Study of American Business at Washington University in St. Louis that compliance costs are approximately 20 times the cost of the regulatory agency concerned.[14] In 1979, the federal government estimated it spent $135.5 million overseeing "private sector equal opportunities" and a further $15.2 million in partial administration of the fair housing laws, suggesting a total compliance cost of at least $3 billion. Estimated expenditures for 1981 are some $210 million, for which compliance costs could be $4.2 billion.

The federal government's estimate of its 1979 expenditures on overseeing and complying with its own equal opportunity regulations was $170.4 million, with an additional $39.7 million for military equal opportunity. The figures for 1981 are expected to be $194.9 million and $42.9 million.[15]

This is substantially less than the estimate of affirmative action costs that the Congressional Research Service arrived at in 1976 by polling selected government agencies – $367 million.[16] These, of course, by now would be substantially higher. The reason for the discrepancy probably lies in accounting definitions, with the government now taking a far more restrictive view than did the individual agencies. An arithmetical exercise performed on the military budget, for example, appears to imply that the 5,000 persons, who have graduated from something called the Defense Equal Opportunity Management Institute in the last eight years, are serving their country at a cost, in salaries and support expenditures, averaging something less than $8,000 a year. Patriotism, clearly, is not dead. In fact, given the military's remarkably low estimate of its 1980-1981 increase in expenditure on Equal Opportunity – a mere $1,200,000 – we can assume that civilian control at least over military statistics is pretty healthy, too.

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[13] *Cost of Government Regulation*, Arthur Andersen & Co., March 1979.

[14] Robert DeFina, *Public and Private Expenditures for Federal Regulation of Business*, Working Paper No. 22 (St. Louis: Washington University Center for the Study of American Business, 1977). Also, Weidenbaum, *op. cit.*, pp. 21-22.

[15] *Special Analysis: Budget of the United States Government, Fiscal Year 1981* (Washington, D.C.: Office of Management and the Budget).

[16] "Costs of Affirmative Action In Employment," Congressional Research Service, Library of Congress, April 1976.

The costs of affirmative action to state and local governments remain an unexplored continent. In 1976, the Congressional Research Service's intrepid analyst attempted to estimate the costs of federally-mandated programs in this area by asking selected states directly. Unsurprisingly, the results were rudimentary, but they suggested nationwide 1976 costs of approximately $185 million. This is a tribute to the impact of the Bureau of Intergovernmental Personnel programs, which produced this formidable effect for an outlay of only $325,000. No information is available on the cost to the states of their own regulations.

There seems to have been no estimate of the costs to colleges and universities since the American Council on Education published one in October 1975 for six selected institutions.[17] It said the cost was $1,800,000. Extrapolating across the 250 colleges and universities that, according to HEW, had affirmative action programs in April of 1975, the Congressional Research Service concluded that the total 1974-5 cost had been $75 million. In 1979, the federal government estimated that it had spent $14.8 million on "equal educational opportunity," which includes oversight of employment policies. Interestingly, this sum will rise to an estimated $40.7 million in 1981.

This still leaves areas of the economy unassessed. Perhaps the most notable is that of primary and secondary education, where random inquiries suggest affirmative action is at least as much a priority as in the federal bureaucracy. Still, what we have is enough for a consciously-low estimate:

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[17] "The Cost of Implementing the Federally Mandated Social Programs at Colleges and Universities," *American Council on Education*, June 1976.

Private sector – Arthur Andersen/Hatch, 1977	$4.3 billion
Federal govt. – Actual 1979	.35 billion
State and Local govt. – CRS estimate, 1976	.18 billion
Universities, Colleges – CRS/ACE estimate 1974	.08 billion

Considering the partial and dated nature of these figures, the fact that inflation in the four years of President Carter's Administration seems likely to average nine percent a year and the dramatic proliferation of programs of affirmative action in recent years, its incremental cost must be clearly in excess of $5 billion – perhaps as much as $7.5 billion.

It is essential to remember at this point that *$5 - $7.5 billion is only the tip of the iceberg*. It is just the incremental cost of compliance – what Dante DiGaetano pays to satisfy his official tormentors. The full economic cost is the better use Mr. DiGaetano could have put his time and money to, the demoralizing effects on his workers and himself, the chances that workers hired under the new regime may not be as productive, the loss of wealth represented by the exclusion of skilled workers, the possibility that he may give up in disgust and apply for a job in the Department of Labor, and so on. This will be many times higher, if inherently less quantifiable.

Affirmative action is yet another wedge driven between the American worker and the fruits of his labor. The most obvious wedge is that proportion of the fruits comandeered in the shape of direct and indirect taxes. Affirmative action certainly contributes to this because of the expensive oversight apparatus that accompanies it. But a less obvious wedge is the inefficiency it induces in the productive base. This means that an hour of work yields less fruit. Instead it is spent getting wrong numbers on the telephone system, and hunting for lost mail. Where the worker faces a high marginal tax rate, quite small changes in return can make him decide to go fishing instead. This is exactly what is happening to the American economy.

Since 1973 particularly, there has been a drop in American productivity growth that cannot be explained in terms of the changing combination of capital and labor input.[18] In real terms, national income per person employed in the first half of 1979 was below that of 1973. The most obvious culprit is the distortion and misallocation effect caused by complying with federal regulations. Affirmative action is only a small part of this – Murray Weidenbaum estimates that total incremental cost of oversight and compliance in 1979 was some $102.7 billion.[19] But since it has such a personal impact on the labor force, its dynamic economic impact is probably out of proportion. One can work happily designing a pollution filter, but not if passed over for a promotion on the grounds of race. In any event, affirmative action is a symbol and a symptom of the regulatory socialism which, sprouting with the New Deal, has grown like a kudu vine until our institutions and their classical liberal inspiration are on the point of vanishing from sight.[20]

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[18] Denison, "Explanation of Declining Productivity Growth," *Survey of Current Business*, August 1979.

Perhaps the best way to look at affirmative action is to regard it as a "rent-seeking" activity, of the sort described by Gordon Tullock.[21] Rent-seeking is the process by which individuals and groups attempt to get society at large to pay them a subvention. Professor Tullock has demonstrated that most societies in history have been organized in this way. Government officials and their clients exact income in the form of salaries, bribes and the proceeds of government-sponsored concessions and monopolies. Everyone else invests time and money in evading them – "rent avoidance." Professor Tullock gives an example of an entrepreneur in a developing country who knew nothing of the production process in his factory because his time was best spent negotiating with, and paying off, various functionaries. Without (as yet) the venality, the same process is, according to him, under way here. It is significant that Du Pont Corporation has recently found it desirable to appoint as chief executive a lawyer specializing in government negotiations and public relations instead of a chemical engineer. Some of his time will probably be spent negotiating with EEOC officials about the amount of income to be redirected from Du Pont workers and stockholders to whatever groups are politically important enough to be designated "protected classes." The actual making and selling of chemicals somehow gets shuffled lower and lower in his In tray. From an economic standpoint, it would be better to pay the $5 billion out in undisguised grants.

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[19] Weidenbaum, p. 22.

[20] Theodore Lowi, *The End of Liberalism* (New York: W.W. Norton, 1969).

[21] Gordon Tullock, "Rent Seeking," Working Paper No. CE 78-2-8; and "The Backward Society: Static Efficiency, Rent Seeking and the Rule of Law," Working Paper No. CE 78-7-1, Center for the Study of Public Choice, Virginia Polytechnic Institute.

ERRATUM

In E.G. West's article "The Unsinkable Minimum Wage" (*Policy Review* #11, Winter 1979; pp. 83-95), a graphic table was unintentionally omitted. With our apologies to Professor West and to our readers, Table One (see pp. 88-89) is reproduced below.

TABLE 1

CHARACTERISTICS OF LOW WAGE WORKERS 1975

Characteristics by Year	All Hourly Wage Employees	Hourly Wage Less than $2.00	$2.00-$2.49	$2.50 or more
Teenagers (16-19) 1975				
Percent of total	100.0	15.4	51.4	33.2
Percent in each wage interval				
Working part-time	63.8	84.0	72.5	41.1
Students	43.4	65.0	49.5	23.9
Female	46.2	61.4	50.3	32.7
Black	6.4	6.3	7.1	5.5
Family income exceeds $15,000	41.8	32.7	52.2	30.0
Persons Aged 65 or Over 1975				
Percent of total	100.0	18.8	44.6	36.6
Percent in each wage interval				
Working part-time	73.4	89.9	84.5	51.4
Female	41.2	47.7	45.7	32.5
Black	6.5	4.5	8.5	5.2

Source: May Current Population Survey, individual records.

A Blueprint for Judicial Reform

Edited By

Patrick B. McGuigan
Randall R. Rader

5

THE SON OF SEPARATE BUT EQUAL: THE SUPREME COURT AND AFFIRMATIVE ACTION

Orrin G. Hatch

The legacy of the modern, "activist" federal judiciary has been substantial. In such diverse areas as legislative apportionment, criminal justice, civil rights, environmentalism, and abortion, this judiciary has played the key role in the development of important public policy. It would be no exaggeration to suggest that the federal judiciary—in particular, the Supreme Court—has been the major architect of much of the most important domestic and social policy of the United States during the past three decades.

In few areas, however, has the high court had as great an impact as in transforming this country's public policy as in the area of what has come to be known as "Affirmative Action." The Supreme Court, in my view, in such cases as *Fullilove*, (1980)[1] *Weber*, (1979)[2] and *Bakke* (1978),[3] has been busily engaged in reinstituting the power of the state to distinguish between citizens on the basis of race, ethnicity, and other essentially irrelevant factors. While it took the Court more than sixty years to confess its errors in *Plessy v. Ferguson* (1896)[4] in upholding the doctrine of "Separate but Equal," it has wasted much less time in moving to reverse the *Brown* (1954)[5] notion that the Fourteenth Amendment to the Constitution entitled all citizens to equal protection of the laws without regard to race or ethnic origin.

In a series of cases compressed within a period of less than six years, the Supreme Court has called into question some of the most enduring ideas of what the Fourteenth Amendment represents. The idea of a "color-blind" Constitution, as referred to by the elder Justice Harlan in his classic *Plessy* dissent, now seems more remote than during even the most entrenched days of Jim Crow and Theodore Bilbo. The idea of a society in which the law would take no account of an individual's skin color—the great goal of the civil rights movement of the 1950s and 1960s—is now regarded by many as, at best, an exceedingly naive sentiment and, at worst, as one reflecting a commitment to second-class citizenship, even servitude, for this country's minorities.

The idea of individual treatment has been replaced by the notion of collective entitlement.

It is important to define what one means by the term "Affirmative Action." There seem to be nearly as many definitions of the term as there are persons commenting upon it. By "Affirmative Action," I refer primarily to color-conscious public policies—policies which establish quotas, goals, timetables, or numerical objectives on the basis of race. While "Affirmative Action" can also refer to similar policies with respect to ethnic groups, religious groups or the sexes—and I find such policies equally offensive to the principles of the Constitution—most of the debate over this policy has been framed in terms of its treatment of discrete racial minorities.

It is also difficult to disentangle from the controversy over Affirmative Action the increasingly prevalent notion in various and sundry judicial decisions of the United States that discrimination can be identified purely through the use of numerical and statistical evidence rather than through some demonstration of wrongful intent or purpose or motivation on the part of an actor. Thus, the courts have increasingly relied upon evidence of racial "imbalance" within neighborhoods or within universities or within places of employment or within legislative bodies as proof of unlawful discrimination. Rather than placing a burden upon those alleging discrimination to demonstrate some identifiable act of discrimination, the courts have allowed discrimination to be adduced through evidence that some "ideal" racial proportion had not been achieved.

By "Affirmative Action," I also wish to make clear that I am not referring to policies aimed at disadvantaged persons generally—and administered without regard to race, color, sex, or national origin—but which may be expected to benefit disproportionate numbers of minority individuals. If blacks or Hispanics or Poles or Jews happen to comprise a disproportionate number of the poor, for example, it would not be surprising that they would also comprise a disproportionate number of the beneficiaries of public programs aimed at assisting the poor. A program, however, aimed only at the black poor or aimed at blacks, without regard to their income level, would fall within the scope of my definition of "Affirmative Action."

What is remarkable about Affirmative Action is that such a policy, so arguably inconsistent with the traditional ideal of equality in our law, should have begun to take root within our society almost totally without the ratification of the elected, representative branch of the national government. While Congress certainly shares responsibility for this development by virtue of its acquiescence in it, the Courts and the federal executive branch have assumed the primary, active role in imposing Affirmative Action upon this country. An official public policy of racial discrimination has become institutionalized in a growing number of areas of society with little more than a whimper of protest by Congress.

While it has been the executive branch that has been primarily responsible for the day-to-day implementation and administration of Affirmative Action programs—the Equal Employment Opportunity Commission (EEOC), Health and Human Services (HHS), Office of Civil Rights (OCR), Department of Justice (DOJ), and the rest of the alphabetical soup of civil rights enforcement agencies—it has been the judicial branch which has played the major role in providing impetus and according legitimacy to Affirmative Action. Through an unusual mixture of "Activist" policies and uncommon deference to the racial policies of other branches of government, the federal judiciary can take the major share of the responsibility for the rise of the present regime.

THE COURT'S ROLE

Let me briefly summarize some of the major Supreme Court decisions that have led to the transformation of the equal protection doctrine over the past decade. Each of them has reimbedded in our law the idea discarded in decisions such as *Brown*, *Loving*,[6] *Anderson*,[7] and *Evans*[8] that the state was prohibited under the Fourteenth Amendment from taking cognizance of race in distributing the benefits of society. Each of them has contributed toward greater consideration of race and color in public and private decision-making rather than, as seems to have been the traditional objective of the Fourteenth Amendment, reduced consideration.

In 1964, Congress enacted the landmark Civil Rights Act, outlawing many forms of public and private discrimination. While I am sensitive to the many constitutional controversies that surrounded the passage of this Act, had I been a member of the Senate at the time I would have been a supporter of this measure. I believe strongly that the Fourteenth Amendment poses an insuperable barrier for legal distinctions between individuals on the basis of race or color.

The 1964 Act went further, of course, and brought within its coverage certain areas of private decision-making, as well. The owners of "public accomodations," such as restaurants and motels, were prohibited from discriminating by race in admitting individuals to their places of business. Employers were limited in their ability to discriminate among potential employees on the basis of race. Despite constitutional challenge, these provisions were sustained by the courts and represented a potential foundation for achieving a social structure in which important public and private decisions would be made with minimum regard for such factors as race.

Hardly had this new structure been erected than the Supreme Court began to chip away at its foundations. The ideal of genuine racial neutrality—something that had taken a revolution to get and a civil war and endless political strife to maintain—began to be eroded even before it could be set in place.

The first step was taken in a 1971 Supreme Court decision—*Griggs v. Duke Power Company* (1971)[9]—in which the Court, under the terms of the 1964 Civil Rights Act, rejected an employment test adopted by a utility company because it resulted in higher failure rates for black job applicants than for white job applicants. One section of the 1964 Act prohibited employers from depriving individuals of employment opportunities because of race, color, sex, religion, or national origin, while another, specifically, prohibited employment tests that were "intended or used" to discriminate.

In rejecting the employer's test—the completion of a high school education and passage of a professionally prepared aptitude examination—Chief Justice Warren Burger stated:

> What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

In creating this standard, the Court effected a subtle but critical change in the direction of the 1964 Act. Rather than placing the burden upon the state or upon the aggrieved party to demonstrate some act of purposeful discrimination by the defendant, the Court instead placed a burden upon the defendant to demonstrate that his test was not "arbitrary"; specifically, the Court held that it must be demonstrably "job-related."

Thus, even in the absence of an act of discrimination (and there can be no such thing as accidental or inadvertent "discrimination" as the term has been commonly used by the Court) the Supreme Court in *Griggs* struck down a bona-fide employment practice that had been adopted in good faith, with utterly no racially discriminatory purpose, because it could not be justified to the Court's satisfaction as being "job-related."

Griggs is important both in redefining the concept of discrimination and in legitimizing the notion of looking to statistical evidence as a means for identifying discrimination. Whereas, both in its legal sense and its popular sense, discrimination had always required some wrongful motive on the part of a discriminator, some corrupt state of mind, *Griggs* introduced the notion that illegal discrimination could occur entirely in the absence of such a state of affairs. It was no longer sufficient to look to the motives or state of mind of the defendant; it was permissible as well to look at the racial balance or proportion in a work-force, within a classroom, or living within an apartment building. If that balance was inadequate in the social view of the Court, a burden could be placed upon the defendant. And this was not merely a burden of demonstrating an absence of discriminatory intent—a difficult enough proposition—but a burden of demonstrating that he was conducting his own affairs in a manner that ensured optimum racial balance.

Griggs has transformed the concept of equal treatment from that of being a process, a means to an end, to an end in itself. It is no longer a defense to a charge of discrimination that one did not treat individuals differently because of race or some other proscribed characteristic; rather, one must now carry an additional burden to demonstrate an affirmative commitment to a racially balanced institution. More than any other case, *Griggs* has lent credence to the idea that it is equality of result rather than equality of treatment that is being pursued by modern-day exponents of "Civil Rights." However desirable it might have been for the Duke Power Company to have adopted a test that would have disqualified fewer numbers of blacks, while still maintaining a semblance of "job-relatedness," it nevertheless remains the case that the Civil Rights Act was addressed only toward ensuring that all job applicants took the same test and were adjudged on the basis of the same test, not that they be passed in proportionate racial numbers.

While *Griggs* was limited in its application to Title VII of the Civil Rights Act, and while subsequent High Court decisions have maintained the requirement that intent to discriminate be an essential component of civil rights violations under particular provisions of the Constitution, the case nevertheless has set an extremely important precedent.

More recently, the federal government has agreed to discontinue its entry level employment examination, the so-called PACE

Examination (Professional and Administrative Career Examination) because it yielded lower percentages of black and Hispanic job applicants passing than white applicants. Although the Reagan Administration made modest changes in an earlier agreement reached by the Carter Administration which would have imposed a direct racial hiring quota on the federal government, the PACE Examination has been eliminated nevertheless on the basis of the same faulty premises read into the law by the Court in *Griggs*. Not only was evidence of a discriminatory purpose to PACE totally absent, but it was considered irrelevant; it was also irrelevant that PACE had been adopted by the federal government in direct response to earlier allegations that a predecessor examination had been discriminatorily administered.

The slippery slope that the Court embarked upon in *Griggs* was continued down further three years later in the first of four cases, to date, in which the Court has been confronted with applications of the Affirmative Action principle.

Marco Defunis[10] was a Sephardic Jew who had been denied a place in the University of Washington Law School despite the fact that minority applicants with considerably worse academic records had been admitted. Separate admissions pools had been established by the University, one of which consisted only of minority applicants, defined to include blacks, chicanos, American Indians, and Filipinos. Defunis challenged the admissions policy of the University all the way to the Supreme Court. By the time, however, that the Court rendered its decision, Defunis had been admitted to the Law School; the Court seized upon this opportunity to term the case moot and refused to issue a decision.

To his credit, however, the late Justice William Douglas dissented in this non-decision. He believed that an effort should have been made to establish the merits of the issue. While Douglas was enthusiastic about developing opportunities to ensure that minorities would be competing on an equal footing with others in job and educational opportunities, he nevertheless declared:

> The state may not proceed by racial classification to force strict population equivalencies for every group in every occupation, overriding individual preferences. The equal protection clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized.

Rather than dealing forthrightly with this issue and reinforcing their decisions of the preceeding two decades that the Fourteenth Amendment prohibited racial classifications, the Court rested its silence upon a technicality. In refusing to issue a relatively summary dismissal of the claim that unlawful discrimination could be redeemed if the object of the discrimination was white, the Court lent incalculable impetus to the Affirmative Action effort. Had the Court been as meticulous a year earlier in refusing to deal with important constitutional issues on the basis of technical mootness, it would have deferred a decision in the *Roe v. Wade* (1973)[11] case, as well (in which the Court identified a "constitutional right" for a woman to terminate her pregnancy). This, by virtue of the fact that Ms. Roe's pregnancy had already been terminated by natural means by the time that the Court's decision was handed down. Thus, there was no longer any immediate case or controversy before the Court.

An intriguing account of the Court's decision in *Defunis* was given in Woodward and Armstrong's *The Brethren: Inside the Supreme Court.*[12] According to the authors, the Court treated the Affirmative Action issue as a pure policy matter rather than as a significant constitutional question. In effect, they decided that a dose of Affirmative Action would be good for the country and adopted the easiest expedient to achieve this goal without having to face the moral issue or public protest. Their deliberations were summarized as follows:

> At first, all nine Justices leaned toward holding that such fixed racial quotas were unconstitutional. Marshall considered special quotas an insult to minorities but at the same time he knew better than anyone the difficulties posed by the remaining barriers for minorities in schools and in employment. Affirmative Action programs—most of them only a few years old—would all be at stake. On the other hand, to uphold the fixed quota for minorities might create an unfortunate precedent which could be used eventually to exclude minorities.
>
> At conference, several of the Justices indicated that they would not mind avoiding the issue by saying the case was moot; the law student had subsequently been admitted to the law school. The Court would have several more years before another reverse discrimination case worked its way through the courts. In the meantime, Affirmative Action programs could continue to bring about more educational and employment equality. Stewart offered to write a *per curiam* declaring the case moot. Burger, Blackmun, Powell, and Rehnquist agreed finally, but not before Douglas had first circulated an opinion ruling out Affirmative

Action, withdrew it the next day, and then substituted a draft saying that race could be taken into account in selecting candidates.

Even the liberals breathed a sigh of relief that the case was gone.

The issue was not gone for long, however. In 1978, the Court split badly over the similar case of the admission of Alan Bakke to the medical school at the University of California at Davis.[13] In an extremely confusing opinion, the Court totally avoided reliance upon any principles of constitutional law. Instead, it purported to interpret Title VI of the 1964 Civil Rights Act, which prohibited discrimination in the administration of federally-assisted programs.

In the *Bakke* case, the medical school at the University of California at Davis had set aside sixteen seats out of each class of 100 specifically for minority applicants. Non-minority applicants were ineligible for these reserved seats. Bakke claimed that this violated Title VI since the medical school was the recipient of substantial amounts of federal assistance.

In a 5–4 decision, the majority ruled that strict quota systems of the sort adopted by the University were in violation of Title VI, while ruling simultaneously that a university need not be color-blind in its admissions decisions. It could take race into account, but not through an inflexible system of racial quotas. In other words, a publicly-funded institution could judge applicants on the basis of their skin color, but please try to avoid doing it in too heavy-handed and blatant a manner.

The *Bakke* decision is especially confusing because each of the nine judges contributed to portions of the majority opinion, with only Justice Powell in accord with the full majority opinion. Four Justices—Stewart, Burger, Rehnquist, and Stevens—concluded that Title VI was clear in its prohibition of reverse discrimination; four justices—Marshall, White, Brennan, and Blackmun—identified no such impediment in its language. The key was Justice Powell, who was ultimately responsible for the seemingly contradictory holding. Alone among the justices, he concluded that the University had violated Bakke's constitutional rights under the Fourteenth Amendment's equal protection clause. Powell's support of Bakke was the strongest of all the Justices in the sense that he grounded his defense in the Constitution, even though Bakke himself had relied only upon Title VI in presenting his case.

However, Powell also concluded that the goal of a university in achieving a diverse student body was sufficiently compelling to justify consideration of race in admissions decisions under limited circumstances. The University of California at Davis, though, had simply not overcome its burden in demonstrating that its procedures were appropriately tailored to this objective.

The *Bakke* case offers little in the way of useful precedent because of its floating majorities and because Justice Powell was in relatively sharp disagreement in both instances with the Justices whom he joined in ruling coalitions. The *Bakke* case is most important, in my view, in its contribution toward the notion that there is a reasonable distinction that can be drawn between inflexible racial quotas (which are wrong) and the more flexible, color conscious policies of Affirmative Action (which are not wrong). The distinction is illusory, I believe; even were it not, I would see no legal, no moral, and no constitutional basis for tolerating the one but not the other.

One year after *Bakke*, the Court voted 5-2 not to overturn a pure quota plan developed under federal pressure by the Kaiser Aluminum Company and its union, the United Steelworkers. In that case, a white employee, Brian Weber,[14] had been refused entry into a skilled craft training program in favor of minority workers with less seniority and less experience. Weber challenged the training program on the grounds that it violated Title VII of the Civil Rights Act of 1964.

Section 703 of that Act made it an unlawful employment practice for an employer to:

> Fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex, or national origin; *or*. . . to limit, segregate, or classify his employees or applicants for employment in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex, or national origin.

Another provision in the same section expressly precluded anything in the Civil Rights Act from being interpreted to require any employer or any labor organization granting "preferential treatment" to any individual or to any group because of race, color, religion, sex, or national origin and expressly referred to such a bar applying to apprenticeship and other training programs.

Despite this apparently unequivocal language, and despite the equally unequivocal intent of Congress in enacting this law (as demonstrated in the Act's legislative history recounted at length by Justice Rehnquist in his dissent), the majority in *Weber* upheld this exercise in "voluntary" affirmative action.

While "voluntary" affirmative action by the private sector, just as "voluntary" discrimination, may not be prohibited by the Constitution (since the Fourteenth Amendment is limited to discriminatory "state action"), it is unambiguously clear that the purpose of the 1964 Civil Rights Act was to prohibit some forms of private discrimination that could not be reached directly through the Constitution. The constitutionality of the Act, grounded in the commerce clause rather than the Fourteenth Amendment, was unanimously upheld by the Supreme Court in an earlier decision.

In upholding Kaiser's apprenticeship quotas, in the face of Title VII, the Court, through Justice Brennan, placed great weight upon the "spirit" of the Act which was to "open employment opportunities for Negroes in occupations which had traditionally been closed to them." It also found in the language of Title VIII the implication that, because it did not "require" reverse discrimination, Congress certainly must have intended to "permit" the practice. "It would be ironic," Justice Brennan argued, if a law "triggered by a nation's concern over centuries of racial injustice" should be interpreted as prohibiting "all race-conscious affirmative action."

Ironic though Justice Brennan may have found it, that seemed to be precisely the intent of Congress, an intent reflected faithfully in the provisions of Title VII. The "nation's concern over centuries of racial injustice" was precisely the motivation for barring affirmative action. In order to go beyond race-consciousness, Congress felt that such a public policy had to be eliminated outright, not perpetuated in a slightly different guise and directed toward different victims.

Rarely if ever has the Court done such abuse to the clear language of a congressional enactment. I was moved at the time of this decision to introduce a resolution in the Senate restating precisely the wording of Section 703 and appending at the end, "and we mean it this time." I simply did not believe that Congress could have been any more explicit, any more direct, and any more clear in its attitude toward affirmative action than it had already been in this provision.

The "voluntary" quotas of *Weber* have more recently given way to the less voluntary quotas adopted by the Coca-Cola Company, in response to an economic boycott campaign by Rev. Jesse Jackson's Operation PUSH. In its recently adopted plan, Coca-Cola agreed to meet, by various deadlines, quotas for Black distributorships (32), Black Directors (1), and Black management (12.5%). Coca-Cola announced this agreement as part of its "moral covenant" with Jackson's federally-funded organization.

Having made clear the permissibility of racial quotas in the private sector, the Supreme Court wasted little time in making clear that nothing in the Constitution stood in the way of public-sector quotas, either—so long, of course, as they were directed against the White majority and non-protected minority groups. Official definitions of "minority" groups never seem to have included such historical victims of discrimination as the Chinese, the Jews, Eastern Europeans, Mormons, etc. In a 1980 decision —*Fullilove v. Klutznick*[15]—the Court sustained a congressional statute from constitutional attack that established quotas for minority businessmen on public works contracts.

In that decision, the Court upheld a 1977 law which set aside 10% of federal funds for local public works programs to be spent with businesses owned by a variety of selected minority groups. These businessmen possessed nothing in common but their skin color and ethnicity; there was absolutely no showing by Congress that any of them had ever suffered from discrimination in the past on the part of the federal government in letting out public works contracts. By a 6–3 vote, the Justices found nothing in this law that might run afoul of the Constitution, a Constitution that guaranteed that no person was to be denied "the equal protection of the laws."

Speaking for the majority in *Fullilove*, Chief Justice Burger stated that "appropriate deference" must be given to Congress in its decision to carve out a preference for Negroes, the Spanish-speaking, Orientals, Eskimos, Indians, and Aleuts. The Constitutional power of Congress to provide for the "general welfare" offered one basis for Congress to allocate public benefits in a racial manner, while Congress' authority under the enforcement clause of the Fourteenth Amendment offered an alternative basis of justification. That some innocent members of non-protected groups might be injured, i.e. non-minority contractors, was an "incidental consequence of the program" the Chief Justice observed. The same sense of benevolence on the part of the Court for the innocent non-minority individual could be sensed in Justice Brennan's remarks in the *Weber* case that Kaiser Company's quota plan did not "unnecessarily trammel upon the interests of the white employees." Only a necessary trammelling, no doubt.

Again, there was confusion as far as precisely what the High

Court indeed had said since there was no single majority opinion. In an intriguing concurring opinion, Justices Marshall and Brennan expounded upon the notion of racial distinctions and racial categories which were "stigmatizing" and those which were "non-stigmatizing," in the sense of being directed at white individuals, could be judged by a far more lenient standard than those which were directed at traditionally discriminated-against groups.

Again, there was an unusually harsh dissent. Justice Stevens, while alluding to the German *Reichstag* Laws which had defined Jews as individuals undeserving of various legal protections during pre-war Germany, stated unequivocally that Congress' law created "monopoly privileges for a class of investors defined solely by racial characteristics." Justices Stewart and Rehnquist were even more blunt. They observed:

> The equal protection standard of the Constitution has one clear and central meaning—it absolutely prohibits invidious discrimination by government. . .racial discrimination is by definition invidious discrimination. The rule cannot be any different when the persons injured by a racially biased law are not members of a racial minority. The guarantee of equal protection is universal in its application.

Such was the reverent silence that greeted the *Fullilove* decision, particularly it seems in Washington, that I hesitated before arguing on the floor of the Senate last year that it represented a shattering blow for "tyranny, discrimination and arbitrary government." At the same time, I introduced a proposed constitutional Amendment that would have restated the traditional purpose of the Fourteenth Amendment's equal protection clause by prohibiting Congress or the states from enacting or enforcing laws which make distinction on account of race, color, or national origin. In a comprehensive statement before the Congress, I outlined on September 3, 1980 the case against Affirmative Action and the case for such an Amendment.

CONCLUSION

Why has the spread of Affirmative Action been received in such deafening silence by America's opinion-makers? Why has a policy at such odds with fundamental American political ideals become so deeply entrenched with so relatively little controversy? There are a number of reasons. Partly, because Affirmative Action only marginally affects the press and politicians, Congress having thoughtfully exempted itself from all civil rights laws.

Partly also, because Affirmative Action is typical of modern politics in that its partisans are articulate, organized, and militant, while its opponents—I should more properly say its victims—are leaderless, intimidated, and ill-informed.

And partly, and perhaps most importantly, because there are many in this country who have still not realized that Affirmative Action has nothing to do with the transcendant cause of civil rights. Affirmative Action is not the logical and inevitable result of the civil rights efforts of the past three decades. It is exactly and precisely the contrary. It is a radical departure from the spirit and genius of the American Constitution (and I would be the first to admit that we have not always been faithful to that spirit and genius) because it denies that all are entitled to equal protection of the laws. Instead, it says that what you get depends upon who you are, what your skin color or ethnic background is. It is a retreat to the medieval notion of government by status.

Affirmative Action is immoral (and is unconstitutional) for exactly the same reasons that discrimination is immoral (and is unconstitutional). It means that we are not treating people as individuals. It cannot be justified or regarded as some form of "reparation" for the wrongs of the past. The people who benefit from Affirmative Action are not the ones wronged and the people who must pay—blue collar workers like Brian Weber—are not the ones who committed the wrong. What is "moral" about that?

The concept of Affirmative Action as a "temporary" remedy to past discrimination concerns me in another sense. Because Affirmative Action relies so heavily upon the use of statistical evidence of racial imbalance or disparity, I am perplexed as to the criteria that society is to use in order to determine when the extraordinary and "temporary remedy" of Affirmative Action is no longer needed. In other words, if evidence of statistical imbalance suffices to justify Affirmative Action, in the first instance, what evidence, short of statistical equivalence, will suffice to suggest that Affirmative Action is no longer needed? What alternative criteria are there? So long as the benefits of society, in each and every respect, are not apportioned to each racial and ethnic group in minutely precise proportions, I am concerned that there will be continued calls for Affirmative Action. So long as we accept the premises of Affirmative Action, I can see no logical stopping place for it short of some unrealistic and never-to-be-attained state of absolute equality of result.

The longer that the "temporary" expedient of Affirmative Action is in place, the more that the supposed beneficiaries of Affirmative Action will view it as an "entitlement," and the more difficult it will be to eliminate this "entitlement." (I share Professor Thomas Sowell's belief that there has been no real, long-term gain for minorities from most Affirmative Action programs.) There is little question in my own mind that Affirmative Action contains the potential for social division and disharmony of an unprecedented degree. The longer that our society organizes itself among the lines of its principles, the greater the likelihood that this potential will be realized.

While the Supreme Court has not been alone in its contribution to the growth of Affirmative Action in the United States, it shares the major responsibility. Not only has it been derelict in rejecting numerous opportunities to forthrightly reaffirm the principled thrust of its decisions on race over the past three decades, but through a blend of mal-interpretation (*Griggs*; *Weber*), uncommon exercise of judicial restraint (*Defunis*; *Fullilove*), and simple constitutional sophistry (*Bakke*; Fullilove), it has contributed substantially toward the development of a more race-conscious society. Given the leadership that the Court has exerted in the area of race relations since the *Brown* decision, this failure is compounded all the more. As Duke University Law Professor, William Van Alstyne, has put it, the Court has gone through one of its periodic "rites of passage" in dealing with the Affirmative Action controversy. It has failed in this, in my opinion; because of this we must now look to the legislative and executive branches of the national government for unaccustomed leadership on the racial issue. Debate over Affirmative Action may ebb and flow; it will not, I am quite confident, go away, however.

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Benign Victimization

MIDGE DECTER

Despite the fact that the policy known euphemistically as "affirmative action" is held in disfavor by an overriding majority of the American people, it seems safe to say that racial and sexual quotas are solidly established in our midst and will remain so for the foreseeable future. Indeed, nothing less than a serious social upheaval or major constitutional crisis – certainly no mere change of administrations or shift in the balance of congressional power – is apt to dislodge them. For public disapproval of the kind that can be expressed at the ballot box has not only proven to be no hindrance to the policy, it has in some sense provided reinforcement to the very process of its institutionalization. Affirmative action after all has a double agenda. First, there is the open agenda, the securing of places in society – preeminently in schools and jobs – for the members of particular groups claiming to have been intentionally and unjustly excluded in the past. And second, there is the somewhat more hidden one, which is to remove a certain order of social decision from the political arena and give it over to such agencies as the courts and bureaucracies where it can be kept securely out of public reach. Thus the widespread opposition to affirmative action has been held in the first instance to be itself prime evidence for both the justice and the necessity of the policy; and in the second instance has provided a spur to the policymakers to take matters ever more firmly into their own hands. Such a vicious circle will not easily be broken.

We can expect, therefore, to be living with quotas for some time – even though their most dedicated proponents hasten on every possible occasion to assure us that they are only a temporary expedient, a means of giving the provably disadvantaged that first indispensable leg up, after which reparation will have been made and justice achieved. By the time that golden age will have descended upon us, it is unlikely that any policy in a policy-ridden age will have done more than affirmative action to unsettle the series of delicate balances – between democracy and republic, individuals and pluralities, private rights and public necessities – it was once the unique political talent of this society to have struck.

Much has already been observed (as, for example, only recently in these pages) about the harmful impact of quotas on such instruments for maintaining the balances I have referred to as the schools and universities, the political parties, the agencies of government, and the economy. Moreover, that quotas are themselves indisputably unjust – not a means for doing away with the arbitrary exclusions of the past but merely a new form of arbitrary exclusion enforced against a new and different set of victims – has been frequently and forcefully pointed out (albeit as far as the courts are concerned, to no avail). It is on this point, as we have seen, that public opinion has drawn the firmest line: "unfair" is the characterization of quotas for which pollsters have found the highest level of assent. One issue, however (and it may be the most important issue of all) has so far not been paid the attention it deserves. That is the question of the impact of quotas on those who are their intended beneficiaries. How does preferential treatment affect those who are, in actuality or even only potentially, its recipients? Beyond this, how does it affect the feelings of others toward them? And finally, how does it affect the attitude of everyone toward the society he is living in?

There is, to be sure, good reason why this issue has been scanted. It resides in a realm difficult to get at directly, and in which the most important hypotheses are impossible to "prove." Attitudes are not opinions. Whereas opinions are held, and can be offered with varying degrees of forthrightness by the holder, attitudes are more often than not *betrayed* – sometimes in very roundabout fashion and usually over a considerable passage of time. In addition, they do not, or let us say should not, openly enter into the construction of legal briefs, which has been the major forum of public argument about affirmative action. Yet the attitudinal, or psychic, or spiritual effect of this policy, both on individuals and on the nation as a whole, will undoubtedly prove to be the most lasting and by far the most destructive.

The Beneficiary Groups

The two main groups at whose behest quotas have been instituted and on whose behalf they have been administered are, of course, blacks and women. True, their ranks have been swelled by American Indians and that mysterious entity, "Spanish Surname," but these latter groups have imposed themselves primarily through an extension of logic (as other ethnic groups are lately and on the whole feebly attempting to do). It seems highly unlikely that they would have devised such a measure, or could have succeeded at having it implemented, in their own right.

Now, leaving aside the whole question of the respective merits of the claims of blacks and women to recompense for past injustice, the two are entirely dissimilar groups. Their linkage under the common heading of disadvantaged minorities is, literally, an incongruous one. Blacks have had a shared history; women as such have not. Blacks have had a shared cultural and political experience; women as such have not. In fact, women can hardly be said to be a "group" at all, as that term is generally understood. For historical reasons that remain to be properly explicated, however, the "causes" of women and blacks came to be treated as one and dealt with in a single fashion. In examining the issue of attitude, we are consequently bound to find the two groups, with certain inevitable and interesting variations, in an ever more similar condition.

It would be impossible, as I have said, to test an idea about that condition with any degree of scientific authority, but a good deal of so-called soft evidence is all around us. And what this evidence points to is that recipients of preferential treatment tend to suffer from a serious, and no doubt in many cases permanent and irrecoverable, decline in self-respect. The advantages gained in this fashion appear to be bringing little sense of either private or public satisfaction but only more strident assertions of grievances yet to be redressed. If a certain number of places are secured in this industry or that university, a large number is stormily demanded. For an outsider to remark upon any improvement in the situation of the aggrieved is for him to call down upon his head heated accusations of heartlessness and bigotry.

This otherwise anomalous behavior on the part of the beneficiaries of preferential treatment is often laid to the phenomenon known as the revolution of rising expectations. That is, we are told that more jobs and special opportunities lead to greater rather than lessened unrest among the affected minorities, because they provide a glimpse precisely of what full justice might look like and thus feed an ever more impatient desire to attain it. But this explanation is less than satisfactory, because what needs to be accounted for are not only the demands themselves but the increasingly sullen, surly, and bitter tone in which they are proffered. The tone is one not of people impatient for more but rather of people who have discovered that their sought-for special privileges, being unearned and therefore feeling unmerited, are doing them, spiritually speaking, no good.

So it is, for example, that large numbers of women who have been carried into the academy have devoted their teaching and research to the field of Women's Studies, which is to say, to the perpetuation of the anger and hostility responsible for their being there. So it is that large numbers of blacks who have been — almost, as it were, forcibly — hurled up the professional ladder have elected to make a profession of being black. So it is that in both cases individual as well as collective endeavor is frequently conducted with the kind of routine incivility that comes with the lack of a sense of self-worth. It is an open secret in this country, alluded to only in whispers but commonly recognized all the same, that students admitted to colleges and professional schools by virtue of helping to fulfill a racial or sexual quota tend quickly to feel defeated there. Even the qualified, insofar as they know themselves to have won a competition through the added benefits of a special allowance, sooner or later undergo crises which are crises of self-doubt. Nor for those employed can the nervousness and low expectations of employers, the all-too-evident and unavoidable response to a situation in which they have hired as they have in order to fend off lawsuits, union actions, and the like, contribute much to self-regard.

How could all this be otherwise? At the heart of affirmative action, no matter how the policy is defined — whether as specific numerical quotas or only as desirable goals — lies the simple proposition that the individuals being hired or admitted or promoted would not in their own individual right be so. In terms of at least one of the central areas of their lives, in other words, they are not looked at or seen as individuals at all. In short, no matter how passionately affirmative action is sought and defended by its client groups, its underlying proposition is one that in the end must breed a painful resentment.

A Legacy of Resentment

But if self-doubt and resentment are the irresistible consequence of quotas for the beneficiaries, what can we imagine about the emotions of the rest of the people among whom they work and live? Polls, particularly the Sindlinger Poll undertaken for *Policy Review* (for which see the Spring 1980 issue),* offer persuasive evidence that the opposition to affirmative action so widely found in the American public is not race- or sex-related. Plainly, people are against preferential treatment not because they are against blacks or women. Eighty-four percent of the people surveyed, to take an extremely significant example, answered No to the question of whether they would avoid dealing with black doctors or women lawyers. Their opposition is not to the groups but to the principle. But to repeat, opinions are not attitudes. In the daylight world where people actively and willfully make up their minds, Americans have undergone a massive diminution of racial prejudice. In the dark night of the soul, however, affirmative action itself is creating a new wave of racism and sexism. The new wave of racism and sexism differs from the earlier sort in that it is based not on fear, hatred, or guilt but on contempt. There is, of course, also a good deal of the kind of rage always engendered by the spectacle of unearned advantage, though in this case rage of this kind seems to be confined largely to the particular groups who are made to feel the immediate pinch on their own flesh – better qualified students who lose out in the competition with less qualified, white male academics, ethnics whose own minority status has been left out of consideration, and so on. On the whole, though, the more telling, and far more consequential, response is an involuntary, almost instinctive, inclination to patronize. Whatever people *think* about the justice or injustice of making special allowances for blacks and women, what they *feel* is that the objects of these allowances are somehow inferior.

Frequently, to be sure, this feeling is accurate. Affirmative action is not simply, and not even mainly, a legal or administrative arrangement; it is a frame of mind – a frame of mind best characterized by the term "double standard." If someone must be included on whatever list in order to fulfill a quota or for the sake of appearances, a lowering of expectations and standards follows naturally. Such a lowering of standards extends far beyond jobs and school admissions. It seeps into the whole fabric of the culture. Accordingly, we have seen works written by blacks and women being praised all out of proportion to their merits, if any. We have seen public honors being bestowed for trivial if not laughable achievements. Perhaps more meaningful has been the application of a double standard to the public conduct of these groups: everything from lapses of taste to violations of the norms of decency to outright criminality has, under the sway of the general atmosphere of affirmative action, been condoned on the grounds that those who do such things are entitled by a history of inferiority to do no better. Just as the beneficiaries of affirmative action officially approve of the policy but necessarily feel demeaned by it, so the public at large may officially claim to feel no prejudice but cannot remain unaffected by the notion of group inferiority that is inherent in – indeed, that is the very determinant of – the double-standard system.

Eighty-four percent of the people polled may believe that in principle they would experience no inclination to avoid, say, black doctors; in practice they are likely as time goes on to assume that in the absence of powerful evidence to the contrary, any black doctor is underqualified. Before long, the irony will have escaped no one: by means of a policy intended to shortcut past discriminatory practice the American populace will have become subject to a kind of prejudice which, if more subtle, is also by the same token infinitely more difficult to overcome. This prejudice, moreover, will be no unforeseen accident. Affirmative action is in its very inception based on a racist (and, in its subsequent application to women, a sexist) idea, which is that blacks, or women, given the removal of all barriers to opportunity, could not ever fairly compete. The rhetoric of the policy's supporters focuses not, as might be supposed, on equality but on incapacity. And in this rhetoric lurks the real underlying truth of attitude.

Equal Opportunity Overthrown

Finally, there is the problem of what affirmative action does to the attitude of everyone – those who benefit from it and those who do not – about the nature of the society in which he lives. The assault on the old idea that in America equality means equal opportunity has an impact on attitudes far wider than merely those toward race and sex. The message being daily hammered home by the arguments for a system of preferential treatment is, to put it bluntly, that society is a racket. There are no such things as standards of performance. Standards are a shibboleth; look how easily – with a stroke of the bureaucratic pen – they can be dispensed with. There is no such thing as achievement. Achievement is whatever the authorities in charge decree it to be. Above all, there is no such thing as justice. Justice is whatever happens to be dispensed by courts of law – malleable to current social conditions and fashioned to the humors of political and social convenience. To live in accordance with the belief that standards or achievements or justice have a reality that is to some extent objectively measurable, that they matter, and that they are worthy of aspiration is to be a sucker. All of these, too, are ideas difficult to resist in the dark night of the soul, no matter how earnestly or piously denied in the course of daylight inquiry.

A society cannot long remain vigorous and productive when so massive a cynicism about its principal beliefs is permitted to spread through the underground consciousness. A complaint frequently heard these days is that nothing works as efficiently as it used to, from telephones, banks, industrial products, all the way down to postage stamps. This is a serious charge against the United States, whose vitality is characteristically expressed in efficiency. No one has yet attempted – possibly no one has dared – to estimate the contribution of affirmative action to this decline. There is the direct contribution, in the form of the lowering of the standards of competence for employment in all sorts of areas. And there is the far more important indirect contribution made by the growing cynicism I have described: even those who are competent find it less and less compelling to take pride in what they do.

Here, then, we have the unmeasured, and in some sense unmeasurable, results of affirmative action. Blacks and women (and some few others) are learning in a new way to regard themselves of lesser account and being encouraged to hold themselves not accountable. Their fellow citizens are willy-nilly adopting a double standard toward them and being encouraged to pervert the sense of fair play into a virulent new strain of racism and sexism. The society as a whole is being undermined with respect to belief in the terms of its past achievements.

Difficult to weigh and measure with precision as these results may be, they are already being given unhappy expression in countless ways among us. If nothing intervenes to break the grip of this policy – and it is hard to see what will – they will be given countless more, and even unhappier ones, in years to come.

FROM BACK TO PATRIARCY

(BY DANIEL AMNÉNS
ARLINGTON HOUSE,
1979)

VII

Affirmative Action

ONE WONDERS HOW many people who profess sympathy with feminism have read such books as George Gilder's *Sexual Suicide*, George Roche's *The Balancing Act*, Nathan Glazer's *Affirmative Discrimination*, or R. F. Doyle's *The Rape of the Male*, books that explain how the feminist program—

affirmative action, free day-care centers, E.R.A., divorce subsidized by husbands, the abandoning of the rational socialization of children, and so forth—works to undermine the family and civilized society.

The present chapter is concerned with the first of these, affirmative action.

The university where I teach recently joined the hue and cry for what is designated by the Orwellian expression "Equal Opportunity/Affirmative Action." The solidus between the two halves of the expression is intended to mean that my university believes in both of the stated principles: Equal Opportunity and Affirmative Action. If, however, one translates the name of this program out of Orwellese into plain English one finds that the translation of "Equal Opportunity" is "You will be employed, paid, and promoted on the basis of merit, motivation, and achievement," and the translation of "Affirmative Action" is "If you are a member of an unsuccessful group, a government bureaucracy will reward you for your membership in that unsuccessful group and will finance your reward by discrimination against Caucasian males." No person of integrity should affect to believe that these two contradictory policies are capable of being reconciled and combined into one.

It is perhaps to the credit of feminists, in one sense, that they do not even profess to demand Equal Opportunity. Here is Linda Jenness, the Socialist Workers' Party candidate for President in 1972. Writing of "women and Blacks and other oppressed nationalities [sic]" and asserting that the plight of blacks is "just as dismal" as that of women, she says:

> One proposal is that recently hired women and Blacks be given preferential seniority. That is, although only recently hired, they would automatically be given a higher seniority rating as partial compensation for past discrimination and as partial protection against layoffs.
>
> This is only fair. It is hardly the fault of Blacks and women that they are the last hired, so they should not be forced to suffer under the "last hired, first fired" rule.

And then this:

> Special seniority provisions are not new to the union movement. Ever since World War II, for example, some unions have guaranteed men drafted into war their jobs upon return. In addition to their jobs, they were given the seniority they would have earned had they not been drafted.
>
> Another proposal is to insist that layoffs cannot be used to reduce the percentage of women or Blacks in a particular workplace. In other words, this means preserving a minimum quota of jobs for Blacks and women.[1]

As though a woman, by virtue of her nonsuccess on the job market, were entitled to the same gratitude from society as a soldier who had given years of his life for the benefit of his country while others remained at home safely earning fat paychecks.

According to a feminist publication called *Spinning Off,*

> WOMEN-OWNED BUSINESSES are being sought for contracting by the LOS ANGELES UNIFIED SCHOOL DISTRICT. The District buys everything from data processing equipment, paint and maintenance supplies to vehicles, dry goods and printing materials. For information call Betty Miller 625-5115 or Daryl Freeman, 625-5256.

Women-owned businesses, that is to say, are being sought by feminists and house-males who have crept, climbed, and intruded themselves into the fold of the Los Angeles School District and who feel themselves entitled to break the law by using the taxpayers' money to discriminate on the basis of sex. To borrow the words of Linda Jenness, this is only fair.

According to Professor Thomas Sowell of UCLA, himself a black, "If the 'affirmative action' program were merely inane, futile, and costly, it might deserve no more attention than other government programs of the same description. But it has side effects which are negative in the short run and perhaps poisonous in the long run." He goes on:

> While doing little or nothing to advance the position of minorities and females, it creates the impression that the hard-won *achievements* of these groups are conferred benefits. Especially in the case of Blacks, this means *perpetuating* racism instead of allowing it to die a natural death or to fall before the march of millions of people advancing on all economic fronts in the wake of "equal opportunity" laws and changing public opinion.[2]

According to the same publication, *The Public Interest*, Winter 1976, single men professors earn less than single women professors, and black professors have higher incomes than similarly qualified whites.

The fact is that discrimination does not exist on college campuses—or did not until the introduction of affirmative action programs whose beneficiaries are underqualified people and the parasitic bureaucrats who run these programs: people like J. Stanley Pottinger and his pestilential hustlers and carpetbaggers in HEW and other federal agencies.[3] According to one of these hustlers, a Labor Department lawyer named David P. Callett,

> Federal guidelines for affirmative action programs . . . require . . . that employers use special standards when considering women and minority group members, and, if necessary, educate and train them so that they will be able to compete effectively for jobs. . . .
>
> It is when employers design their programs as a matter of expediency, rather than *spend the extra time and money to seek out* qualified women and minority group applicants, that court challenges arise.[4]

In other words, men, most of them breadwinners for families, are to lose out on jobs to women so unmotivated that they haven't even bothered to apply for them. We need affirmative action the way we need green golf balls.

According to an article in the *Los Angeles Times* of 17 May 1978, the carpetbagging Equal Employment Opportunity Commission, "long viewed as one of the most dismal failures in the entire federal bureaucracy," has recently "received another critical vote of confidence when President Carter chose the commission to become the centerpiece of the government's newly streamlined fair employment system, giving the agency greater clout and additional enforcement responsibilities," which permit it to take over affirmative programs from the Labor Department and the Civil Service, the principal government branches still fighting to maintain a meritocracy. This is now enabling EEOC, under its new director Eleanor Holmes Norton, to disregard much of its 130,000 backlog of complaint cases, which the Commission was created to decide on the basis of their merits, and to expand "individual complaints into broader class-action court suits." Instead of tediously and judiciously ascertaining whether a complaint has merit, Mrs. Norton, who complains that "the business community—those companies that illegally discriminate—has never had to take this commission seriously," can now sweep aside individual complaints (in which employers were presumed to have a right to a hearing) by largely relying on expanding individual complaints into broader class-action court suits—and "challenging employment trends for entire industries rather than focusing on individual firms." "I think businessmen who see such a serious, relentless litigation program under way will soon get the message that we mean business, and they had better start changing some things," says Mrs. Norton. The business community has evidently gotten the message, bitten the bullet, and decided that their claims to equity are not going to be considered by the carpetbaggers at EEOC, and that they had better pay the blackmail and protection money.

Another similar agency is the Office of Federal Contract Compliance Programs (OFCCP), which specializes in "taking contracts away from companies that refuse to comply with federal discrimination laws." In the first few months after OFCCP was taken over by its new head, Weldon Rougeau, contracts totaling $150 million were canceled. Previously, according to Rougeau, the bureau was "something of a joke. It was not respected. That cannot and will not continue."

Rougeau, a black, boasts that he has vast powers and means to use them. "We'll have about 20 or more cases within another year, with contracts that could cost the companies hundreds of millions of dollars."[5]

Faced with such pressures, most employers, even corporate giants, are simply paying the money, often without admitting guilt, and instituting quotas.

According to the feminist house-male Frank Askin, "There is nothing in law, logic, or morality which requires, as a neutral principle, equivalent treatment of oppressor and oppressed.[6] And from this premise a feminist named Wallach reasons as follows:

> If Askin's criterion is applied to the case of compensatory treatment of women, the proper test for such benign sex classification is not the emergent test of presumptive invalidity, but rather the traditional equal protection test of reasonableness of the classification, under which *preferential treatment of women would be permissible even though discrimination against women would still be presumptively invalid.*[7]

Here is the way this nondiscrimination works out:

> Any adequate concept of equality, as applied to the need for all-women law firms must include the right of all-women law firms to refuse to hire qualified male attorneys, because the liberation of women requires it. At the same time it must forbid all-men law firms to refuse to hire qualified female attorneys. Both of these positions are justifiable as necessary to the eventual attainment of equality by an oppressed and colonialized class—women—and until such time as women will have achieved the condition of *real* parity with all men. In the meantime, parity between the sexes is insufficient because it cannot yield equality.[8]

It is best not to reply to such an argument. The purpose of argumentation is to make something clearer than it was previously, and nothing can be clearer than the fact that this impudence is the very opposite of a plea for equal opportunity.

Discrimination against women is a myth. If one asks for evidence of it he will be given the familiar assertions that women earn little more than half of what men earn; that there are no women senators or Supreme Court justices; and that the higher paying positions in all professions are mostly held by men.

It is intelligible that women would like more money and that, like other relatively less successful elements of the population, they should turn to government bureaucracies in an attempt to get it. But there is one thing in their argument that remains unintelligible: How is their conclusion that women are discriminated against presumed to be derived from their premise that women are less successful than men? If there is a race between two runners and one runner comes to the finish line far ahead of the other, why may not the inference be made that the winner is the swifter runner? Why should it be supposed that the loser has lost because of unfair discrimination, and that the winner ought therefore to carry a handicap so that both runners will in future reach the finish line simultaneously?

Of course most men make more money than most women. How could it be otherwise? Most men have wives, who perform innumerable services for them. An employer who hires a married man is engaging the services of two people. Most married men have children for whom they wish, and by whom they are expected, to provide the good things of life. Men with such advantages and such motivation are most certainly going to earn more than those—women and single men—who lack them. It is well for society that they should—and that they should teach their sons to expect to do the same when they becomes husbands and fathers. Women, in fact, do not earn a mere 60 percent of what men earn, as the feminists allege. They earn 60 percent of what *married* men earn—and almost exactly the same as what single men earn. Actually slightly more.[9]

Put it this way: it is well that male aggression should be employed for useful purposes. It is the squandered aggression of single males, improperly socialized by the civilizing influence of the patriarchal family, that produces most crime and delinquency. Feminism is a program for increasing the number of such unsocialized males—whose antisocial behavior is then pointed to by the feminists as proving the need for more feminism.

Of course most whites will make more money than large numbers of disadvantaged minorities, as long as most of the former grow up in families headed by fathers, where the members of the family dine together at a regular hour and enjoy stimulating conversation at the dinner table, where the father helps his children with their homework after dinner, and where there are interesting magazines and shelves filled with good books—and as long as many of the latter grow up in households headed by women, where children perceive evidence on every side that to be responsible is to be female, and where the father's role as provider is usurped by a parasitic and wasteful welfare bureaucracy that tells large numbers of men that they are superfluous and can best serve their families by abandoning them.

Such men now have an additional burden placed upon them —an affirmative action bureaucracy that tells employers that they can fill two quotas by giving employment and promotion preference to minority women, thus further displacing minority men from their role as providers.

What of the effects of affirmative action on higher education? It is working to politicize our colleges and universities in unprecedented ways, ways that are discriminatory, racist, sexist, illegal, unprincipled, costly, and divisive. A decade ago, the following pronouncements by college and university administrators would have been unthinkable:

> Sacramento State College is currently engaged in an Affirmative Action Program, the goal of which is to recruit, hire, and promote ethnic and women candidates until they comprise the same proportion of the faculty as they do of the general population. (Roche, *The Balancing Act*, p. 28.)
>
> An announcement from San Francisco State College of October 8, 1971, of an "affirmative action plan" approved by HEW, calls for "an employee

> balance which in ethnic and male/female groups approximates that of the general population of the Bay Area from which we recruit. What this means is that we have shifted from the idea of equal opportunity in employment to a deliberate effort to seek out qualified and qualifiable[10] people among ethnic minority groups and women to fill all jobs in our area. (N. Glazer, *Affirmative Discrimination*, p. 60.)
>
> A letter in the *New York Times* of January 6, 1972, from some Cornell faculty members reports "that policy, as described in a letter from the President of the University to the deans and department chairmen, is 'the hiring of additional minority persons and females' even if, 'in many instances, it may be necessary to hire unqualified or marginally qualified persons.'" (*Loc. cit.*)
>
> Sidney Hook quotes a letter to the president of the University of Arizona on March 31, 1971, from an HEW official who told him "Department heads should be advised that, in addition to the active recruitment of females, affirmative action requires that Government contractors consider other factors than mere technical qualifications." (*Loc. cit.*)
>
> At one Ivy League university, representatives of the regional HEW demanded an explanation of why there were no women or minority students in the Graduate Department of Religious Studies. They were told that a reading knowledge of Hebrew and Greek was presupposed. Whereupon the representatives of HEW advised orally: "Then end those old fashioned programs that require irrelevant languages. And start up programs on relevant things which minority group students can study without learning languages." (*Loc. cit.*)

How long will the public continue to subsidize institutions of higher education that accept such arrogant dictation from ignoramuses who would have been flunked out of these same institutions had they been students in them twenty years ago?

> A January 12, 1973, memorandum from the Chairman of the English Department of College I of the University of Massachusetts, Boston, on faculty recruitment, reads, "At present, we are authorized, in accordance with the University's strong commitment to Affirmative Action recruitment, to interview only candidates from ethnic minorities." (*Loc. cit.*)

Glazer adds: "It has become common knowledge that minority faculty of any given level of achievement . . . would have to be paid more, if they were to be recruited." Such is the meaning of "Equal Opportunity" as we approach 1984 when, Orwell predicted, men will be saying, "War is peace."

> President Robben Fleming of the University of Michigan has already agreed to engage female professors for 139 of the next 148 vacancies on the faculty. (Roche, p. 58.)
>
> The faculty senate of SUNY at Buffalo has recommended that fifty percent of all new university appointments go to women or minority group members. (*Loc. cit.*)

The following announcements of job openings are collected by Roche, p. 6:

> The Department of Philosophy at the University of Washington is seeking qualified women and minority candidates for faculty positions at all levels beginning Fall Quarter, 1973.
>
> We desire to appoint a Black or Chicano, preferably female. . . .
>
> Dear Sir: The Department of Economics at Chico State is now just entering the job market actively to recruit economists for the next academic year. . . .

> Chico State College is also an affirmative action institution with respect to both American minority groups and women. Our doctoral requirements for faculty will be waived for candidates who qualify under the affirmative action criteria.
>
> Dear Colleague: Claremont Men's College has a vacancy in its . . . Department as a result of retirement. We desire to appoint a black or Chicano, preferably female. . . .
>
> I should very much appreciate it if you could indicate which of your 1972 candidates are either Negro or Mexican American.
>
> Dear . . .: We are looking for females . . . and members of minority groups. As you know, Northwestern along with a lot of other universities is under some pressure . . . to hire women, Chicanos, etc.
>
> Your prompt response to my letter of May 12 with four candidates, all of whom seem qualified for our vacancy, is greatly appreciated. Since there is no indication that any of them belong to one of the minority groups listed, I will be unable to contact them. . . .
>
> Dear Mr. . . .: All unfilled positions in the university must be filled by females or blacks. Since I have no information regarding your racial identification, it will be possible for me to contact you for a position only in the event you are black.

Administrators rushing to pacify the feminists, carpetbaggers, and other parasites who are swarming over us must know that this silliness has little support from the public which has to pay for it and which is becoming uneasily aware of the deteriorating value of a college degree. Our institutions of higher learning are more and more converting themselves into propaganda mills for feminism, homosexuality, radical politcs, and the destruction of the family:

> While most Americans favor equal rights and opportunity, they overwhelmingly reject the use of conventional affirmative action and preferential treatment to achieve them. Moreover, the evidence is clear that the goals and tactics of the women's movement enjoy only marginal support among Americans of *both* sexes.
>
> . . . .
>
> Public opposition to so-called remedial action, busing and affirmative action is even more decisive. A recent Gallup Poll asked the following question: "Some people say that to make up for past discrimination, women and members of minority groups should be given preferential treatment in getting jobs and places in college. Others say that ability, as determined by test scores, should be the main consideration. Which point of view comes closest to how you feel about this matter?"
>
> Americans rejected "preferential treatment" by a margin of more than 8 to 1. In fact, only 11% of women and 27% of nonwhites endorsed preferential treatment.
>
> . . . .
>
> In a national poll taken in 1976 for the Washington Post and the Harvard Center for International Affairs, the public was asked to choose between these positions: "Quotas in job hiring should be used to increase the number of women in good jobs" or "Job hiring should be based strictly on merit." 79% of the females and 82% of the males backed "merit," less than 20% of each sex favored quotas.[11]

Administrators and bureaucrats of course know of the public opposition to quotas, of their illegality, and of the opposition to them expressed repeatedly by the framers of the 1964 Civil Rights legislation which these administrators and bureaucrats profess to be implementing by the application of these quotas. Their method of living with these facts is to denounce quotas while employing them, insisting that they are not quotas but "goals and timetables"—an evasion as pitiable as that of the California legislators who professed to reform that state's wretched divorce laws by renaming divorce "dissolution of marriage" and by renaming alimony "spousal support." Or as pitiable as the following argument made in the Bakke case by Archibald Cox, the former Watergate prosecutor:

> The tall, crew-cut Cox, addressing the justices [of the Supreme Court] from behind the lectern much like [sic] he might a class on constitutional law, denied that the UC program imposed "quotas"—at least in the sense that quotas have been used in the past to limit the number of Jews admitted to professional schools.
>
> "But the Davis program did put a limit on the number of white students, did it not?" asked Justice Potter Stewart.
>
> "Yes," Cox answered, "but it was not pointing a finger at any group which had been marked as inferior in any sense. . . . It was not stigmatizing in the sense that the old quota against Jews was stigmatizing."[12]

The old quota against Jews was not stigmatizing at all, of course. It was imposed not because Jews were incapable of succeeding in fair competition but because it was presumed that in fair competition Jews would be too successful and would therefore displace less qualified non-Jews. Cox's assertion that nobody was stigmatized in the Bakke case, when UC Davis excluded Bakke in order to admit members of minority groups less qualified than Bakke, is as false as his assertion that there was no quota involved. Those who, with bureaucratic help, crowded Bakke out will carry the stigma of being quota-duffers for the rest of their lives.

Affirmative action might conceivably propel us into a new Reconstruction Era, this one nationwide rather than confined to the South. We might, before it is too late, learn some of the lessons of that first era and of the right-wing reaction that followed it. Those who refuse to take seriously the possibility of such a reaction have not read Rabbi Meir Kahane's book *Time to Go Home*, and they are choosing to ignore some important and increasingly audible signals.

> Listen to the radio talk shows that have given haters the opportunity to vent their feelings on the air to listening millions and the anonymity to screw up their courage to begin. One listens, and catches for an instant a brief look at the hell that looms ahead, a momentary glance into the ugly, sordid, soul of the hater.[13]

According to Tristram Coffin's *Washington Spectator*, 15 November 1977:

> Like the fabled Phoenix rising from the ashes of the past, an aggressive right wing is the most startling phenomenon of American politics today.
>
> . . . .
>
> The right would resurrect the old House Committee on Un-American Activities, which, *Congressional Insight* reports, "earned a reputation as a witch-hunting panel that used innuendo and guilt-by-association to intimidate people with left-of-center causes." The move to revive HUAC has 150 sponsors, and an omen of its use is in the *Congressional Record* inserts by its chief backer, Rep. Larry McDonald (D-Ga.). These are lengthy attacks upon liberals, radicals, the media and even fellow members of Congress.
>
> . . . .
>
> A political round-up in the Knight-Ridder newspapers reports: "In legislative battles in Congress, in political fund-raising, in mobilizing support on controversial issues throughout the country, in winning key off-year elections, and in sheer intellectual energy and talent, the 'New Right' has overwhelmed the traditional Republican establishment."
>
> . . . .

> The *Manchester Guardian* notes: "In W. Germany, the former Chancellor has written to the Bonn government pointing out growing and violent activity by West German neo-Nazis. The recent rally of European Nazis in Flanders outraged Belgian public opinion. . . . In Italy court cases are proceeding against Italian fascists charged with terrorist outrages."

According to *Extra*, January 1978:

> The Ku Klux Klan in Pasadena, Texas, is sponsoring what might be called "Dial-a-Tirade" recorded telephone messages, advocating everything from the extermination of gays to the ambush killing of liberal judges. A recent message warned of the dangers of gun control, urging callers to think about "shooting" anyone from the government who comes around to collect guns if gun control laws are ever enacted. The KKK tells callers it would be "unwise" to shoot an antigun judge in the courtroom. "Use your head," it advises, pointing out that judges are more vulnerable to attack in their homes at night, or while on the way home.

The danger of such a movement is of course exacerbated by the outrageous fees asked by the legal profession, fees that virtually deny access to the courts to any save the government bureaucracies and rich.

Young people may be attracted, as indicated in the following from the *Los Angeles Times* of 4 August 1977:

> There is evidence of renewed Nazi recruitment on high school and college campuses, particularly where there are racial problems. In Seattle, the 24-year-old son of a federal judge is trying to establish a unit at the University of Washington.
>
> Prisons also may be the focus of new Nazi membership drives.

. . . .

> Others are concerned that the movement is being orchestrated from a central source or that "outside money"—possibly from the Middle East or Europe—is being pumped into its treasury.
>
> . . . .
>
> The Midwest appears to be the prime future target, but no one is ignoring the possibility of Los Angeles as fertile area for Nazi racism when schools are integrated.
>
> . . . .
>
> "All these groups have been dead for years," he says, "and suddenly they're active as hell. Too many things are going on at once, and it isn't by accident.
>
> "Something is happening. Something is stirring. Mergers. Coalition. Movement."
>
> . . . .
>
> Probably the most active group in the L.A. area is the National Socialist League, the gay Nazis. . . . (T)here's a whole new cadre of ex-Nazis around who are smart enough not to wear swastikas. They join the Klan now or create churches.

The unifying power of homosexuality in military societies is well known.[14]

Those like President Carter who are concerned about civil rights in other countries might wish to ponder what thoughts must be generated in the mind of a white Afrikaaner, for example, as he contemplates the spectacle of affirmative action in America. Might he not think something such as the following: "A few years ago the Americans were talking loudly about equal opportunity—of employing and promoting people on the basis of merit alone. Now they have abandoned the idea of equal opportunity and replaced it by its opposite—discrimination against white males. If this can happen in America where whites are a majority, what would happen in South Africa where blacks are a majority? If whites allowed blacks equal opportunity, would blacks allow whites equal opportunity when they had the power to deny it? Not likely.

We had best remain in control of things." Those who decry the absence of equal opportunity in South Africa and at the same time support affirmative action in America might profitably consider whether they are providing the rationale for such an argument.

Other right-wing movements are becoming visible. The following is a Reuters dispatch printed in the *Los Angeles Times*, 11 June 1975:

> BUENOS AIRES—A new nationalist movement sworn to combat Marxism and Zionism has emerged in Argentina with a recruiting slogan, "The best enemy is a dead enemy."
>
> Foundation of the movement, named Caudillo (Strongman), coincides with an increasingly violent backlash against the left throughout the country.
>
> It has alarmed Argentina's large Jewish community whose members say they have detected signs of what could be a fresh wave of anti-Semitism here.
>
> . . . .
>
> "If one of us falls, the enemy's total destruction would not be enough to avenge his death. . . . We will not destroy buildings, windows and people without cause." But if there is a cause, nothing will be left standing, the posters said.
>
> More than 100 people a day have flocked to the recruiting centers, the Caudillo spokesman said. They were being organized into "command groups" for political training.
>
> . . . .
>
> Slogans and symbols on the posters are reminiscent of Hitler's Nazi Party. . . . Caudillo admits that it is based in part on European Fascist ideology.
>
> Members of Argentina's 500,000 strong Jewish community say they view the appearance of Caudillo and other recent events with concern.
>
> . . . .

> Right-wing death threats have been made against a number of Jewish personalities, including film director Sergio Renan. And there were unconfirmed reports that a right-wing terror squad, the Tacuara, which operated here in the 1960s, beating up Jews, was re-forming.

Two things would be needful to generate a right-wing revulsion: economic crisis and a grievance. These existed in the South during the era of the Ku Klux Klan and in Germany during the rise of Hitler. A very large number of economists are telling us that the economic crisis is on the way; and affirmative action is supplying a grievance to the most powerful group of American citizens—white males—by assuring them that they will not be allowed to be rewarded for their merit and achievement. So far, since the times are still relatively affluent, such injustice seems to be generating little in the way of reaction, and bureaucrats appear to presume that feminist clamors require more attention than the claim for simple justice by the one group that is unquestionably the victim of discrimination, white males.

Some of our universities (following the precedent of the Nürnberg Laws and the social legislation of the Soviet Union and the Union of South Africa) employ census reporters to make ethnic identifications of employees and prospective employees (usually without their knowledge) and to report on their skin color in order to determine who should be employed, promoted, or dismissed. Public school systems have found it necessary to classify students and teachers by race—often in defiance of state laws—to determine who should be removed from their neighborhoods.

It is becoming common to make large profits via affirmative action programs without having a viable case at all. The following news story describes one of the smaller settlements:

> COLLEGE AGREES TO PAY
> $80,000 IN BIAS CASE
>
> Without admitting guilt, Contra Costa College has agreed to pay $80,000 to settle a suit which charged that the college discriminated against Mexican-Americans.

> A statement signed by attorneys for both sides said the settlement was "*to avoid the burden, the expense and the uncertainty of continued litigation.*"
>
> A 1973 suit alleged that Joseph Crofts was dismissed from a counseling position and Luis Sosa was denied a college job because of their heritage.
>
> In a consent decree signed in federal court, the college agreed to pay Crofts $40,000 and Sosa $13,000. A sum of $27,000 was to be paid to the Mexican-American Legal Defense and Education Fund. The decree also called for efforts to improve opportunities for "Spanish-heritage persons" at the college. (*Los Angeles Times*, 20 November 1977; emphasis added.)

The qualifications of the people named were never an issue. All that was needed was to hire a law firm (at the public's expense) and raise a clamor.

ITT was shaken down for $125 million in wage adjustments and back pay to women and minority men; and there have been similar chousings of Merrill Lynch, Pierce, Fenner and Smith; NBC; and the *Reader's Digest* (*Newsweek*, 28 November 1977). All of the cost of this inanity is of course passed on to taxpayers and consumers.

"There is no requirement in Title VII," wrote Senators Joseph Clark and Clifford Case at the time when the Civil Rights bill was being debated in 1964, "that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance,[15] whatever such balance may be, would involve a violation of Title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race."[16] In less than a decade we moved from this to "We desire to appoint a Black or a Chicano, preferably female."

If there are to be quotas, should there not be religious as well as racial and sexual ones? It is notorious that Jews are overrepresented on university faculties, as they are in *Who's Who* and in the awarding of Nobel Prizes, whereas Baptists, Catholics, and Jehovah's Witnesses are just as conspicuously underrepresented in these favored groups. The Nobel

Prize Committee, in particular, must be not only sexist and racist (how many women are awarded prizes? how many are awarded to Ugandans or Haitians or to the Swedes' own oppressed Laplanders?) but also bigoted religiously. According to Joseph McCabe's *Rationalist Encyclopedia*,

> Of the prizewinners whose position in regard to religion is ascertainable, about sixty are included in this work, while fewer than twenty have declared themselves members of any of the Churches of Europe or America, and not more than three out of more than 200 are claimed in the voluminous *Catholic Encyclopedia*! Of about 150 recipients of the scientific prizes, the vast majority have never written or spoken on religion and we fall back upon Leuba's proof that 70% of American scientists (including teachers in institutions under sectarian influence) are atheists or agnostics, and, of the greater men, 84%. Of the minority of those prizewinners in science whose opinions are ascertainable, a score are declared Rationalists and are described in this work, while only four or five profess to be Christians (and are generally heterodox), and only one (Carrel) is a Catholic.

The most egregious part of the affirmative action program is its inclusion of onomastic criteria along with sexual and racial, which is to say its absurd pretense that Americans have been discriminated against—and therefore require bureaucratic favors—because they have Spanish surnames. Sacramento and San Francisco State Universities have declared that it is their wish not only to have the same racial and sexual composition on their faculties as is found in the general population, but to have the same surname distribution as well. This would mean, among other things, reimposing something eliminated in quite recent academic history—quotas for Jews. But why, if we wish to discriminate against Jews, would we then discriminate in *favor* of Sephardic Jews, so many of whom have Spanish surnames like Mendez, Mendoza, Franco, Spinoza, de Leon, and Abrabanel? And why should the relatives of Prince Juan Carlos de Bourbon be entitled to special bureaucratic favors because they have a Spanish surname, while the relatives of the Mexican emperor Maximilian be denied these same favors because they bear the Germanic name of Hapsburg? If John Archibald Martin is not qualified for special favors, why then is Juan Raoul Martin, who has the same surname? Is a Portuguese named Pereira entitled to claim benefits on the ground that his surname is Spanish as well as Portuguese? In fact, why would it not be possible for anybody to place himself on the favored list by Hispanicizing his surname? A Peterson could translate his name to Perez or put the nobiliary particle de in front of it and claim to have a Spanish surname. It's perfectly legal.

Many bureaucrats and administrators have already committed themselves to the follies of affirmative action and know that if they now reverse themselves they will lose face. And yet the problems created by affirmative action will not go away—they will get worse. The deterioration of American colleges in the decade or more that they have been discriminating against ability and merit in order to fill quotas is a familiar topic of cynical conversation on the part of the public and the teaching profession itself. It is better to acknowledge now that affirmative action has been an error, rather than postpone the acknowledgment until a time when it will be even more embarrassing.

What lies at the bottom of the problem is whether groups have rights or whether individuals have rights. The Civil Rights Act of 1964 was clear about the nature of rights: it declared repeatedly that there shall be no discrimination on the basis of race, sex, national origin, or religion (Title II and VI), none "on account of his race, color, religion, sex, or national origin" (Title VII). And Title VII adds that "it shall not be an unlawful employment practice . . . for an employer to give and act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. . . . Nothing contained in this title shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer. . . ." Senator Clark, one of the floor managers of the Civil Rights Bill, when asked whether the bill would not require employers to establish quotas (translation today: "goals and timetables") for nonwhites, replied that "quotas are themselves discriminatory." According to the late Hubert Humphrey, "The proponents of the bill have carefully stated on numerous occasions that Title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group." Senator Williams declared that the bill would "specifically prohibit the Attorney General, or any agency of the government, from requiring employment to be on the basis of racial or religious quotas. Under the bill "an employer with only white employees could continue to have only the best qualified persons even if they were all white."

Compare now these explicit and reiterated assurances with the working policy of EEOC:

> The anti-preferential provisions (of Title VII) are a big zero, a nothing, a nullity. They don't mean anything at all to us.[17]

A big zero indeed. Compare the following from the *Los Angeles Times* of 24 May 1972:

> Acting Los Angeles Mayor Billy G. Mills Tuesday signed an ordinance under which construction industry contractors doing business with the city must agree to hire increasing numbers of minority workers during the next three years. . . .
>
> The ordinance, which Mills, a black, sponsored 18 months ago, provides that by 1975, at the latest, minorities will be hired *at least* in proportion to their percentage of the total population.
>
> Contractors unwilling or unable to meet the *nondiscrimination* requirement will not receive city contracts.
>
> A minority is defined in the ordinance as a Spanish-surnamed American, American Negro,

> Oriental/Asian-American and American Indian. (Emphasis added.)

What we are talking about is not just panhandling but illegal panhandling and shakedowns. "By every standard of simple equity," writes George Roche, "by the standards of the American dream at its best, in the interest of all individuals, especially in the interests of the 'disadvantaged,' and finally in the interest of society as a whole, we must understand that the egalitarian dream now pursued by Affirmative Action programming on the campuses of America's colleges and universities is undercutting the very structure of the open society."[18]

What of quotas for homosexuals, who now, with increasing vociferousness, affect to represent themselves as victims of past discrimination and therefore as deserving candidates for bureaucratic favors? One lesbian gives us assurance that a demand for such a quota for her minority is unlikely to be made "in the immediate future"; but, in fact, the demand has already been made, though not (at the time of writing) enacted into law. Former Congressman (now New York Mayor) Edward I. Koch's bill H.R. 2998 *requires* employers to *seek out* and hire homosexuals on a quota basis. Incredible but true.[19] It would be interesting, in any case, to know how Mr. Koch would define a homosexual, in view of Kinsey's famous chart (*Sexual Behavior in the Human Male*, p. 638) indicating that while there are few exclusive homosexuals (Kinsey guessed 3-4 percent) considerable numbers of people have had some homosexual experiences. And what of the claim made by some homosexual writers that everyone is bisexual, so that there really is no such thing as a homosexual or heterosexual? Koch's proposed legislation, incidentally, would clearly violate the privacy of homosexuals who chose to remain closeted.

Hear a lesbian named Francie Wyland, writing in the *Los Angeles Times* of 3 July 1977:

> It is women's dependency on men . . . that prevents us lesbians from "coming out" and denies us free choice in every part of our lives.
>
> . . . .

> But we're pushing hard for change. The lesbian movement is emerging, millions strong. Just how great our impact has been can be seen in backlash crusades like the one Anita Bryant is waging against us. Our response to her, and to others who would deprive us and our children of a right to sexual choice, is the slogan that many of you have seen on our placards today, "Lesbian women have rights and so do our children!"[20]

"Once homosexuals receive official recognition as past victims of illegitimate discrimination," writes Patrick Buchanan, "the next step will be for affirmative action programs and quotas in hiring. . . . Homosexuality is not a civil right. Its rise almost always is accompanied, as in the Weimar Republic, with a decay of society and a collapse of its basic cinder block, the family. . . . Homosexuality, then, is not some civil right. In a healthy society, it will be contained, segregated, controlled and stigmatized, carrying both a legal and social sanction."[21]

Wyland continues:

> Straight women in the International Wages for Housework Campaign understand that the struggle for lesbian rights symbolizes a greater, common cause. What we all want is what they want: the power to determine our own sexuality, our own lives and the ability to live independent from men—without paying the price of poverty, isolation, overwork and forced childlessness.

This price can, thanks to bureaucratic machinery which homosexuals can manipulate, be passed on to men to whom they owe no reciprocal services.

Wyland again:

> Last week, at the International Women's Year Conference at the University of Southern California, straight and lesbian women passed the following resolution, to be taken to the National Women's Conference in Houston this fall:

> Whereas our poverty and social pressure force too many lesbian women to choose between coming out as lesbians, and having and keeping our children, be it resolved that we demand wages for housework from the government for all women so that we have the power to freely choose whether or not to be lesbian, and whether or not to have children; and be it resolved that we support our children's fight for their own right to sexual choice.

The fight that the children are waging is not further identified; but Ms. Wyland's own struggle is clear enough: she and *her* children are to have a choice about their "sexual orientation"; but this is possible only if lesbians are subsidized by the government, and that is possible only if the government is subsidized by taxpayers, including the children's fathers, who are to have nothing to say about the socialization and education of their children—particularly if they wish to point their lifestyle in the direction of normal heterosexuality.

Wyland once again:

> Wages for housework is an issue in which all women have a stake. But every women's issue is a lesbian issue, too, for every hardship on women—such as unpaid housework—is doubly oppressive for lesbians. No one—gay or straight—will be free until we women see in our hands the money we have earned by our labor.
>
> Until lesbians are strong, all women are weak. Therefore we are fighting to destroy the conventional definition of what is "natural" and "feminine" for women.

What have we here? "Every hardship on women is doubly oppressive for lesbians." In other words, it is unfair that there should be advantages to women in marriage—that a husband (rather than a bureaucrat) should have something to offer a woman when he proposes marriage to her. "No one will be free until we women see in our hands the money we have earned." In other words, no one will be free until we women (Wyland is not concerned about men except that they be free to subsidize the arrangement she is proposing) see in our hands the money men have earned, which must be transferred from them to us by agencies of government. Women are not free if their husbands merely turn the paycheck over to their wives, since this leaves ex-wives and lesbians unsubsidized and, therefore, unfree.

Discrimination is notorious in the very regulatory agencies that are mandated to end discrimination. Roche wrote in 1974 that at EEOP there had been no fewer than 85 complaints about reverse discrimination in hiring on a quota basis.[22] This was almost 10 percent of the staff at that time. HEW flimflammer J. Stanley Pottinger has in his Orwellian fashion acknowledged the use of illegal quotas: "While HEW does not endorse quotas, I feel that HEW has no responsibility to object if quotas are used by universities on their own initiative." It goes without saying that he and his Merry Men have no intention of keeping their oath of office requiring them to enforce the law against quotas.

Quotas and the hiring of "qualifiable" (i.e., unqualified) candidates are of course incompatible with standards. "Neither minority nor female employees should be required to possess higher qualifications than those of the lowest qualified incumbent," reads the Higher Education Guidelines of the Department of Health, Education, and Welfare. In other words, it is illegal for an institution to improve itself or even to maintain already deteriorating standards. It requires little foresight to see what this means for higher education. Large numbers of qualified white males, realizing that their talents will be used as justification for discriminating against them, will seek other outlets for these talents. Large numbers of females and minorities, realizing that their sex or their race rather than their abilities will be rewarded, will crowd into the field of higher education, knowing that bureaucratic assistance will be a sufficient compensation for their scholarly shortcomings.

A word needs to be said about the formula that recurs continually in discussions of affirmative action—that it is required to overcome the effects of past discrimination against women and minorities. No person of integrity should affect to believe that American women as a class—the most pampered humans, male or female, who ever lived—have suffered from discrimination. Their coddling and cosseting by American men is a constant source of merriment to foreigners, even to foreign feminists like Simone de Beauvoir. As for discrimination against minorities, the problem is basically that their disadvantages led to the discrimination rather than the reverse. What is required is not emphasis on grievances that facilitate panhandling, but a resolute attack on the disadvantages in question, whose removal will facilitate the entry of the minorities into the mainstream of society. Most of these disadvantages are associated with the parlous condition of so many minority families, a condition largely created by the displacement of many minority males by welfare. Another increasingly serious disadvantage is feminism. On this matter, Gilder is worth quoting at some length:

> The women's movement—particularly in its moderate manifestation—is the most important remaining organized enemy of black progress in America. It influentially opposes programs that are crucial to reestablishing the black male as the chief provider and supporter of the ghetto family—programs that might help black women in their beleaguered efforts to socialize the ghetto male.
>
> The chief requirement for giving upward mobility to any poor community is maintenance of a family and employment structure that affirms the male in his role as provider. If the male is the external prop of the family, he can venture into it without risk to his masculine confidence. One of the few successful movements for the socialization of truly indigent males in the black community—the Black Muslims—has learned this lesson—that the first step in restoring a poor community is to rectify the sexual imbalance bred by poverty. Because the males are clearly dominant in Muslim society, they can afford to submit to long-term patterns of female sexuality. They

> identify with their children and hence with the community and its future.
>
> . . . .
>
> It is unfortunate that it is a movement of racial fanaticism that hit on this clear imperative of social regeneration. But as long as the rest of the society fails to recognize the need to reestablish the male, the government will continue to reinforce the matriarchy—thus ensuring continued anarchy and crime in the ghetto.
>
> Andrew Billingsley has offered another example . . . of the effectiveness of special programs for *males*. In a study of "the sources of achievement" of leading black male professionals, Dr. Horace Mann Bond found that the crucial factors were (1) "a history of family literacy," (2) "a *father* with a determination of iron, an ambition for his children that is illimitable, and a disciplined mind that will exemplify and induce and foster good habits in children," (3) "a mother who shares these qualities with her husband," and (4) "a good school."[23]

One thing contributes more to success in society than all other things combined—motivation. Affirmative action destroys the motivation of white males by assuring them that their motivation, merit, and achievement will remain unrewarded. It destroys the motivation of women and disadvantaged minorities by assuring them that motivation, merit, and achievement are unnecessary for them, since they automatically qualify for society's rewards because of their sex, their race, their onomastic classification—or simply *because* they are unsuccessful. It provides two powerful disincentives for what it purports to encourage: if the "beneficiaries" of its programs do enter the mainstream of society, they lose the subsidy given to them for being unsuccessful and they must contribute to others less successful than themselves. What motive could they conceivably have for leaving the receiving end of the money pipeline and traveling to the input end to join Whitey?

Anything touched by an affirmative action bureaucracy becomes contaminated. If, under the sexist and racist principles of such bureaucracies, a status-conferring appointment should be given to a white male, the thought will occur to an impartial observer that this white male must have been exceptionally qualified, since he succeeded in spite of heavy discrimination against him. But if such an appointment is given to a female or a member of a minority, the thought will occur that the appointment may have had little to do with merit. Imagine someone considering treatment by one or another of two physicians, one black, the other white. Suppose he knew the two physicians had had the same training and experience and that they had graduated from the same medical school—and that that school had an affirmative action program that mandated lower standards for blacks than for whites. Which physician would he prefer to be treated by? The black physician would carry a stigma during his entire career because nobody could be sure whether he had been qualified on the basis of merit. The white physician would enjoy enhanced status from the knowledge that he had succeeded in the face of discrimination. Is it not clear that affirmative action must inevitably act to perpetuate and intensify racism rather than eliminate it?

Professor Thomas Sowell, the black economist previously cited, tells of his feelings on opening a letter in which he read, "Swarthmore College is actively looking for a black economist. . . ." This was Sowell's reply:

> (T)he phrase that came immediately to mind was one from a bygone era, when a very different kind of emotionalism was abroad, and a counsel facing Senator Joseph McCarthy said, "Sir, have you no shame?" What purpose is to be served by this sort of thing?
>
> . . . .
>
> *Many a self-respecting black scholar would never accept an offer like this*, even if he might otherwise enjoy teaching at Swarthmore. When Bill Allen was department chairman at UCLA he violently refused to hire anyone on the basis of ethnic representation—and thereby made it possible for me to come there a year later with my head held up. Your

> approach tends to *make the job unattractive to anyone who regards himself as a scholar or a man*, and thereby throws it open to opportunists.
>
> . . . .
>
> *(W)hat good is going to come from lower standards that will make "black" equivalent to "substandard" in the eyes of black and white students alike? Can you imagine that this is going to reduce* racism? On the contrary, more and more thoughtful people are beginning to worry that the next generation will see an increasing amount of bigotry among those whites educated at some of the most liberal institutions, where this is the picture that is presented to them, however noble the rhetoric that accompanies it.
>
> You and I both know that many of *these "special" recruiting efforts are not aimed at helping black faculty members or black or white students, but rather at hanging onto the school's federal money.* . . . (T)here are limits to what should be done to get [money], and particularly so for an institution with a proud tradition, at a time when the government itself is wavering and having second thoughts about this policy, and when just a little courage from a few men in "responsible" positions might make a difference.[24]

The principal reason for the large difference between the income and status of men and women has nothing to do with discrimination. It is the result of the greater motivation of men. A woman's importance is given to her at birth, built into her body. A man's importance must be earned—earned, in a civilized society, by work and achievement that enable him to function as an essential provider for his family. If women were economically independent of men, as the feminist and affirmative action programs wish to make them, men would have nothing to offer women. The male role would be destroyed, and society would become a vast ghettoized matriarchy in which women held the positions of responsibility and men sought to find a meaningful masculine role through violence, or sought to forget their predicament through alcohol and drugs. A man with a family knows that the security and happiness of his family, and his ability to maintain a meaningful role within it, depend upon his performance and achievement. He knows that his sexual prospects and his hopes for a happy and civilized life depend upon his functioning as provider. A man considering marriage with a woman cares very little about how much status she has or how much money she makes. He does not intend to earn these things by marriage. Indeed, if his prospective wife were educated and capable of earning a comfortable income on her own, he would need to consider seriously the fact that educated women with indpendent incomes have the highest divorce rate of any group in society. If his contemplated wife were actually rich, his ardor could be greatly cooled by the thought that marrying her might cast him, or seem to cast him, in the role of a gigolo or a stud.

Gilder's *Sexual Suicide* and Goldberg's *The Inevitability of Patriarchy* explain why it is that the status of men is (and for the good of society should be) largely acquired by performance and achievement, whereas the status of women is (and for the good of society should be) largely acquired by having high-status fathers and husbands. The world's fastest auto racer is (at the time of writing) a woman named Shirley Muldowney. The status that she enjoys from being a champion must be a very mixed blessing. A male champion would be pursued by females desirous of having status conferred upon them; but a female champion is unlikely to be pursued by many males desirous of being known as the man belonging to the champ. Such men would feel like—and be thought by both men and women to be like—males who sought out and wanted to marry women who were taller and more muscular than themselves. (Not surprisingly, Ms. Muldowney is cordially resented by the male drivers.) Liberated feminist sociologists who imagine that they can alter the nature of male and female status by writing elementary textbooks in which women are astronauts and firemen while men mop floors and change diapers are engaged in the most preposterous exercise in futility since Pope Callixtus III excommunicated Halley's Comet.

Women, we are assured by the Swedish feminist Maj-Britt Sandlund, "should not be able to acquire social status and privileges automatically by virtue of their husbands' contributions to public life."[25] In other words, housewives and mothers should be treated with less respect than career women. A man should have no motive to acquire status in order to confer it upon his wife, since the woman can and should acquire it for herself (even though, it turns out, she needs help from the bureaucrats). But why, one must ask, would a man wish to have anything to do with a woman to whom he had nothing to offer, a woman who could brush him aside when she had a whim to do so (as half of American wives do), a woman belonging to the group with the highest divorce rate in our divorce-plagued society, a woman more likely to deprive him of his children and home and property and income than other women? Why should he not bestow his attentions instead upon a woman who would not resent, but be grateful for, his achievements and the status he could bestow?

A *woman* considering marriage is most properly concerned with the status of her prospective husband and with his ability to function as a reliable provider for her and for their offspring. Were she to fail to consider these things with the gravest care, she would be deemed vain and frivolous not only by her own sex but even by men.

"The value of an employee," writes Gilder,

> is far more determined by his motivation and career ambition than by his education and credentials. To most men, success at work is virtually a matter of life and death, for it determines his sexual possibilities and affirms his identity as a male in a socially affirmative way. . . . For a female employee the sexual constitution of money is much less important. Her sexual prospects are little affected by how much she makes. Thus even if the woman is a very dependable employee, a payment to her does not usually purchase as great a commitment as does a payment to a man.[26]

In his *Naked Nomads*, Gilder expressed the view that a man's need for a woman is greater than a woman's need for a man. What he ought to have said is that a man's psychosexual need is greater. But there is a complementary dependence on the woman's side: her economic need for a man. It is the complementariness of these needs that makes civilized society possible. It is the feminist-bureaucratic attempt to make women "independent" of men that is threatening to destroy this complementariness, and to destroy society along with it.

This complementariness, what Gilder calls the sexual constitution of society, is based upon the acceptance by both men and women of the fact that women are central to the human enterprise. Feminists have been insisting so stridently that "women are not inferior" that the point must be emphasized. Men really do have an inferiority complex. Few transvestites or transsexuals are women who wish to pretend they are men; nearly all are men who wish to pretend they are women.[27] One would feel very sorry for a woman who said of some book she had written or some project she had completed, "That's my baby"; but this is what a man says of what he deems his greatest accomplishment. Women who have not been confused by feminism know well that there are better ways of being creative than by writing books and devising projects. It is because they have this knowledge that they feel less compulsion to perform and achieve in areas where men must perform and achieve. It is because men also have this knowledge that "women and children first" is such a deep feeling in them. And it is well for the world that this is the way things are.[28] It is a grave threat to society that affirmative action is attempting to penalize rather than reward the greater motivation, aggression, and achievement of males. The health of society requires that male aggression shall be channeled into useful directions, and that when it is so channeled it shall be rewarded. What happens when society denies such reward is visible in the ghettos, where so many men continue to be displaced from the provider role by the welfare bureaucracy and where so much male aggression, in consequence, assumes antisocial form.

Millions of women *have* been confused by feminism into believing that the male world of achievement is the world that really matters and that the role of mother and wife is of secondary importance. Moreover, this error is being transmitted by increasing numbers of mothers to increasing numbers of daughters, of whom so many, thanks to our divorce arrangements, are growing up in fatherless homes. The health of society requires that women shall know, and know with deep conviction, that the role of wife and mother is central to society. Such internalized conviction depends upon girls knowing that they are attractive to men—something which, in a properly constituted society with properly constituted families, they learn from the first men in their lives, their fathers. Henry Biller[29] and many other investigators have shown that paternally deprived girls tend to be lacking in femininity and self-assurance in interpersonal relationships. They are more likely to be homosexual and to suffer from other psychic ills—which is to say (though these are not Biller's words) they tend to be feminist types.

The American way of solving social problems is to tax the honest yeomanry of the realm in order to subsidize paternalists in the government who use this subsidy—or what is left of it after they have skimmed it—to confer benefactions upon those deemed to be in need of them. The most paternal and protective of these bureaucracies is the Bureau of Indian Affairs, founded in 1824. Its success in advancing the condition of American Indians is not conspicuous. Is there perhaps some connection between the bureau's paternalism and the stagnation of those it serves? There is no bureau of Jewish affairs; and one cannot but wonder whether there may be a connection between the benign neglect of the Jews and their conspicuous success in academe and elsewhere. In any case, the two most obvious advantages enjoyed by Jews, their patriarchal family structure and their tradition of learning, are not the kinds of advantages that can be conferred by bureaucracies which, in most cases, weaken patriarchal family structure by functioning as father substitutes.

More and more males are being phased out of civilized society. Sexual impotence is the commonest complaint at campus health centers across the country. Dr. Paul Popenoe informs us that homosexuality has reached epidemic proportions. Transvestism, transsexuality, alcohol, machismo, and violence are commonplace. The plight of males, described in such books as Karl Bednarik's *The Male in Crisis* and Alexander Mitscherlich's *Society without the Father*, is becoming nearly desperate. What are men to do?

The fact is that societies have never discovered any psychologically satisfactory and socially useful thing to do with a male other than to persuade him to take his meager assets—his greater aggression, his heavier musculature, and his probably superior ability in handling abstractions—[30] and to use them to earn an income that he can then offer to a woman, through whom, and through whom alone, he may participate in the biological future of the human race—in other words, to create a family.

It is of absolutely fundamental importance for any society which hopes to remain civilized that it shall induce its males to make this last choice. Yet there can be few societies that expend as much ingenuity in devising disincentives for it as ours does. Affirmative action programs are becoming the second most significant of these disincentives—second only to the divorce laws which confront males with the fact that there exists a one-hundred percent certainty that wives *can*, and a fifty percent probability that they *will*, deprive them of their children, their homes, and the entire set of motivations that make them useful members of society.

Another consideration. Most of the failures of society are men. The small number of women in the most desirable occupations is not more striking than the sparseness of women in the least desirable places in society. Feminists clamor to occupy fifty-one percent of the seats in Congress, to be fifty-one percent of our research pathologists, judges, and corporation executives. We may believe that they want real equality with men when they begin clamoring also to occupy fifty-one percent of the curbsides on skid row and fifty-one percent of the cells in our prisons. This, however, is not the kind of equality these elitist ladies have in mind.

If one wishes to determine whether women are discriminated against, the way to do so is not to inquire whether most high-status positions are occupied by males or females. It is to draw up a list of *all* the occupations in society, from the most desirable at the top to the least desirable at the bottom, and then to note whether the typical female occupations (housewife, nurse, children's librarian) fall above or below the median of the list in point of desirability. One would not need to seek long for the answer to that inquiry.

Feminists are in a double bind. They have taken over the first two points of the Black Panthers' program—unknowingly, of course. Point number one of the program is a demand for freedom; point number two is a demand for a subsidy. But to be free is to be independent and to be subsidized is to be dependent, and it is impossible to be both. The feminists' expectation, and their demand, is that their subsidization shall not be at the hands of husbands motivated by love of their families to place "women and children first," but by judges, lawyers, bureaucrats, social workers, and politicians who can bring about this same subsidization (which costs them nothing) because they have in their hands the coercive power of the law and the machinery of taxation. With these they can compel males to provide for females (and their army of attendant parasites) even after the motive of love of family is replaced by the motive of fear of prison. Such is the program of feminism—and of the police state.

NOTES

1. *Affirmative Action vs. Seniority*, pp. 3, 5.
2. *The Public Interest*, Winter 1976.
3. Pottinger, after briefly transferring his mischief-making to the Justice Department, has now retired from what is called government service. He now calls himself Stan Pottinger.
4. *Los Angeles Times*, 14 August 1976; emphasis added.
5. *Los Angeles Times*, 6 June 1978.
6. *Rutgers Law Review*, 1969; cited in Florence Howe, *Women and the Power to Change*, p. 29.
7. *Loc. cit.*
8. *Loc. cit.*
9. Gilder, *Sexual Suicide*, p. 6.
10. "Qualifiable" means, of course, unqualified.
11. Seymour Martin Lipsett and William Schneider, *Los Angeles Times*, 31 July 1977. Another poll cited in the *Times* of 21 November 1977 recorded similar results.
12. *Los Angeles Times*, 13 October 1977.
13. Kahane, p. 36.
14. "It is this tendency to infantilism, rather than any

social censure of homosexuals, which is the reason why homosexual relationships are nearly always temporary and casual. Their basically autistic character permits no deepening or broadening of emotional relations; on the contrary, these relations tend to be impoverished and to atrophy. Homosexuality is fundamentally antisocial. It can achieve social value only in purely military societies, as in Sparta, a state keyed to fighting and war. Only in such a culture can homosexuality become institutionally anchored. . . ." (Karl Bednarik, *The Male in Crisis*, p. 86.)

15. This maintenance of a racial balance is precisely the intention of the administrations at San Francisco State College and Sacramento State College, quoted above.

16. *St. Louis Globe-Dispatch*, 22 April 1976.

17. Cited by Glazer, p. 53.

18. George Roche, *The Balancing Act*. LaSalle, Ill., Open Court Publishing, 1974, p. 74.

19. *The Anita Bryant Story*, p. 101.

20. The reference to "our children" and their "rights" is worth careful attention. Unlike the homosexual agitprop that ridicules the idea of homosexuality being "catchy," Wyland appears to believe that if the children of homosexuals are socialized to be straight and to think that family life is some kind of norm, then they are being deprived of their rights. Compare the title and subtitle of Jill Johnston's book *Lesbian Nation: The Feminist Solution* with its dedication: "This book is for my mother who should've been a lesbian and for my daughter in hopes she will be." As regards the "catchiness" of homosexuality, cf. the remark of a nursing supervisor who expelled two lesbian nursing students: "If you have a couple of them, pretty soon half the dorm will be lesbian."

With Wyland's remarks about the power of the emerging lesbian movement, compare the following from Gifford Gibson and Mary Jo Risher's *By Her Own Admission*, p. 35:

> As an eager pupil, Mary Jo was astounded. The infrastructure of the gay community was broader and more complex than she had ever imagined. It was more than a spiritual bond, it was real, a tangible, organized community. She was out, a lesbian

woman with limited practical experience but giddy with anticipation.

21. *St. Louis Globe-Dispatch*, 7 June 1977. (It is not clear what Buchanan means by "sanction.")

22. EEOP is "what many in Washington say is the most mismanaged and overburdened Federal agency" (*Newsweek*, 16 January 1978).

> Its "guidelines represent a qualified promise by the commission that it will not cite employers for violating the civil rights of *white men* who believe themselves wronged by affirmative action hiring programs. . . . In point of fact, [the commission] has actually received very few such reverse discrimination cases relative to the tens of thousands of complaints filed under Title VII," the chairman said. "*Unfortunately*, there is a risk that even these few cases will have a chilling effect on future efforts by employers to take voluntary action." [Translation: employers might get the idea that white males have some rights too.] The key guideline is the commission's promise that it will dismiss *reverse* discrimination complaints in cases in which the employer asserts that the action complained of was taken as a voluntary remedial program to meet fair employment standards of the guidelines. [Translation: to discriminate against white males.]
>
> The guidelines state also that:
>
> —Employers are obligated to comply with the statute without awaiting the action of any governmental agency. [Translation: they are obligated to *violate* the statute in order to follow the guidelines.] (*Los Angeles Times*, 22 December 1977; emphasis added.)

23. *Sexual Suicide*, pp. 128ff.
24. Quoted in Roche, pp. 22f. The emphasis is Sowell's.
25. Dahlstrom, *Changing Roles of Men and Women*, p. 219.
26. *Sexual Suicide*, p. 105.
27. Eight out of ten sex-change operations are from male to

female. (Walter Cronkite, CBS Evening News, 6 December 1977.)

28. The house-male Ashley Montagu ridicules the expression "*Man* the boats. *Women and children first*," suggesting that it represents male manipulative psychology whose purpose is the exploitation of women. If your daughter is ever involved in a shipwreck, you may hope she finds herself surrounded by male chauvinists rather than by people like Professor Montagu, who not only believes chivalry is bogus but that the chief proof of the superiority of the female sex is provided by its greater longevity.

29. See the references given in Chapter IV, especially *Paternal Deprivation* and *Father Power.*

30. See Steven Goldberg's *The Inevitability of Patriarchy* for the evidence that males do possess this minor advantage, especially pp. 185ff.

Racial Classification: Politics of the Future?

L. H. GANN AND ALVIN RABUSHKA

One of America's greatest challenges concerns the question of civil rights. Past discrimination stains the pages of American history; racial discrimination persists today—albeit in a more covert fashion than in the past. The courts have taken a major part in rectifying injustice; the Supreme Court persists in the admirable endeavor to give *de facto* as well as *de jure* equality to our country's citizens.

No man of good will can quarrel with the Supreme Court's aim. But the methods currently followed may have consequences as yet unanticipated by the interpreters of our law. The Supreme Court closed its 1980 docket by upholding a federal law, passed in 1977, which requires that 10 percent of all federal works contracts be set aside for business firms operated by members of racial minorities. According to the Court's majority, Congress may discriminate in favor of some racially defined group that has suffered from prior discrimination. In the case of *Fullilove v. Klutznick*, the Court has further endorsed affirmative action programs that include minority admission on special terms to universities and job quotas set aside by employers for minorities. The Court has agreed to hear additional cases that may extend the quota principle for jobs and government subventions to minority groups.

Individual Rights

Affirmative action programs have subtly begun to change the entire tenor of American life. In the past, appointments and promotions to government service positions, government contracts, admission to universities depended—at least in theory—on individual achievement. Evasions and abuses there were aplenty. Both Catholics and Jews, for instance, once were subject to academic discrimination, not to speak of widespread and malignant discrimination against blacks. But at least the principle of individual merit went unchallenged, and after World War II became increasingly effective in its enforcement. Recent court actions, administrative decisions made by powerful bureaucrats,

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and the changing climate of academic opinion have helped to create a new concept of group rights of a kind familiar to countries like Northern Ireland, Lebanon, Cyprus, and the former Austro-Hungarian empire, where ethnic affinity counted as much as personal merit in the incessant competition for jobs.

Such concepts even started to affect hiring for the federal civil service. The federal government, to give an example, engages a substantial number of college graduates for higher-level positions such as customs agents and tax adjusters. Candidates for such positions used to be chosen by the so-called Professional and Administrative Career Examination (PACE) which—all the experts agreed—provided well-qualified candidates for technical jobs. For a variety of educational and sociological reasons, minority candidates performed less well—on the average—than candidates of other racial origins. Under pressure from political activists within the Carter administration and from career officials within the Justice Department, the old system was abolished; quotas were set up to achieve a 20 percent minority employment figure. (Once the Reagan administration had come to power, the quota provisions were eliminated.)

Opportunity Targets

The enthusiasm for filling quotas is also revealed in a succession of documents issued within the Department of Health and Human Services (HHS). The Department's instructions for "setting affirmative action targets under the Operations Management System" (dated April 1, 1980), and issued by the Assistant Secretary for Personnel Administration within HHS laid out, with Germanic thoroughness, the extent of "under-representation," and at the same time set up a complex system of "opportunity targets." The instructions issued contained mathematical formulations that might test the ingenuity of a doctoral candidate. For example, "to reach parity in 'T' years," the department set an equation whereby target hiring rate percentage equalled

$$\frac{d/T + L}{EOs}$$

(d = current deficiencies; L = expected loss; EOs = employment opportunities).

This directive was followed on June 3, 1980 with a memorandum issued by the Assistant Secretary for Management and Budget in HHS. Each operating section component of HHS was instructed to determine the precise percentage of "under-representation" of particular minorities and women within the GS 1-8, GS 9-12, and GS 13-15 grades of the civil service, compared with the National Civilian Labor Force. As soon as the department had decided that any group was under-represented in any particular grade, the department set for itself a percentage target to rectify the position.

Subsequent inquiries showed that there was under-representation among blacks, Hispanics, Asians, American Indians, women, and handicapped persons in one or more of the different gradings of the civil service. The investigators also found, however, a disproportionate over-representation of blacks and women in the GS 1-12 grades, which ran from double to quadruple that in the National Civilian Labor Force. However, HHS issued no directives to take over-representation into account. If the employment opportunity targets were met for particular minorities in all under-represented grades, the net result would be minority over-representation in the entire HHS staff. To be fair and to assure symmetry, blacks, women and other minority group members would have to be let go from jobs they currently hold. At least such is the implication of HHS's affirmative action targets policy.

Defining Minorities

The substitution of ethnic affinity for personal merit is a dangerous precedent. But court action raises the even more vexing question of how minority members should be defined in law. As court rulings affect an ever increasing part of the American economy, and as ever growing sums will be disbursed for the benefit of qualified minority members, the problem of defining who is, and who is not, a member of a minority will become increasingly urgent. How can unscrupulous members of the majority otherwise be prevented from claiming benefits reserved by law for minority members? If quota chiselling and quota cheating should come to parallel in extent present welfare chiselling and cheating, we shall have to rethink past assumptions.

At present, minority applicants for jobs or federal contracts identify themselves as such. But can applicants be trusted fairly to do so in the future? To ensure that only blacks, Hispanics, Asians, and Native Americans receive the benefit of court rulings, will it become necessary for the courts or the legislature to define minority members by law? Will some mechanism have to be found to select groups no longer eligible for minority classification, (say Japanese Americans, whose average family incomes now exceed the whites'), or to include new groups (immigrant Haitians, Cubans, Laotians, and Vietnamese)? Classification by race is not a new problem, and it is one that even the most explicitly racially-oriented regimes have had trouble in solving.

What fraction of black ancestry determines black eligibility? 100 percent? Three quarters? One-half? One-fourth? How important are phenotypical characteristics, such as type of hair, darkness of skin, eye color, and so forth? If a dark-skinned Appalachian with curly hair claims to have discovered his blackness, should his claim be denied? If it is to be denied, it must be on some legal criterion of racial classification to guarantee equal protection under the law.

The definition of "Hispanics" is even more difficult. Should Mr. Gomez, a native of Madrid and graduate of Spanish university, be classed as Hispanic? If so, should Mr. Gomez, born in Lisbon, be denied the same privilege? Are only those Hispanics already lawfully resident in the United States eligible for the quotas, or do the set-aside opportunities also extend to later immigrants, lawful and unlawful alike. Are Hispanics only those of Mexican and Puerto Rican extraction, or are Cubans, El Salvadoreans, and all Latin Americans eligible?

Above all, what happens to persons of mixed ancestry? Suppose, for example, that Andrew Maclean of Scottish descent, married Miss Maria Gomez, of Mexican origin. Are their children eligible under the one-half rule, even if they have blue-eyes, and speak no Spanish? How about Mr. John Alvarez, who has one Mexican grandfather? Should he be classified as "Hispanic," even though he happens to be a member of the WASP establishment in a small city in Iowa? How is descent to be traced? Through the father's line, as in traditional societies? Or would such a practice conflict with the feminists' demand for equal rights?

Racial Classification

If we are to implement our court rulings, we shall willy-nilly be forced to adopt an explicitly defined legal status of race. In the past, the Nazis developed an elaborate system of racial classification based on the Nuremberg Laws enabling the authorities to define with lunatic precision "Aryans," "Quarter Jews," "Half Jews," and "Full Jews." The Nazi scheme was, in the literal sense of the word, a matter of life or death for those caught within its chains. The Soviet Union's existing system of ethnic passports is somewhat more benign in intention; it does, however, enable the Soviet authorities to define with precision who is or is not a Ukrainian, a Jew, a Lithuanian, or a Russian—with all the attendant disadvantages that such a scheme may entail for the Soviet citizens thereby affected.

Still better known is the case of South Africa. The South Africans have much experience in dealing with the difficulties entailed by racial classification. They can and do distinguish between Mr. Andries Joubert, and Afrikaner (thus white) with dark complexion and curly hair, and his namesake, Mr. Johannes Joubert, a Colored (and thus designated non-white), despite his wholly European appearance. In the past the United States itself used a crude system of racial classification to intern Japanese Americans during World War II—despite all requirements of equity.

We do not live in Nazi Germany, the Soviet Union, or South Africa. To the man in the street, a national system of racial classification in modern-day America seems inconceivable. But if we are to implement existing court rulings we must adopt an explicitly defined status of race, despite all its inconsistencies. At present such classification need only be of a voluntary kind, applied merely to those competing for a federal contract with minority-designated job quotas or for public employment. As court rulings put millions of jobs and billions of dollars at stake, the system will, however, have to be extended to prevent "inequities" and "confusion." Racial slots moreover will have to be defined with increasing exactitude. To accomplish this task, we shall require a vast bureaucratic machine where patronage will be profitable and will surely be linked to racial politics.

We have already gone a long way on the road to racial classification. Standard Form 181 (7/80), U.S. Office of Personnel Management, FPM Chapter 298, entitled "Race and National Origin Identification" is written in a language quite familiar to a South African. Who is white? "A person having origins in any of the original peoples of Europe, North Africa, or the Middle East, except persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish cultures or origin. . . ." Who is Hispanic? "A person of Mexican, Puerto Rican, Cuban, Central or

South American, or other Spanish cultures or origins. Does not include persons of Portuguese culture or origin." Who is black? "A person having origin in any of the black racial groups of Africa, except Hispanics."

These definitions have a spurious air of exactitude. In fact they raise more questions than they solve. North Africans are classed as "white." But who is a North African—a Mauritanian, an Egyptian, a Moroccan? Some Moroccans have origin in the "black racial groups of Africa," and some have light skin, or European appearance. Are they both white? An Algerian is clearly "white" under the present classification, however swarthy his complexion. A blonde Castillian or a red-haired and blue-eyed Uruguayan, on the other hand, do not count as "white;" they rank as "Hispanics," together with Puerto Ricans of the darkest, as well as the lightest hue. A Portuguese from Braga in Northern Portugal is a "white," whereas a Gallego, born across the border in Vigo in neighboring Spain, absurdly counts as a "Hispanic." A Brazilian is "white," but not an Argentinian or a Mexican?

Identification Guidelines

All such classification schemes are bound to be absurd in their anomalies. But the trouble does not stop there. Such schemes are also bound to become increasingly complex as new ethnic pressure groups come into being, and as an expanding federal bureaucracy has more manpower available to tackle new tasks. In summer 1979, the Subcommittee on Civil and Constitutional Rights of the U.S. House of Representatives Committee on the Judiciary requested detailed information on the numbers of minorities and women serving in the federal judiciary. Despite the fact that court rulings are largely responsible for the minority data gathering requirements imposed on private institutions and other governmental agencies, the judiciary itself had never kept any records that would identify its workforce along racial lines. To collect these data for the Subcommittee, the Administrative Office of the U.S. Courts issued a series of guidelines to all courts. One particular guideline, issued on August 23, 1980, illustrates the fears we entertain. This guideline promulgated a requirement that federal court employees and judicial officers must thereafter be identified according to a listing of "race/national origin" that included the sub-groups "Arabic" and "Hebrew." The new subgroups were to be based, in the words of the circular, "on ethnic, not religious factors," a definition that would have delighted the heart of Alfred Rosenberg and other Nazi theoreticians of "racial science."

The document is a sorry "first" in American history. As Senator Moynihan pointed out, this was the first time that the federal government had ever asked that "Hebrew" employees be thus identified.[1] Fortunately, the agency's request aroused an unanticipated degree of opposition. A new circular, issued to all Equal Employment Opportunity Coordinators on September 26, 1980, thus backtracked, on the grounds that "the breakdown of the category 'white' to reflect the semitic [sic] subgroups designated as 'Arabic' and 'Hebrew' would not be necessary in the future." This information had been requested merely "in anticipation of a possibility that it might be needed in the future." The agency, however, did not even consider the possiblity that such racialist identification might be politically divisive, morally objectionable, and unacceptable to any legislature. To go further, the logic that compels a "Hebrew-Arabic" distinction among semitic peoples could force distinctions among the Irish and English, Norwegians and Danes, Poles and Czechs, until an ethnic-religious-linguistic-racial encyclopedia would be officially sanctioned.

Employee Compliance

But the racial classifier's troubles do not stop at this point. What happens when an employee refuses to classify himself in a racial fashion? Or, worse, what does an agency do when an employee deliberately furnishes a "wrong" classification. The tortured language of the "Conversion Procedures for Agencies, Attachment 1 to FPM Ltr. 298-10" from the Office of Personnel Management, dated August 17, 1980, reveals the extent of bureaucratic perplexity. If an official refuses to provide the data required by the agency, "then the agency is authorized to and will identify the employee's race or national origin as that which the agency visually perceives to be the correct classification for the employee." In other words, the agency will decide as to Mr. Lopez's "Hispanic" or Mr. Muhammed Abd al-Aziz's "white" status by looking him straight in the eyes!

If the employee provides what is evidently "wrong" information, the bureaucrat faces even greater difficulties. In such a deplorable case "the agency will counsel the employee as to the purpose for which the data are being collected, the need for accuracy, the agency's recognition of the sensitivity of the data and the existence of procedures to prevent its unauthorized disclosure." If the employee, however, proves obdurate and sticks to his chosen classification, the agency is bound to accept it. To the bureaucratic mind, however, this is a troublesome privilege; if it were to be widely exercised, it would surely wreck the entire affirmative action program which such classification schemes are designed to serve.

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[1] (*Congressional Record; Proceedings and Debates of the 96th Congress,* Second Session, v.126, 24 November 1980, no. 165)

Group Rights

If present trends continue, we may expect increasing refinements in racial classification; we may look to their increasing use; we may anticipate growing bureaucratic discretion in their application. It would be an ironic turn of fate if compliance with court rulings and administrative regulations, inspired by the most impeccably liberal sentiments, should compel us to elaborate a system of racial classification of the kind embodied in South Africa's passbook or in Nazi Germany's *Ahnenpass*.

West German law-makers have since learned from their country's unhappy past. The German armed forces, for instance, at various times in the past discriminated against Jews. Now discrimination is illegal. Jews are promoted in the German army—not through compensatory quotas—but through personal merit alone. A number of Jewish career officers are known to serve in the German military. But no one knows exactly how many, for the German constitution wisely prohibits public officials from inquiring into the citizens' racial or religious affiliation. In this country, we can profit from West Germany's example and—even more so—from our own traditions. The founders of the United States, the point bears repeating, wisely based our political institutions on individual rights. We are now drifting toward a new concept, the concept of group rights, a concept alien to the Constitution, but one increasingly acceptable to academic theory, court decisions, and administrative regulations. If this process is allowed to continue, it will inevitably lead to the fragmentation of American society, until the United States becomes a Lebanon or continental dimension. The time has come to call halt.

Why Racial Preference Is Illegal and Immoral

Carl Cohen

The role of race in assuring social justice is again squarely before the Supreme Court in a case whose full and revealing name is: *Kaiser Aluminum & Chemical Corporation and United Steelworkers of America, AFL-CIO, v. Brian F. Weber, individually and on behalf of all other persons similarly situated.*

Weber, a white unskilled steelworker, is Bakke's analogue. The Steelworkers Union and Kaiser Aluminum are not the only forces against him. The United Auto Workers and the United Mine Workers, the National Education Association, the Coalition of Black Trade Unionists, and assorted other unions are against him. The American Civil Liberties Union is against him. Even the United States government is formally aligned against him. On Weber's side is the Anti-Defamation League of B'nai B'rith (with some associated non-Jewish ethnic groups) and, according to repeated surveys, an overwhelming majority of the American population, including a majority of the black population.

But the issues at stake here, touching the most fundamental rights of individual persons, are not to be decided by counting noses. The chief things going for Weber are the Fourteenth Amendment of the U.S. Constitution, the Civil Rights Act of 1964 as amended, and sound moral principles. Thrice is he armed who hath his quarrel just.

Weber has thus far been victorious, both in the Federal District Court, and in the Federal Court of Appeals (5th Circuit, New Orleans). His formidable opponents find it difficult to overcome the plain words of the law applied straightforwardly to the established facts of his case. The law (Title VII of the Civil Rights Act, Sec. 703) forbids flatly all discrimination in employment because of race.[*] Beyond any possible doubt (as we shall see) Weber was discriminated against by his employer, and classified by his employer, and had his status as an employee adversely affected because of his race. That the employment practice through which this was done is a violation of this federal law is an ineluctable conclusion of any rational mind.

Is it not remarkable, then, that unions, industry, and government should now join in the effort to persuade the Supreme Court to evade this conclusion? Weber's opponents are neither foolish nor evil. They seek, somehow, to surmount the barriers to racially discriminatory treatment in order to achieve objectives they think good. Reflection upon this case will oblige the Supreme Court—and all citizens who would reach thoughtful judgment on these issues—to reconsider those objectives, and to appraise the means by which they have been pursued.

The *Bakke* case, and the *DeFunis* case before it, dealt with racially discriminatory practices in professional-school admissions—a matter for which the middle classes have, rightly, a tender concern. *Weber* deals with racial discrimination in blue-collar employment. The injury done Brian Weber was at least as great as that done Allan Bakke, and the class Weber formally represents is very much larger, if less articulate, than that directly affected by racially preferential school admissions. It is disturbing, therefore, that the voices raised in behalf of Weber's rights, and the rights of literally millions of individual citizens in like circumstances, are so painfully few. Silence now from quarters that were outspoken in opposition to racial preference in higher education may lead some to infer that self-interest, more than justice, was what motivated that earlier concern.

In both spheres—school admissions and industrial employment—the same issues arise: in the

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[*] Subsection (a) of Sec. 703 reads:

"It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S. Codes 2000e—2 (a) (1970).

allocation of scarce goods, may one's race count in one's favor? If ever, when? In *Bakke* a racially preferential admission system at the University of California Medical School at Davis was struck down, but attention to race in the admissions process was there held permissible within certain very narrow limits: to advance the diversity of an entering class, or to remedy the condition of specific persons who had been discriminated against by the school using the racial instrument. *Weber* is in many important respects different. Here the factor of diversity does not enter; here matters pertaining to intellectual qualifications are replaced by matters pertaining to seniority. Here the stakes are greater and the underlying moral issues are presented more cleanly.

I

THIS is what happened. Kaiser (Kaiser Aluminum & Chemical Corporation) and the union (United Steelworkers of America, AFL-CIO) sought to increase the number of minority workers in the skilled crafts at Kaiser's Grammercy, Louisiana, plant. To this end, in a 1974 collective-bargaining agreement, they changed the system whereby employees would enter on-the-job training for craft positions. Prior craft experience was eliminated as a requirement, and entrance ratios, by race, were established for acceptance in the job-training program. For each white worker admitted one minority worker would be admitted, until the percentage of minority craft workers in the Grammercy plant roughly approximated the percentage of the minority population in the surrounding area, then about 40 per cent. Dual seniority lists were established, one black and one white, and each two vacancies filled with the persons at the top of the two racially distinct lists.

It was an inevitable result of this system that some employees would be favored because of their race, and some would be injured because of theirs. Brian Weber was refused admission to the job-training program although his seniority was higher than some employees from the other racial list who were admitted. Weber sued on his own behalf and on behalf of all non-minority employees who applied for on-the-job training at the Grammercy plant after that labor agreement was signed. A racially preferential scheme for allocating on-the-job training opportunities, he argues, is a clear violation of the Federal Civil Rights Act.

One portion of Title VII of that Act deals explicitly with on-the-job training programs. That portion (subsection (d) of Sec. 703) reads as follows:

> It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, *including on-the-job training programs*, to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training [42 U.S. Codes 2000e–2 (d) (1970); emphasis added].

Was it prescience that caused the Congress to formulate this ban with language so precisely and indubitably covering the case at hand? Not at all. Title VII had as its purpose the elimination of all ethnic favoritism in employment; there had been, at the time of its adoption, plenty of experience of the ways in which racial prejudice can be given effect—one of the commonest being in job-training programs. In that form as in all forms, said the Congress in effect, racial discrimination in employment is no longer permissible.

How can Kaiser and the union (and the U.S. Department of Justice) reasonably argue that such a scheme is indeed lawful or fair? They contend that the law, properly interpreted, does not forbid this variety of racial preference, which they think justified by our history of discrimination. They contend that if the pursuit of pressing social objectives now imposes incidental costs on individuals, Weber and his like are the right persons to bear those costs. They contend that they were ordered, by the U.S. government, to introduce racial preference of precisely this kind. And they contend that Weber wasn't really injured by this program at all. I examine these arguments in turn.

II

"KAISER and the union [the first argument begins] reached an agreement that was fully in accord with the spirit of Title VII. Theirs was a voluntary effort to bring a greater number of minority workers into the skilled crafts. Congress never intended to forbid such voluntary efforts. If now the product of such agreements, reached through collective bargaining, is struck down, the cause of racial justice will have been dealt a devastating blow.

"We must [this argument continues] permit management and labor to join, as in this case, to correct a racially unbalanced situation flowing from the historical and social realities of American life. Blacks have been discriminated against, cruelly and consistently, by industry and by unions. Now an effort is being made to give redress. It is an ironic inversion of the Civil Rights Act to use that Act to forbid the only instruments that may effectively achieve its own intended result.

"It is true [the argument proceeds] that Title VII specifies that preferential treatment of racial minorities is not required [Section 703 (j)]. But that is not to say it is forbidden. When its aim is precisely that of the Act itself, it must not be forbidden. Weber relies upon the narrowest construction of the words and misses—inadvertently or deliberately—the remedial spirit of the law and of the Kaiser program here in question."

The main pillar of Weber's opposition comes to this: "If the Court agrees that racial quotas such as this one are discriminatory, we will be kept from doing what many of us think it is necessary to do, and do quickly, in the interest of long-term justice. Let it be understood, therefore [the argument concludes], that this quota, although it does of course distinguish by race, and does, admittedly, give favor by race, does not 'discriminate' by race in the bad sense that the law condemns. When we come to realize that some plans for racial balance, while they may have adverse effects upon some white workers, are nevertheless justified by pressing societal needs, we will also see what interpretation of the law is required by justice."

To put the argument plainly is to see both its earnestness and its frailty. The requirements of the Civil Rights Act, which in turn were intended to give concrete meaning to the constitutional demand that no citizen be denied the equal protection of the laws, were aimed at bringing to a final halt all formal discrimination on the basis of race—and color, religion, sex, and national origin. It certainly was not intended, and it obviously was not formulated, to forbid only such racial discrimination as employers and unions thought objectionable, while permitting any racially discriminatory schemes that employers and unions might by agreement find worthy or convenient. What the employer and the union happen to prefer, whether their motives be honorable or crass, has absolutely no weight, says the law in effect, against the *right* of each individual citizen to be dealt with, in matters pertaining to employment, without regard to race, religion, or national origin.

III

"BUT that cannot be the correct interpretation of the law," answer Kaiser and the union in chorus, "because the Supreme Court has several times, in the years since, recognized the lawfulness and wisdom of racially preferential employment schemes. Indeed, our federal courts have *ordered* the imposition of such racial preference in some cases! So it is clearly false that *all* racial preference has been forbidden. If that is so, then it is not obviously true that *this* scheme for racial preference has been forbidden."

This rejoinder brings us to the core, legal and moral, of the controversy in *Weber*. What kind of attention to race does the Civil Rights Act (and, indirectly, the Constitution) permit? And what should it permit? In the *Bakke* case, this question was complicated by the entry of First Amendment considerations pertaining to the robust exchange of ideas in the classroom; the holding in *Bakke* was tangled by the fact that Justice Powell's pivotal opinion, although condemning racial favoritism, permits attention to race to advance diversity among an entering school class. Here, in *Weber*, such First Amendment considerations are totally absent. What, if anything, remains to justify race-conscious employment practices?

There is a clear and honorable answer to this question, given forcefully by federal courts at every level. Title VII of the Civil Rights Act forbids all deliberate discrimination by race, save only in cases where racial classification is absolutely essential to give redress to *identifiable persons* injured by racial discrimination *and where the injury done them was done by the same party upon whom the numerical program is imposed.* One purpose only may justify numerical schemes using racial categories: the *making whole* of those to whom redress for racial injury is specifically owed, by those who owe it.

For example: the known victims of racial discrimination by a trucking company have been held entitled, as a remedy, to a place in the seniority lists of that company that would have been theirs if they had not been so victimized. To put them now in as good a place as they would have been in but for the discriminatory employment practice from which they can be shown to have suffered, it may be necessary to attend to race. Only in that way can the victims be made whole; they would otherwise remain subordinate to persons who, had it not been for racial discrimination in that company, would now be their subordinates. (See *Franks* v. *Bowman Transportation Co.* 424 U.S. 747 [1976].) In such cases, the racially oriented remedy cannot be refused on the ground that the effect on other employees is adverse because, although the employees who suffer from the imposition of the plan are very possibly innocent themselves, they have clearly benefited, in seniority, from the specific discriminatory practice for which remedy is being given. Race-conscious remedies for the victims of illegal discrimination are lawful, consistent with Title VII, only in such circumstances.

Weber and Kaiser Aluminum are in no such circumstances. Upon examining the facts, the Federal District Court found that Kaiser had not been guilty of any discriminatory hiring or promotion at its Grammercy plant. Kaiser's industrial-relations superintendent at that plant testified that, prior to 1974, Kaiser had vigorously sought trained black craftsmen from the general community. Advertising in periodicals and newspapers that were published primarily for black subscribers, Kaiser found it very difficult to attract black craftsmen. The evidence established two key facts:

1. Kaiser had a serious, operational, no-discrimination hiring policy at its Grammercy plant from the day of that plant's opening in 1958.

2. Not one of the black employees who were offered on-the-job training opportunities over more senior white employees (pursuant to the 1974 Labor Agreement) had been subject to any prior employment discrimination by Kaiser.

From these facts it is an inescapable conclusion that the quota system at Kaiser's Grammercy plant was not an instrument for the specific redress of persons injured by racial discrimination there; it was unabashed racial preference aimed at numerical proportions having nothing to do with past conduct in that plant. Such preference Title VII outlaws. The distinction, between impermissible racial preference and permissible remedy for past discrimination, is put eloquently by the Circuit Court of Appeals in affirming Weber's rights:

> If employees who have been arbitrarily favored are deprived of benefits capriciously conferred on them in order that those who were arbitrarily deprived may receive what they should, in fairness, have had to begin with, no law is violated. This is so even if both the class whose rights are restored and the class required to "move over" are defined by race—if the original arbitrariness was defined in that manner. And the reason is that no one is being favored or disfavored, advantaged or injured, under these circumstances *because* of race; rather, those who have been unjustly deprived receive their due and those who have been arbitrarily favored surrender some of the largesse capriciously conferred on them. That these consequences end by race is a mere incident of the fact that they began that way.*

But those who were favored by race at Weber's expense were admittedly not the victims of such original arbitrariness. The Circuit Court's support of Weber is therefore categorical: "[U]nless a preference is enacted to restore employees to their rightful places within a particular employment scheme it is strictly forbidden by Title VII" (p. 225).

IV

SINCE it is clear that the beneficiaries of this racial program were not victims of Kaiser's previous discrimination, and equally clear that the use of dual seniority lists is an explicit effort to favor blacks over whites, the defenders of this program are compelled to resort to a different justification—past "societal discrimination."

"We cannot deny [say the defenders in effect] that the two-list system deliberately favors one race over another. But we do deny that favoring this race at this time in this country is unfair. We contend that, in view of the historical discrimination against blacks (and other minorities), the racially preferential device now before us is entirely justifiable. It is justifiable not only because blacks have been so long oppressed, but because, as a corollary, whites have been unfairly *advantaged* by race prejudice. The white employees of Kaiser who are passed over by this plan may indeed be innocent of any racial discrimination themselves, but they have been and are the beneficiaries of racial discrimination by others. This is the heart of our justification. Favor to blacks now is just because of the favor whites have enjoyed until now."

This is the principled argument by which many without selfish interests in these programs are persuaded that they are fair. One might have expected the American Civil Liberties Union, for example, to spring to the defense of the rights of an almost defenseless individual. Instead it joins the forces against Weber because the ACLU has convinced itself that his rights have not really been infringed on, even though he suffers from deliberate disadvantage because of race. How can that be?

"Racial preference in employment is justified [the argument proceeds] when it is a response to the morally legitimate demand that the *lingering effects* of past racial discrimination be remedied. The lingering effects of historical oppression include the continuing losses of decent employment, together with the money and status that it brings. But the same historical race prejudice that has systematically blocked minorities from access to decent jobs has conferred an involuntary benefit upon whites because, while the number of desirable jobs remains roughly constant, the elimination of competition by minority workers results in the availability of desirable jobs for whites in generous disproportion to their numbers. This benefit is conferred even upon those whites who may, in fact, deplore the prejudice from which they gain. Yet they did gain. Now, with racial quotas favoring blacks, they lose. Their present loss is morally justified by their earlier gain. The primary target of racially preferential programs should be those guilty of past unlawful discrimination, of course. But where those guilty parties simply cannot be identified or are no longer available to make restitution, a secondary but legitimate target is the unjust enrichment attributable to that racial discrimination. Quota plans, like the one devised by Kaiser and the union, seek to redistribute that unjust enrichment. Seen in this light, their fairness—the moral rightness of racial preference for societal rebalancing—cannot be denied." So reasons the ACLU explicitly, and many other honest citizens implicitly, in giving pained approval to race quotas.

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* 563 F. 2d 216, 225 (1977); page references below refer to this decision. The Supreme Court has agreed. In a case arising from a plan devised to give remedy to school employees within a previously discriminatory system, the Supreme Court declined review of a decision that, in view of the source and nature of that earlier injury, a minority worker may there be entitled to preferential treatment "not because he is black, but because, and only to the extent that, he has been discriminated against" *Chance* v. *Board of Examiners*, 534 F. 2d 993, 999 (1976); cert. denied 431 U.S. 965 (1977).

The argument fails utterly upon inspection. It relies upon a premise that is clearly and admittedly false in the *Weber* case and like cases. And were all its premises true, they could still not justify the racial preference here in question.

Consider the premises first. The adverse impact on Weber is held justifiable by his unjust enrichment resulting from the bad conduct of others. But if Weber were in any way the beneficiary of past discrimination, he certainly was not unjustly enriched by employment discrimination in the Grammercy plant. In that plant, it is agreed by advocates of the quota and by the courts, there had been no refusal to hire or promote blacks or other minorities, no racial discrimination from which Weber benefited. But the injustice done to Weber is manifested in the loss of entitlements he earned by ten years of work *in that plant*—not in the Kaiser Corporation or in the workforce at large. His entitlements in this matter cannot have been acquired as the result of the historical misconduct of others. Long before Weber came to work at that plant, blacks and whites received equal employment treatment there—so the claim that simply by virtue of his having the seniority that he did in the Grammercy plant Weber was enjoying an unjust enrichment is simply false. That false premise cannot justify "redistribution." The Circuit Court put the matter crisply: "Whatever other effects societal discrimination may have, it has had—by the specific finding of the court below—no *effect* on the seniority of any party here. It is therefore inappropriate to meddle with any party's seniority or with any perquisites attendant upon it, since none has obtained any unfair seniority advantage at the expense of any other" (p. 228).

But suppose *arguendo* (what is not true) that Weber had been unfairly enriched by past racial discrimination. What would follow? The enrichment thus identified might then be a target for redistribution. Among whom? To take from Weber and give to another because Weber got his seniority "unjustly" could conceivably be justified (if ever) *only* if those to whom the redistribution were made were the same persons from whom the spoils had been taken in the first instance. The appealing argument by which so many are persuaded makes the faulty supposition that, if *X* has gained fortuitously but undeservedly from some unidentifiable *Y*, we are morally justified in taking from him and giving to a wholly different *Z* who suffered no loss to *X*'s benefit, but who happens to be of the same *race* as that injured but unidentifiable *Y*. Buried in this reasoning process is the mistaken premise that the distribution of goods or opportunities is rightly made by racial categories. *Z*, the person now given preference over *X* because of race, has a right to get from him (this premise supposes) because *Z* is black, and blacks have been so long oppressed. But rights do not and cannot inhere in skin-color groups. Individuals have rights, not races. It is true, of course, that many persons have been cruelly deprived of rights simply because of their blackness. Whatever the remedy all such persons deserve, it is deserved by those injured and because of their injury; nothing is deserved because of the color of one's skin. This is the philosophical nub of the *Weber* case.

V

So long-lasting and self-perpetuating have been the damages done to many blacks and others by discrimination that some corrective steps must be undertaken. The moral anxiety created by this need for affirmative action accounts, in part, for the willingness of some to tolerate outright racial quotas. In the passion to make social restitution, sensitive and otherwise fair-minded people have gotten the moral claims of living persons badly confused. The head of the Office of Federal Contract Compliance (by whom, as we shall see, Kaiser was threatened) epitomizes this confusion: "Society is trying to correct an age-old problem, and Weber is a victim of that process. There is nothing I can say to him. This is something that has to happen. The question is whether you give priority to a group that's been systematically deprived of opportunity while Brian Weber's parents and grandparents were not discriminated against. If someone has to bear the sins of the fathers, surely it has to be their children" (New York *Times Magazine*, February 25, 1979).

But deliberately visiting the sins of the fathers upon their innocent sons and grandsons, to the special advantage of persons not connected with the original sinning, is conduct neither lawful nor morally right. To suppose that both the beneficiaries of redress and those who are made to carry its burden are properly identified by race is, to be plain, racism. It is ethical racism because supposed with good will. It is simplistic because, on this view, race by itself—without consideration of the nature or degrees of past injuries, present advantages, or future pains—is sufficient to trigger the preferential device. The mistaken view in question is therefore properly entitled *simplistic ethical racism*.

Injuries are suffered in fact; claims made and burdens carried, by individual persons. Civil society is constituted to protect the rights of individuals; the sacrifice of fundamental individual rights cannot be justified by the desire to advance the well-being of any ethnic group. Precisely such justification is precluded by the Fourteenth Amendment of our Constitution, whose words—no state "shall deny to any person within its jurisdiction the equal protection of the laws"—express no mere legalism but a philosophical principle of the deepest importance. Explicating that clause, in a now famous passage, the Supreme Court wrote: "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. . . . Equal protection of the laws is not advanced through indiscriminate imposition of inequalities (*Shelly* v. *Kraemer* 334 U.S. 1, 22 [1948]).

The nature and degree of the injury done to many Americans because they were black or brown or yellow varies greatly from case to case. Some such injuries may justify compensatory advantage now to those injured. But the calculation of who is due what from whom is a very sticky business; compensatory instruments are likely to compound injustice unless the individual circumstances of all involved—those who were originally hurt, those who benefit now, and those who will bear the cost—are carefully considered. Whatever compensatory advantage may be given—in employment or elsewhere—it must be given to all and only those who have suffered like injury, without regard to their race. What we may not do, constitutionally or morally, is announce in effect: "No matter that you, *X*, were innocent and gained no advantage; you are white and therefore lose points. No matter whether you, *Z*, were damaged or not; you are black and therefore gain points." If the moral ground for compensatory affirmative action is the redress of injury, the uninjured have no claim to it, and all those individuals of whatever ethnic group who have suffered the injury in question have an equal claim to it.

Racially based numerical instruments have this grave and unavoidable defect: they cannot make the morally crucial distinctions between the blameworthy and the blameless, between the deserving and the undeserving. As compensatory devices they are under-inclusive in failing to remedy the same damage when it has been done to persons of the non-favored races; they are over-inclusive in benefiting some in the favored categories who are without claims, often at substantial cost to innocent persons. Except in those cases where the discriminatory policy of the employer is established, and the identity of injured applicants or employees determinable, racial preference in employment is intolerably blunt, incapable of respecting the rights of individuals.

VI

THIS unsuitability of the racial means to the compensatory end partly explains the queasiness of language with which the advocates of "numerical instruments" defend their schemes. Although they believe their aims are good, there is yet widespread shame among them that they resort to racial preference to advance them. Hence the use of euphemisms like "disadvantaged" in identifying the beneficiaries of racial programs, when what is really meant is "black" or "minority." Not all minorities are disadvantaged, and not all those disadvantaged are minorities, obviously. But it is tempting to hide the racial character of a program which, if exposed, would be legally and morally intolerable.[*]

"Affirmative action"—a phrase that now pervades our language—has commonly been used in the same duplicitous way. Affirmative steps to eliminate racially discriminatory practices rightly win the assent of all. Affirmative efforts to recruit fairly (whether for on-the-job training programs or for professional schools), affirmative inquiry to determine whether testing is job-related and to insure that evaluation of performance is not racially infected—in such forms affirmative action is of unquestionable merit. But when, in the name of affirmative action for racial equality, the deliberately unequal treatment of the races is introduced, we suffer a national epidemic of double-speak. Employment advertisements everywhere exhibit this duplicity with an almost ritualized motto: "An equal opportunity/affirmative action employer." The very term "affirmative action" has lost its honor and has become, for most, a euphemism for racial preference.

The unsavory character of their means is recognized by the advocates of racial instruments; that recognition is revealed by an inclination to be covert in conduct and to equivocate in language. Unsavoriness is tolerated here, however, even by organizations whose normal pride it is to expose immoral expedience in the body politic. Nothing is more indicative of the true spirit of a community than the character of the instruments it permits, and of those it precludes, in advancing public policy. Police surveillance to root out spies, the suppression of speech (radical or conservative) to protect the peace—all such instruments are rejected in a decent society. Civil libertarians wisely insist that we forswear instruments that invade the rights of individuals, even when forswearing proves inconvenient. The use of such instruments is precluded, forbidden not just to evil people but to all people. Preference by race is one of these forbidden instruments. The very high priority given to this exclusionary principle, and its applicability to all including the state itself, marks it as *constitutional* in the most profound sense.

Efforts to cut constitutional corners—however well-intentioned—corrupt a civil society. The means we use penetrate the ends we achieve; when the instrument is unjust, the outcome will be infected by that injustice. This lesson even civil libertarians have always to be relearning.

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[*] In the original trial of the *Bakke* case, the University of California defended the racial quotas at the Davis medical school as being for all "disadvantaged" students. When the court noted that not a single disadvantaged person who was not of an ethnic minority had been admitted in all the years of that program's operation, the university in effect conceded the misdescription. Not a pretty business.

VII

The inconsistency between racially preferential means and the end of honestly equal treatment is exquisitely exhibited in one aspect of the *Weber* case upon which Kaiser and the union place much emphasis. "We are caught [say they] in a monstrous double bind. What will you have us do? Desegregate, you say. Integrate your workforce; show us that you mean to undo, affirmatively, the wrongs earlier done. We do it, making serious efforts to increase the number of minorities in craft jobs through advertisement, recruitment, encouragement. We get some results, but they are not dramatic. Then you—the nation speaking through your regulatory agencies—tell us that what we have done is not enough. You threaten us! Of course we take action in response to your threat—and having done so, we are threatened at law on the other side! Such inconsistency is unbearable. You, the body politic, must speak with one tongue!"

What is that first threat of which Kaiser complains? It came from the Office of Federal Contract Compliance whose regulations mandate "affirmative action" by all government contractors. The withdrawal of all federal contracts was the price Kaiser might have had to pay if, to avoid being found in "non-compliance," racial preference for minorities had not been introduced. Whence does the OFCC get the authority to make such threats? From an order of the President of the United States, say they, Executive Order 11246. This order requires federal contractors to take affirmative action to prevent low employment of women and minorities in their workforces, on the assumption that most disproportionately low employment is the result of discrimination. Since the racial instrument agreed upon was a direct response to federal authority exercised under that valid order, it is outrageous now, say Kaiser and the union, to attack us for violation of the Civil Rights Act.

This response to official inconsistency cannot help but evoke some sympathy. But as a defense of racial quotas it is worthless. The argument fails on two levels. First, Executive Order 11246 does not require and cannot justify racial quotas in cases like this one, in which the conduct of the employer has not been unlawfully discriminatory. The Order says nothing about numerical ratios. Indeed, its plain words *forbid* all racial preference. The relevant passage of that Order reads: "The contractor will take affirmative action to insure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin" (30 Fed. Reg. 12319 [1965]).

Some numerical plans to protect employment for minorities have been upheld by the courts as valid executive actions—but they have been so upheld as responses to specifically identified violations by those upon whom the remedy was imposed. The so-called Philadelphia Plan was held permissible under Title VII, but that holding was explicitly tied to prior exclusionary practices by the six trade unions controlling the workforce in the construction industry in Philadelphia. Whatever tools the Office of Federal Contract Compliance may think itself entitled to employ, it has no authority in law, and certainly none in morals, to press for a racial quota in cases where, as here, those getting preference under the scheme had not been injured by that employer, and those injured by the scheme had not benefited from any misconduct of that employer.

The argument fails at a second level as well. If Executive Order 11246 be interpreted so as to authorize the OFCC to require racial quotas in cases like this one, the Executive Order itself is plainly unlawful, an illegitimate exercise of administrative authority in conflict with federal statute. The Civil Rights Act specifically prohibits racial classification in admission to on-the-job training programs (Sect. 703 (d); cited above, p. 41). The quota plan devised by Kaiser and the union is, as we have seen, patently in violation of this section. When the law and an executive order clash, there can be no doubt of the outcome. Writes the Circuit Court: "If Executive Order 11246 mandates a racial quota for admission to on-the-job training by Kaiser, *in the absence of any prior hiring or promotion discrimination*, the executive order must fall before this direct congressional prohibition" (p. 227).

Only by resolutely enforcing the rights of citizens can the insolence of office be restrained. Individual workers, without power or money, need to be protected against civil servants who take it upon themselves to threaten in order to be able to report numerical ratios they think desirable, claiming only to be following the orders of their superiors.

VIII

Defenses of racial preference—by efforts to reinterpret the law, by confused arguments based on "societal discrimination," by claim of executive order—all collapse. It is important to see why they *should* collapse. The defenders, conscious of their own righteous pursuit of racial justice, little doubt that the tools they wish to employ would have the good consequences they hope for. To question the merit of those tools is for them almost a betrayal of the oppressed in whose behalf they claim to battle. In their eyes the conflict is only over whether they are to be permitted to do a good deed—i.e., give preference to racial minorities—not whether it is a good deed, or whether its consequences will be good.

Decency of motivation, however, does not insure the goodness of the immediate object, or the goodness of its consequences. Racial justice is an aim that all share; it is distorted when transformed into formulas for ethnic proportionality in workforces and professions based (as in this case) upon ethnic populations in the surrounding area. What accounts for this transformation? Motives honorable in their general statement are blended with a vision of cultural homogeneity that is profoundly unhealthy. The objectives then sought in making that blend operational often prove inconsistent with the original aim. It is this inchoate vision of homogeneity—made concrete in numerical proportions—that lies behind racial instruments like the one at issue in *Weber*. Federal Appellate Courts have not been oblivious to the evils that ensue:

> There are good reasons why the use of racial criteria should be strictly scrutinized and given legal sanction only where a compelling need for remedial action can be shown. . . . Government recognition and sanction of racial classifications may be inherently divisive, reinforcing prejudices, confirming perceived differences between the races, and weakening the government's educative role on behalf of equality and neutrality. It may also have unexpected results, such as the development of indicia for placing individuals into different racial categories. Once racial classifications are imbedded in the law, their purpose may become perverted: a benign preference under certain conditions may shade into malignant preference at other times. Moreover, a racial preference for members of one minority might result in discrimination against another minority, a higher proportion of whose members had previously enjoyed access to a certain opportunity [*Associated General Contractors of Massachusetts Inc.* v. *Altshuler* 490 F. 2d 9,17-18 (1973)].

In this spirit three Federal Circuit Courts have repeatedly refused to approve racial quotas in the absence of proved past discriminatory practice dictating that specific remedy.

Racial classifications have insidious long-term results: anger and envy flowing from rewards or penalties based on race; solidification of racial barriers and the encouragement of racial separatism; inappropriate entry of race into unrelated intellectual or economic matters; the indirect support of condescension and invidious judgments among ethnic groups—in sum, the promotion of all the conditions that produce racial *dis*harmony and racial *dis*integration. What Kaiser and the union defend is very far from an innocuous good deed. It is a plan having very damaging consequences to very many people.

Some of the damage, direct and substantial, is done to those, like Weber and Bakke, who bear the immediately resulting burden. "Society" does not pay; the "white majority" does not pay; individual citizens pay. The penalty to them is great and undeserved. One notable feature of the *Bakke* decision, almost entirely overlooked by commentators and the press, is the fact that all nine Supreme Court Justices there agreed that, as a result of the quota system used by the medical school at Davis, Allan Bakke was done a constitutional injury—that is, an injury he should not have to suffer unless it can be well justified. Even the four Justices who thought the injury could be justified took the hurt done to him very seriously. One of those four (that is, one of the group who did *not* side with Bakke), Justice Blackmun, refers to the injury done to Bakke as an "ugly" one. The other five Justices struck down that racially preferential program; Powell among them condemns the damage such programs do. The Washington Supreme Court, too, in deciding against Marco DeFunis in an analogous case, did not deny that he had been seriously hurt, and candidly rejected the claim that such quotas are "benign." A program giving special favor to racial minorities, say they, "is certainly not benign with respect to nonminority students replaced by it" (*DeFunis* v. *Odegaard* 507 P 2d 1182). *Reverse discrimination* is not an invention or a hypothesis yet to be confirmed; it is a sociological and legal fact.

IX

THE reality of the evils flowing from racial instruments introduces one of the most intriguing aspects of the *Weber* case. A dispute arises between the District and the Circuit Court beneath which lies a momentous philosophical issue. Numerical remedies based on race do damage, the two courts agree; they further agree that this is a case in which the imposition of such a numerical remedy cannot be justified because there has been, in fact, no previous unlawful discrimination by the employer here. However, in those cases in which such remedy might prove justifiable (previous discriminatory practice in that setting being alleged), the following question arises: may that numerical instrument of redress be devised and executed on the authority of the employer and union acting jointly? Or is a racial quota permissible as remedy only on the express authority of the judiciary? The District Court not only found the remedy unjustifiable, but held in addition that such painful remedies would in no case be in the province of unions and management to impose. The Circuit Court, agreeing on the first point, did not agree on the second. Voluntary remedial action (said they) is preferable to court action; therefore, to insist upon judicial imposition of remedies would interfere unduly with reasonable private amelioration. The underlying issue here is the locus of authority in resolving questions of justice. Which court is the wiser?

In permitting numerical remedies to be imposed (if at all) only by the judiciary, the District Court, I submit, is deeply right. The reasons for this are several and complicated.

First, the question of whether the circumstances are such as to justify the imposition of a numerical remedy (a question that must be answered affirmatively if any such remedy is to be lawful) is precisely the kind of question that cannot be answered fairly by employers and unions acting in their joint interests. Individuals will bear the burden; if the case were of a kind to justify the imposition of that burden on Weber and his like, past discrimination by that employer in that context must be proved or admitted. No employer is likely to make that admission. To do so would invite a host of very expensive lawsuits in behalf of those injured. Employers will therefore enter such agreements only with the understanding that no past discrimination has been proved or admitted. That very understanding (however arguable it may be) on which an employer might be willing to enter an agreement with a union to give racial preference to minorities is precisely the understanding which, if reflecting the facts truly, shows that racial preference unjustly injurious and unlawful.

This peculiar feature of "voluntary" racial instruments is admitted—even emphasized, ironically—by the UAW, the NEA, and other assorted unions. If (they argue) voluntary racial preference is permissible only when the employer's past conduct would be found in violation of Title VII, there will be no voluntary race-conscious action. For, as they agree: "[I]t is usually difficult to predict whether or not [previous] discrimination would be found" (associated unions, brief *amici*, p. 13). Indeed! For this reason precisely it is a question of such a kind that no answer to it reached as part of a labor-management agreement could be trusted.

The aggregated unions continue: "Moreover, the employer would, by taking voluntary action, put itself in a no-win situation in a suit such as this. Either its past conduct will be determined to be unlawful, thereby inviting litigation by discriminatees, or the remedial action will be found unlawful, and liability to white employees will exist" (*ibid.*). Just so! But the authors of this candid statement apparently do not see where their argument leads. They would like the courts to conclude that, since the present standard (that "voluntary" racial quotas suppose the same finding of unlawful discrimination which alone might justify court-imposed remedies) effectively precludes "voluntary" quotas altogether, we should permit the introduction of a new standard, one that would allow "voluntary" quotas under some factual circumstances that—as they admit—would not justify a court in imposing them! What could serve as such a standard? The lone dissenting judge of the Circuit Court, pursuing the same line, is driven to propose an astounding answer: A "voluntary" quota plan should be upheld, he suggests, if it is "a *reasonable remedy* for an *arguable violation* of Title VII" (p. 230, emphasis added).

This standard is neither feasible in practice, nor morally acceptable if it were. As a practical matter, such notions as "reasonable remedy" and "arguable violation" have virtually no objective content. Only the courts could resolve, on a case-by-case basis, disputed claims about "arguable violations" and about the reasonableness of remedy. Endless litigation could not be avoided—but it is the elimination of time-consuming litigation that is alleged to be the great merit of "voluntary" racial instruments. The increase in court involvement that would result undercuts any proposed justification of "voluntary" quotas on grounds of efficiency.

More important than its inefficiency, however, is the fact that the proposed standard (that a voluntary quota plan should be upheld if it is "a reasonable remedy for an arguable violation of Title VII") is morally unacceptable. Just remedies presuppose some determinable wrongs for which they give redress and by which they are justified. It is confusion of mind to propose a *remedy* for an *arguable* violation; one cannot put right what might prove on more judicious examination to have been no wrong at all.

ALL "voluntary" quotas (i.e., those introduced without court imposition) presuppose reliance upon some standard that must encounter essentially the same problem. The philosophical dimensions of the dispute between the two courts here emerge. The Circuit Court's position exhibits irremediable moral defect: by permitting racially preferential programs without the backing of judicial authority, it permits the delegation of questions of justice to private hands that are neither equipped, nor disposed, nor authorized to resolve them fairly.

To resolve a matter of individual right the bargaining process between labor and management is almost the worst imaginable tool. The impartial determination of facts without regard to interest, and the honest application of principles without regard to advantage, are essential in adjudicating questions of right—but the elimination of regard for self-interest and advantage is precisely what is impossible at the bargaining table.

Even if the needed impartiality were possible there, it would be inappropriate, uncommon, and surely could not be relied upon. Union and management bargainers are duty-bound to press for the advantage of the units they represent. The process is designed to deal with issues of pay and working conditions, not with the protection of individual rights. Justice entails giving to each his due—whether or not he or others can negotiate for it successfully.

Most important, the authority to resolve questions of justice cannot lie in a labor-management bargain. Individual rights *may not*—as a matter of law or morals—be bargained away. As a matter of constitutional principle, the Supreme Court has spoken definitively on this issue. A union, they agree, may waive some of its rights to *collective* activity, such as the right to strike, in a bargaining agreement made with the aim of economic advantage for its members. The Court continues:

> Title VII, on the other hand, stands on plainly different ground; *it concerns not majoritarian processes, but an individual's right to equal employment opportunities.* Title VII's strictures are absolute and represent a congressional command that *each* employee be free from discriminatory practices. Of necessity, *the rights conferred can form no part of the collective bargaining process* since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver [*Alexander* v. *Gardner-Denver Co.* 415 U.S. 36, 51-52 (1974), emphasis added].

Contracts reached through collective bargaining may, of course, introduce different terms of employment for different groups of employees in the light of the relevant conditions of those groups. Race, however, is never relevant in that sense. Because racial discrimination invariably touches the non-bargainable rights of all individuals adversely affected, race itself has been identified as an inappropriate criterion for the classification of employees.[*]

In sum: the courts have repeatedly held that, in compromising with an employer, a union may not take race into account. Programs like the one at issue in *Weber* explicitly take race into account. The conclusion of this syllogism is inescapable.

The unions take another tack. "You fail to note [they rejoin in effect] that this is a *voluntary* program. Weber and his fellows may be said to have relinquished their rights in this matter because, when the plan was devised, they were adequately represented by their union. The union has a duty to represent all of its members; its bargainers are selected democratically; and since white workers constitute a majority of the bargaining unit, the union process may be relied upon to reach no agreement that will violate the rights of individual white members."

It is hard to take this argument seriously. Union process is often genuinely democratic; negotiators for unions generally do seek to represent the interests of all the members of the bargaining unit. But the most sympathetic review of union process could not rationally conclude that the fairness of unions to their members over the long term has been such as to justify the delegation, to bargainers, of matters of fundamental individual right. The current flow of complaints about reverse discrimination in employment contracts in itself provides substantial evidence that the bargaining process, notwithstanding its general fairness, cannot be depended upon in this sphere. "Voluntary" is an appealing word. But its use here suggests what is not true—that those who were injured by the racial instruments devised in the contract did themselves volunteer to carry the burden. To call Weber's sacrifice "voluntary" is most inappropriate.

This defense of "voluntary" racial instruments (even if unions were invariably sensitive to matters of individual right) avoids the key question of legitimate authority. At stake here are the rights of individuals to the most fundamental of democratic conditions—equal treatment under the law—and, moreover, their rights to that equal treatment as it bears upon the most suspect of all categorical distinctions, race. Even legislators, it may be argued, however powerful their assembly, honorable their election, and dutiful their conduct, may not take from individual citizens certain fundamental rights. With the noblest of intentions, it is not within their authority to pursue public policy at the cost of compromising the individual citizen's right not to be discriminated against because of his race or religion. Philosophers will differ about the grounds of legislative authority, but few will seriously deny that upon such authority there must be some hard limits. Unequal treatment because of race is as clear an example as there is of the violation of those limits.

If the principle here expressed were somehow mistaken, if it were sometimes just, in the cause of racial redress, to sacrifice the rights of some blameless non-beneficiaries to advantage others who had not been injured, even so it would at least be certain that no such decision could be properly made by any save the legislature of highest authority, subject to the review of the court of highest jurisdiction. The notion that, to encourage "voluntary affirmative-action plans," we may bypass the body politic, investing unions and management with the authority to bargain with fundamental human rights, makes the prospect of a reversal in the *Weber* case very distressing. Not substantive entitlements alone are at issue here, but also the procedural rights of working people to have questions of justice decided by legislatures and courts.

X

Weber and *Bakke* are closely analogous in this procedural regard. Weber's right to equal treatment was infringed on by a union-management agreement, Bakke's by a medical-school admissions committee. Legitimate authority was exceeded in both cases. When it was asked, in *Bakke*, for what purposes a university might consider race in admissions, Justice Powell replied, in his decisive opinion, that it may be considered for the sake of student diversity (to support the exchange of ideas in accord with First Amendment concerns), or, conceivably, as redress for the specific victims of specific injustices. "Societal discrimination" as a ground for racial preference he explicitly considered and rejected. Powell wrote:

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[*] The Supreme Court has written: "[T]he statutory power to represent a craft and to make contracts as to wages, hours, and working conditions does not include the authority to make among members of the craft discriminations not based on such relevant differences. Here the discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations." *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192, 203 (1944).

> We [i.e., the Supreme Court] have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals, in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations [references omitted]. After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case the extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined. Also, the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit. Without such findings of constitutional or statutory violations it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus the government has no compelling justification for inflicting such harm [*University of California Regents* v. *Bakke* 57 L. Ed 2d 750, 782-83 (1978)].

But findings of constitutional or statutory violations it is not the business of private bodies—unions, or managements, or medical-school committees—to make. Powell continued:

> Petitioner [the Regents of the University] does not purport to have made, *and is in no position to make*, such findings. . . . [Even] isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria [references omitted]. Before relying upon these sorts of findings in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination (p. 783; emphasis added).

Powell's point is that a medical-school admissions committee (even though indirectly an agent of the state) is entirely without the requisite authority. Kaiser and the union have a far weaker claim to the needed authority than did they. An admissions committee is not competent to make the findings that might justify racial preference, granted. But if the admissions committee had sought to present such findings of identified discrimination at the Davis medical school (discrimination that, in fact, the university specifically denies), they might conceivably contend that as one agent of one arm of one element of the state, it was within their province to do so—and thus might conceivably seek to justify their racial program as remedy. That claim must fail, the mission of the medical school and all its subsidiary elements being educative, not judicial. Any analogous claim made by Kaiser and the union—that they are authorised to make findings of "societal discrimination" that will justify inflicting harm on Weber and other blameless parties—is totally without warrant.

XI

In the absence of any showing or admission of previous illegal discrimination at the Grammercy plant, every defense of racially preferential remedy must prove unsatisfactory. Sensitive to this point, the American Civil Liberties Union argues at length that the factual circumstances of this case have been misunderstood, that Kaiser Aluminum *did* discriminate against minorities. The pattern of employment by Kaiser at other plants in earlier years is reviewed, and much is made of the racially disproportionate impact, at the Grammercy plant, of a "purportedly neutral criterion." Using the percentage of the minority population in the surrounding parishes of Louisiana as benchmark,* the argument concludes that Kaiser's workforce at the Grammercy plant in skilled-craft positions was "severely underrepresentative." Putting aside the question of how "representativeness" might rationally be established, or, if it had been established, what bearing that would have upon the lawfulness of Kaiser's previous conduct, it is important to note that the entire thrust of this argument is misdirected. The *Weber* case presents an appeal to our highest court on a matter of fundamental principle. That principle must be argued on the basis of a factual record properly established at trial in a responsible Federal District Court. Appellate Courts, and the Supreme Court, face the question of principle *given that record*. Even the District Court could analyse only the facts brought before it by the parties. Kaiser testified to its non-discriminatory practices at the Grammercy plant from its opening, and of its efforts to recruit black craftsmen from the general community. They would not and could not report otherwise. If (as some now claim) the record should have shown hidden unlawful conduct by Kaiser, such findings could only have entered the record at the trial level. At this point the issue is, supposing the record complete and accurate, whether, *without* such previous violations established, this racial quota is permissible.

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* ACLU and Society of American Law Teachers, brief amici, p. 11. The inappropriateness of such figures in estimating fairness with respect to employment in the skilled crafts is so obvious, and has been so often remarked, that one is embarrassed for the ACLU to find such an argument here pursued. See Thomas Sowell, "Are Quotas Good for Blacks?," COMMENTARY, June 1978.

To contend that the facts of the matter *could* be viewed differently is to blind oneself to the essence of the controversy. Had the courts found, after examining all testimony, that Kaiser had previously discriminated against minorities in its Grammercy plant, the issue now to be decided here would not even have arisen.[*]

XII

ALL arguments thus far explored incorporate the realization that individuals are indeed injured when disadvantaged solely because of their race. Brian Weber did not get the job-training opportunity he was entitled to. Most ordinary people, and most judges, have no difficulty in seeing that. So zealous are some of the advocates of racial preference, however, that they claim not to see it. Weber was never really hurt, say they. He has a legitimate complaint only if he was discriminated against unfairly. But he wasn't discriminated against at all! Hence he has no case.

Puzzling though this claim appears on its face, it is honestly defended, in two ways. First, it is argued, Weber has lost nothing more than seniority entitlements. But seniority systems may be altered by labor-management agreement, and in any event, seniority rights are not vested in the individual employee but in the collective-bargaining unit. Therefore, when a voluntary quota plan results in Weber's getting less than he expected in view of his greater seniority, he loses nothing that belonged to him in the first place. The injury done to him (it is contended) is apparent, not real.

This argument is twice faulty. It underplays the importance of individual seniority entitlements in the industrial context; and it does not face up to the discriminatory nature of the seniority deprivation in this case.

In allocating scarce opportunities and goods in the industrial world, seniority is critically important. For very many workers a host of matters—job security, opportunities for advanced training, vacation and retirement benefits—depend chiefly upon the number of years of service they have given. Nothing remains to them after years of service but their seniority claims. To deny that harm is done to an unskilled worker on an hourly wage when he is deprived of entitlements flowing normally from ten years' seniority shows gross moral insensitivity. Seniority does not insure qualification for positions demanding special talents, of course; but where qualifications are roughly equal, or not distinguishable, seniority above all other considerations will be relied upon in the interests of fairness.

Seniority entitlements are tied to individuals, not just to the bargaining unit. In matters of job assignment, transfer, layoff and recall, and job training, opportunities must be distributed among competing employees. Competitive-status seniority is therefore of great moral as well as practical importance, and directly affects individuals more importantly than it does the bargaining collective. Non-competitive benefits also—pensions, sick leave, paid vacations—are commonly determined in part by length of service and therefore must be tied to individuals. Seniority, the Supreme Court writes, "has become of overriding importance, and one of its major functions is to determine who gets or who keeps an available job" (*Humphrey v. Moore* 375 U.S. 335, 346-47 [1964]). The "who" in this passage refers to individual persons, not to groups.

Seniority systems are bargainable, true. It does not follow, however, that all seniority rights are bargainable. It is essential not to confuse the *system* of seniority with individual *entitlements* under a given system in force. Once a seniority system has become a reality in rule and practice, a worker's rights and expectations under that system are his and very precious to him. It is callous to minimize the injury done when such rights are not respected.

When the ground of that disrespect is race, the injury is particularly offensive. Entitlements in themselves minor (which an opportunity for on-the-job training is not) become matters of grave concern when manipulated for racial reasons. Where one must sit on a bus or go to the toilet understandably becomes a source of rage and an issue of constitutional proportions when the determination is made by race. Protests over segregated lunch counters had as their target not the culinary opportunities denied, but the immoral character of the ground of their denial. Even if Weber's seniority expectations be thought trivial, the racial ground of the unequal treatment he received is very far from trivial.

Some who understand very clearly why Allan Bakke was injured when excluded from medical school in a racially discriminatory way fail to see that the injury done to Brian Weber is equally unjust. Applicants to a competitive program, they appreciate, have a right to evaluation on some set of relevant criteria—past performance, intellectual promise, character, or whatever—and if deserving on the basis of those criteria, ought not be deprived of place because of race. But if the performance qualifications of all applicants are roughly equal (as were those of Weber and the minority workers chosen in his place), where, they ask, is the injustice?

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[*] Might an appellate court not reverse an inferior court because of its mistaken interpretation of the facts as appearing in the record? Only in those rare circumstances in which the treatment of the facts by the inferior court was "clearly erroneous." That claim would be untenable in this case.

The injustice lies in the deprivation, on improper grounds, of what one is otherwise entitled to. The basis for the entitlement will be different in different contexts. Scarce places in medical or law schools are rightly allocated to persons best exhibiting the characteristics that have been determined relevant to the studies or profession to be pursued. Scarce on-the-job training opportunities are rightly allocated to those having certain seniority entitlements. The bases of Weber's and Bakke's claims to that of which they were deprived are very different; but both were wrongly denied what they would have received if the scarce available goods had been distributed in accord with established criteria in a morally just way. Both were the plain victims of racial discrimination, losing out because of the color of their skin.

Persons concerned about such injustice when done in the academic world ought seriously to consider the wisdom of remaining silent when essentially the same injustice (although with respect to different entitlements) is done in the industrial world. If preference by race should be found, in the *Weber* case, to justify the deprivation of what is fairly earned by a laborer, the security of what is fairly earned by anyone in any sphere is similarly threatened.

XIII

IF THE damage to Weber cannot reasonably be minimized, can it be wholly denied? This is the second line of defense to which Kaiser and the union fall back in the effort to show that Weber was not discriminated against at all. Weber's rights were not infringed on, they say, because he never had any seniority rights to job training here. The argument goes like this: "Where admission to a training program is properly a function of seniority, and seniority, like Weber's, is untainted by the employer's previous discrimination, he would be damaged if race were allowed to supervene. But Weber errs in thinking that seniority gives him any claim under *this* quota program, which was initiated in 1974, by Kaiser and the union, specifically to increase minority representation in the craft employments. New rights were then created, Kaiser and the union agreeing to use seniority only for the distribution of available slots *within* the two racial lists, black and white. If, in the new plan, they had agreed to use the lottery method—two separate lotteries, one for whites and one for blacks—it would be obvious that seniority was not the real issue here. They could have done just that. Weber's claim that he was deprived of seniority rights is a red herring, because the mode of selecting from each racial pool is irrelevant. So the Kaiser plan, as the dissenting judge wrote, 'stands or falls on its separation of workers into two racial pools for assignment to job training' (p. 235)."

This argument is a compound of perceptivity and blindness. Seniority was the system deliberately adopted by Kaiser and the union—but they did not make that choice at random. Years of past work in the very plant where those training opportunities were to arise was thought the fairest consideration in allocating scarce places to otherwise equally qualified workers. Seniority was adopted as a relevant and rational principle. To create two seniority lists, black and white, and then choose the top person from each list, even if he has less seniority than the fourth or twentieth person on the other list, is to override the seniority principle with race. If the basis chosen for the fair distribution of scarce opportunities had not been seniority, but (say) a lottery, then the just application of the lottery principle would require that *it* not be overridden by race. It is therefore perceptive to note that the real issue here goes beyond seniority—that the plan fails simply because it separates the workers into two *racial* pools—every such separation being necessarily invidious. Any system used to distribute opportunities among the members of each racial pool, even if of itself fair, must be distorted by that antecedent racial classification. Whatever besides seniority might prove just as a ground for the distribution of goods, skin color isn't it.

Is it correct to say, then, that Weber had no seniority rights here at all? No. When it is agreed by union and employer that, for allocating these job-training opportunities, length of service is the appropriate basis, employees acquire entitlements on that basis. The injustice of racial favoritism manifests itself, in this case, in the deprivation of those entitlements. Were a worker's entitlements based on some other feature of his circumstances—his experience or his performance on a competitive examination—then the injustice of racial favoritism might be manifested in the deprivation of entitlements flowing from those. Weber has a right to non-discriminatory treatment. To contend that he never had any rights in this matter because the respect in which he was discriminated against isn't the only respect in which he might have been discriminated against is a last-ditch effort to obscure the wrong that was done him.

XIV

THE villain of the piece—here, in *Bakke*, wherever it raises its head—is preference by race. The *Weber* case provides an opportunity to reaffirm the moral and constitutional commitment to govern ourselves without preference to any by reason of color, or religion, or national origin. If we undermine that commitment—even though it be in an honest effort to do good—we will reap the whirlwind.

Justice Debased: The Weber Decision

Carl Cohen

A RACIAL quota in the allotment of on-the-job training opportunities among competing employees, instituted by management-union agreement, was held lawful by the Supreme Court in the recent case of *Steelworkers* v. *Weber*.* This was an important decision, and a very bad one. Its badness lies not only in the substantive result, upholding preference in employment by race, but also in the reasons given by the Court in defending that result, and in the abuse of judicial discretion manifested.

1.

THE precise question decided was this: does Title VII of the Civil Rights Act of 1964 forbid employers and unions in the private sector from adopting racially preferential employment programs like the one adopted by Kaiser Aluminum and the steelworkers union? The answer was no. The evaluation of that answer requires a brief description of the quota plan approved, and a brief review of the statute in question.

The plan, adopted as part of a collective-bargaining agreement between Kaiser Aluminum & Chemical Corporation and the United Steelworkers of America, provides that, in filling apprentice and craft jobs, "at a minimum not less than one minority employee will enter for every non-minority employee entering" until the percentage of blacks in craft jobs equals the percentage of blacks in the local work force—about 39 per cent at the Grammercy, Louisiana, plant where Brian Weber works. Seniority in the plant was the criterion on which employees competing for admission to on-the-job training vacancies were ranked. But two seniority lists were maintained pursuant to this agreement, one for whites and one for blacks; vacancies were filled alternately from the top of the two lists. Weber, a white employee with about five years' seniority in that plant at that time, was refused admission to three different training programs—although, because of the quota plan in force, some non-white employees having less seniority than Weber were admitted. Believing that he had been displaced only because he was white, Weber brought suit against Kaiser and the union, in behalf of himself and all white employees at that plant similarly situated. His target was the racial preference in that job-training scheme.

The law in question, Title VII of the Civil Rights Act of 1964, reads in pertinent part as follows:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

It seems hardly possible to deny that this statute does plainly prohibit racially preferential programs of the kind described above. Thus, as one would expect, Weber won his case in the Federal District Court, and won again, on appeal, in the Federal Circuit Court.

That result has now been reversed by the Supreme Court. The opinion of the five-member majority, delivered by Justice Brennan, is devoted almost entirely to an explanation of why, in their view, Title VII does not prohibit the plan in question. This explanation cries out for response. Response is given in two dissenting opinions, one by Chief Justice Burger which is crisp and con-

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* Decided June 27, 1979. Actually three cases were decided together: *United Steelworkers of America, AFL-CIO-CLC*, v. *Brian F. Weber et al.* (No. 78-432); *Kaiser Aluminum & Chemical Corporation* v. *Brian F. Weber et al.* (No. 78-435); and *United States et al.* v. *Brian F. Weber et al.* (No. 78-436). There are four opinions in all: that of the majority written by Justice Brennan; a concurring opinion of Justice Blackmun; a dissent by Justice Burger; and a second dissent by Justice Rehnquist with which Justice Burger joins. Because these opinions have not yet received their formal pagination, my references below will be to the printed sheets issued by the Court, identifying only the author and page number of that author's opinion.

demnatory, a second by Justice Rehnquist which is scathing and detailed. Justice Rehnquist's tightly woven, thirty-seven page treatise, to which I will be referring, utterly demolishes the majority position. Its cogency is acknowledged by the majority itself.

2.

On what grounds does the majority reach its result? The *intent* of Congress, say they, in enacting Title VII, was not to forbid racial preference having the wholesome purpose this program did. The key to the problem, says the majority, is not the "literal" meaning of the statute, but its "spirit." If, by studying the history of the Act, one can discover the purposes of Congress in its adoption, and if this plan advances those purposes, the plan will be, if not "within the letter of the statute," yet still "within its spirit," "within the intentions of its makers." Now the aims of Congress in passing this legislation can be readily discovered. In a nutshell, Congress aimed to counteract black unemployment, to protect and promote the opportunities of blacks to get decent jobs. In legislative debate Senators Humphrey, Clark, and others contended that, without such a bill, discrimination against blacks would become a source of social unrest and intolerable injustice. The majority's defense of their interpretation of Title VII rests principally upon the fact that the proponents of the bill repeatedly insisted upon the importance of jobs for minority groups. That having been the goal, they continue, it cannot have been the case that Congress intended to prohibit private parties "from taking effective steps to accomplish the goal that Congress designed Title VII to achieve" (Brennan, p. 8).

The argument of the majority, in effect, is this: "We know the purpose of Congress; we know the purpose of this plan; they are fully consonant. It must be, therefore, that Congress did not intend to forbid this plan. If the literal language of Congress says otherwise, we must interpret that language to mean what it did not say, while saying what it did not mean."

3.

What Congress really did intend with this statute is a matter about which I shall have much to say. Before turning to that historical question, however, I want to say something about the logic of the majority's argument. The majority blunders seriously by confusing *purpose* with *intent*. That the purpose of Congress was to promote employment opportunities for blacks is beyond doubt. It certainly does not follow that any special scheme having that purpose was intended to be permitted. Different persons, or different pieces of legislation, may share the same aim yet differ greatly in what are believed the wise or the just steps properly taken to achieve that aim. This simple but important point is what underlies the common homily: "The end doesn't justify the means." The aphorism is imperfect, of course; ends do serve to justify means. But the moral point of the aphorism is sound: ends, even very good ones, don't justify *any* means that may be thought effective in achieving them. That ends are shared is no proof that there will be agreement on the justice or the desirability of particular instruments or programs for their attainment.

Consider this hypothetical example, also in the sphere of legislative action. Suppose funds were appropriated to explore alternative sources of energy, one of the major purposes of the appropriation being, in the minds of most members of Congress, to reduce dependence on foreign oil. By adopting some measures clearly having that objective Congress would not warrant the inference that every measure having the same tendency had thereby been permitted. Suppose the expenditure of the funds appropriated for the exploration of alternative energy sources, although having the larger aim of energy independence, were also restricted by the provision that these funds were not to be spent on the development of nuclear energy. It would not then have been rational to conclude that a plan to spend the funds on the development of nuclear energy was "within the intentions" of the legislature because (as Justice Brennan says of the racial quota in *Weber*) "the purposes of the plan mirror those of the statute" (Brennan, p. 12). To find out whether Congress intended to advance its larger purposes in that way we would have had to read the enacted statute. If they were to have said: "It shall be unlawful to expend any of these funds on the development of nuclear energy," we might or might not have thought them wise in that restriction. But it does not take great profundity to distinguish between their *purpose* in legislating and their *intent* in that law—between what they would have hoped to accomplish and what they would actually have proposed to do.

In seeking to advance employment opportunities for blacks in 1964, Congress adopted legislation forbidding *all* racial discrimination in employment. To argue, as the majority does, that they cannot have intended to forbid all discrimination because some racial discrimination might also serve their larger purposes, does not do credit to a high appellate court.

4.

What opens the question of congressional intent? Under what circumstances is it appropriate for any court to inquire into the intent of a legislature in enacting the legislation being applied? When the applicability of the language of the statute is unclear, or its wording is ambiguous, that inquiry may be very much in order. Such circumstances commonly arise. New conditions, unforeseen by the legislature at the time of a law's enactment, may create issues of interpretation that cannot be resolved by its language alone. A court may then be obliged to construe what the legislative intent might most reasonably have been in order to determine fairly the bearing of the statutory language upon the new conditions. Sometimes, in a different vein, legislation may be formulated in deliberately ambiguous language for assorted political reasons. Courts may later be obliged to apply that language to cases treated equivocally in the statute, having then to construe some reasonable legislative intent to guide them.

Nothing like either of these circumstances arises in the present case. The language of Title VII, as Chief Justice Burger observes, exhibits "no lack of clarity, no ambiguity" (Burger, p. 2). The Kaiser quota plan, as all agree, discriminates against individual white employees seeking admission to on-the-job training programs simply because they are white. That, under the very plain language of the statute, is "an unlawful employment practice."

Could it be, perhaps, that the operative meaning of the language of the statute is unclear because it has been sometimes construed by the Court, in past instances, to prohibit discrimination against blacks, but not discrimination against whites? No, that was put out of the question by this Supreme Court in 1976, explicitly interpreting this Title of this statute. White employees who were dismissed after being charged with misappropriating company property brought suit under Title VII because black employees, similarly charged, had not been dismissed. This Supreme Court then concluded, from the "uncontradicted legislative history," that "Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes . . ." (*McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, at 280).

So there is no doubt that Title VII does—or did!—apply equally to all races. That is what the Supreme Court has repeatedly affirmed. Title VII, they earlier insisted, "prohibits *all* racial discrimination in employment, without exception for any group of particular employees" (*ibid.*, p. 283; emphasis in original). A few years earlier, in a landmark interpretation of Title VII, the Supreme Court had agreed unanimously on a definitive account of the legislative intent of Title VII: "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunity. . . . Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed" (*Griggs* v. *Duke Power Co.*, 401 U.S. 424, at 429 and 431 [1971]). And just one year before *Weber* the very same point was hammered home by the same Court in the context of employment ratios. "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force" (*Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 [1978]; emphasis in original).

There is no vestige, no trace of ambiguity or unclarity, either in the language of the statute or in the interpretation repeatedly given to that language, respecting the question whether Title VII protects whites as well as non-whites. There is, therefore, no justification for entering the question of legislative intent. Justice Rehnquist, understandably infuriated, calls attention to the Court's oft-repeated principle applied in another case just as *Weber* was being decided: "Our duty is to construe rather than rewrite legislation" (Rehnquist, p. 3).

5.

BEYOND opening the question of legislative intent where that is not proper, and beyond the muddling of congressional intent with congressional purpose, the majority has given an unbelievably obtuse reading of that legislative intent. Though it is not appropriate in this case even to ask whether Congress intended to permit some racial discrimination with Title VII, the task of answering that factual, historical question is exceedingly easy. The lengthy debates in the House and the Senate are open to us in the *Congressional Record;* majority and minority committee reports of the House on the proposed bill are also open to us; a lengthy, scholarly study of the legislative history of precisely this Title of this Act is available to us.* There can be no genuine doubt—in the mind of one who has examined these materials—about the intent of the Congress in choosing the language they did choose. Democrats and

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* The congressional debates appear in Volume 110 of the *Congressional Record* of 1964, extending intermittently over exactly thirteen thousand pages (p. 1,511 to p. 14,511) of ten massive tomes. The House reports appear in *House of Representatives Reports*, No. 914, 88th Congress, First Session, 1963. With the majority and minority reports are printed additional views of particular members of the committee, and views of groups of Representatives, on the bill being reported. The Senate having decided to take up the bill directly, it was not submitted to committee there, hence there are no Senate reports beyond the actual Senate debate, which was very long. The study referred to, used both by Justice Rehnquist and myself, is by Francis J. Vaas, "Title VII: Legislative History," in Volume 7 of the *Boston College Industrial and Commercial Law Review*, pp. 431-58. Vaas records the tortuous path of the Civil Rights Act through Congress with meticulous attention to detail, and makes this striking comment: "Seldom has similar legislation been debated with greater consciousness of the need for 'legislative history,' or with greater care in the making thereof, to guide the courts in interpreting and applying the law" (p. 444).

Republicans *both*, conservatives and liberals *both*, insisted repeatedly and at great length, illustrating their explanations with detailed examples, that H. R. 7152 (which eventually became the Civil Rights Act of 1964) would forbid *all* racial preference for *any* race.

6.

IN THE House of Representatives the bill was amended by the Committee on the Judiciary to include Title VII because no compulsory provisions to deal with private discrimination in employment had been included in its original form. It was added, the committee noted, "to eliminate . . . discrimination in employment based on race, color, religion, or national origin" (*H.R. Reports*, No. 914, p. 26). That title was further amended on the floor of the House to include a Section, 703 (d), which specifically addressed the prohibition against discrimination (already formulated in 703 (a) quoted above) to on-the-job training! Section (d) of 703 reads as follows:

> It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, *including on-the-job training programs*, to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training [42 U.S. Codes 2000e-2 (d); emphasis added].

Included with the Report of the Judiciary Committee were the lengthy "Additional Views on H.R. 7152" of a group of its advocates, Representative McCulloch and others, which incorporated a passage referred to by Vaas as fairly stating the consensus of the civil-rights proponents as they guided the bill toward adoption. This representative passage includes these sentences:

> Internal affairs of employers and labor organizations must not be interfered with [under Title VII] except to the limited extent that correction is required in discrimination practices. Its [the Equal Opportunity Employment Commission's] primary task is to make certain that the channels of employment are open to persons regardless of their race and that jobs in companies or membership in unions are strictly filled on the basis of qualification [*H. R. Reports*, No. 914, pt. 2, p. 29; Vaas, p. 437].

The major objection faced by Title VII in the House (and again later in the Senate) was the claim that under it racial proportionality in employment might subsequently be required by some federal agency, acting under color of that law. This fear was epitomized in the Minority Report which suggested, as one serious concern, that an employer, under Title VII, "*may be forced to hire according to race*, to 'racially balance' those who work for him *in every job classification* or be in violation of Federal law" (*H.R. Reports*, No. 914, p. 69; emphasis in original). That fear had to be allayed; proponents of the bill strenuously and repeatedly reassured their colleagues that no such racial balancing was contemplated, and that none would be required or even permitted under this Title.

Representative Celler, one of the sponsors of the bill and chairman of the Committee on the Judiciary, at the opening gun of the debate in the House, made the intent of the language of 703 (a) unmistakable. The fear that it would require or permit hiring or promotion on the basis of race resulted, he said, from a description of the bill that was "entirely wrong." He continued:

> Even . . . the court could not order that any preference be given to any particular race, religion or other group, but would be limited to ordering an end to discrimination. The statement that a Federal inspector could order the employment and promotion only of members of a specific racial or religious group is therefore patently erroneous. . . .
>
> The Bill would do no more than prevent a union, as it would prevent employers, from discriminating against or in favor of workers because of their race, religion, or national origin.
>
> It is likewise not true that the Equal Employment Opportunity Commission [established by Title VII] would have power to rectify existing "racial or religious imbalance" in employment by requiring the hiring of certain people without regard to their qualifications simply because they are of a given race or religion. Only actual discrimination could be stopped [110 *Cong. Rec.*, p. 1518].

This theme was echoed repeatedly in the course of the debate in the House of Representatives. Representative Lindsay of New York, among others, took up the defense of Title VII:

> This legislation . . . does not, as has been suggested heretofore both on and off the floor, force acceptance of people in schools, jobs, housing, or public accommodations because they are Negro. It does not impose quotas or any special privileges of seniority or acceptance. There is nothing whatever in the bill about racial balance. . . . What the bill does do is prohibit discrimination because of race . . . [110 *Cong. Rec.*, p. 1540].

With that clear understanding the bill passed the House, 290 to 130, on February 10, 1964.

7.

IN THE Senate, the expression of legislative intent was voluminous and unequivocal. Again the fear of opponents was that some federal inspector might one day impose racial balance under color of this law. Again—and again and again and again—the defenders of the bill replied with reassurance, insisting vehemently that such fears were totally unfounded. The key term, "discrimination," appearing in Sections 703 (a) and 703 (d) and elsewhere in the bill, was examined minutely on the Senate floor. Could it be taken to mean (the critics asked) only numerical imbalance? Answer: definitely not. Could it have been, for the framers of the legislation, a technical term, whose hidden meaning was "discrimination against blacks" but not "discrimination against whites"? No, definitely not. Senator Humphrey put that suggestion permanently to rest: "[T]he meaning of racial or religious discrimination is perfectly clear. . . . [I]t means a distinction in treatment given to different individuals because of their different race, religion, or national origin" (110 *Cong. Rec.*, p. 5423). The only freedom of employers that the bill limits, he emphasized, is the freedom to take action based on race, religion, sex, or national origin.

When the Senate took up the substance of the Act directly, after deciding not to submit it to committee, it again became essential for the bill's advocates to answer the complaint that the bill would lead to racial preference. Not so, they insisted. Senator Humphrey again:

> That bugaboo has been brought up a dozen times; but it is nonexistent. In fact, the very opposite is true. Title VII prohibits discrimination. In effect, it says that race, religion, and national origin are not to be used as the basis for hiring and firing. Title VII is designed to encourage hiring on the basis of ability and qualifications, not race or religion.

In the same speech Senator Humphrey gives a series of examples that ". . . makes clear what is implicit throughout the whole title; namely, that employers may hire and fire, promote and refuse to promote for any reason, good or bad, provided only that individuals may not be discriminated against because of race, religion, sex, or national origin." He repeats himself so that even the deaf may hear: "The truth is that this title forbids discriminating against anyone on account of race. This is the simple and complete truth about Title VII" (110 *Cong. Rec.*, p. 6549). Humphrey was majority whip and the floor leader for the Civil Rights Act in the Senate. In his support rose Senator after Senator to give the same explanatory assurances about the intent of the legislation.

Senator Kuchel, the minority whip, emphasized that the seniority rights of workers already employed would not be affected by Title VII. He said:

> Employers and labor organizations could not discriminate in favor or against a person because of his race, his religion, or his national origin. In such matters, the Constitution, and the bill now before us drawn to conform to the Constitution, is color-blind [110 *Cong. Rec.*, p. 6564].

SENATORS Clark and Case were floor captains in the Senate for Title VII specifically. To them fell the task of explaining that Title, what it meant and did not mean, what it permitted and what it prohibited. Their chief task was to refute the charge that Title VII would result in preference for racial minorities. In a memorandum prepared for the Senate they expressed the intent of Title VII unequivocally:

> [A]ny deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of Title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited as to any individual [110 *Cong. Rec.*, p. 7213].

A different memorandum, prepared by the U.S. Department of Justice at Senator Clark's request, also makes the point that there is no need to fear employers' being required to maintain racial balance:

> No employer is required to maintain any ratio of Negroes to whites, Jews to Gentiles, Italians to English, or women to men. The same is true of labor organizations. On the contrary, any deliberate attempt to maintain a given balance would almost certainly run afoul of Title VII because it would involve a failure or refusal to hire some individual because of his race, color, religion, sex, or national origin. What Title VII seeks to accomplish, what the civil rights bill seeks to accomplish is equal treatment for all [110 *Cong. Rec.*, p. 7207].

Senators Smathers and Sparkman, granting that the bill did not require the use of hiring quotas, put the attack against Title VII more subtly. Under it, they suggested, employers might be *coerced*, by federal agencies, into giving preference by race. Would that not be permitted under this law? The answer, this time from Senator Williams, was an emphatic negative. Opponents, he replies,

> persist in opposing a provision which is not only not contained in the bill, but is *specifically excluded* from it. Those opposed to H.R. 7152 should realize that to hire a Negro solely because he is a Negro is racial discrimination, just as much as a "white only" employment policy. *Both forms of discrimination are prohibited by title VII of this bill.* The language of that title simply states that race is not a qualification for employment. . . . [A]ll men are to have an equal opportunity to be considered for a particular job. Some people charge that H.R. 7152 favors the Negro, at the expense of the white majority. But how can the language of equality favor one race or one religion over another? Equality can have only one meaning, and that meaning is self-evident to reasonable men. Those who say that equality means favoritism do violence to commonsense [110 *Cong. Rec.*, p. 8921; emphasis added].

Still the fear that racially preferential hiring would somehow be encouraged or permitted under Title VII would not down. Once again the floor leader, Humphrey, took up the battle:

> The title [Title VII] does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. It does not provide that any quota systems may be established to maintain racial balance in employment. *In fact, the title would prohibit preferential treatment for any particular group*, and any person, whether or not a member of any minority group, would be permitted to file a complaint of discriminatory employment practices [110 *Cong. Rec.*, p. 11848; emphasis added].

8.

How could the majority of the Supreme Court, in *Weber*, escape the force of this parade of unequivocal accounts marching across the printed record of the process of its adoption? Could they contend, perhaps, that although racial preference was indeed prohibited, that prohibition did not bear upon efforts to overcome the effects of *past* discrimination upon the seniority rights of employees? At one point, conceding that it was the intent of the Senate to forbid the maintenance of racial balance, the majority grasps at a straw: this Kaiser quota plan was not introduced to maintain racial balance, they contend, but to "eliminate a manifest racial imbalance" (Brennan, p. 11 and p. 13). Can the net of clear congressional intent be thus eluded, by making the distinction between "maintaining" racial balance and "eliminating" racial imbalance, holding that Title VII forbids the former but not the latter?

Not a chance. Explicating Title VII, its most thorough congressional students, Senators Clark and Case, wrote in their joint memorandum:

> Title VII would have no effect on established seniority rights. *Its effect is prospective and not retrospective*. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—*or indeed, permitted*—to fire whites in order to hire Negroes, or *to prefer Negroes for future vacancies*, or, *once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier* [110 *Cong. Rec.*, p. 7213; emphasis added].

The Justice Department had earlier drawn the same conclusion: Title VII could not be used to alter seniority entitlements because of discrimination in employment before its adoption:

> Title VII would have no effect on seniority rights existing at the time it takes effect. . . . This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. . . . [A]ssuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of Title VII. Employers and labor organizations would simply be under a duty not to discriminate against Negroes because of their race [110 *Cong. Rec.*, p. 7207].

The distinction between "maintaining" and "achieving" racial balance was, manifestly, never part of the understanding of the legislature that adopted Title VII.

That distinction, moreover, would have been and is specious from the point of view both of advocates and critics of racial preference. If, after the achievement of racial balance through racial preference, craft jobs again were to become predominantly white, the advocates of racial preference would certainly not be content. Convinced that such imbalance is in itself wrong, they would, understandably, then insist that if racial preference be permitted for the achievement of racial balance, it must be permitted for its reachievement. The claim that such instruments are only "temporary" is a fiction. It will be of little consequence to its advocates that the majority in *Weber* leaned on a tenuous distinction which it will be in their interest to ignore. And the opponents of racial preference—including the 88th Congress of 1964—may rightly insist that if preference by race is in principle wrong, it is no less wrong in the one case than in the other. Indeed, both the Justice Department and the floor captains for Title VII in the Senate very carefully pointed out that maintaining racial balance would be forbidden "*because* it would involve a failure or refusal to hire some individual because of his race . . ." (see above, p. 47; emphasis added). The reference in these arguments is to the actual words of Section 703 (a) cited on page 48 above. Adverse effects upon an employee or applicant because of race would result whether the goal had been the maintenance of racial balance or the achieving of it.

The argument that the Congress intended Title VII to permit racial preference in achieving racial balance, but forbade it for maintaining racial balance, and that therefore once proportionality is achieved all such preference will cease, is unworthy of the Supreme Court; it is a sop designed to placate critics with unreliable assurances that the instrument approved will be only "temporary." In fact ethnic preference, once ensconced, is likely to be nearly impossible to eradicate. To mitigate its unfairness more and different ethnic preferences will be introduced—as already they are being introduced.

Those who condemn racial favoritism condemn it both for achieving and for maintaining racial balance; those who support racial favoritism will not object to its use in either role. That distinction cannot serve to render plausible the majority's interpretation of congressional intent in enacting Title VII of the Civil Rights Act.

9.

AS DEBATE over the Civil Rights Act continued in the Senate it became evident that the bill would have to be amended to make absolutely clear the fact that it could not later serve as the justification, by any federal agency, of the imposition of racial preference. Only thus might the repeated objections of its most implacable opponents be successfully met. A bipartisan coalition, made up of Senators Dirksen, Mansfield, Humphrey, and Kuchel, cooperating with leaders in the House of Representatives, devised the "Dirksen-Mansfield" amendment, ultimately adopted. Among the changes thus introduced was a clarifying addition, Section 703 (j), very specifically addressing the critics' fears of imposed racial balancing. This section provides that nothing in the entire Title shall be interpreted to require the giving of preferential treatment to any individual because of race. It reads:

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified by any employment agency or labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area [42 U.S.C. 2000e–2 (j)].

Now, in an ironic and extraordinary turn, the Supreme Court majority in *Weber* uses the language of this section to infer (relying upon what Justice Burger calls a "negative pregnant") that since it bars the requirement of racial preference, but does not specifically prohibit racial preference, it must have been the intention of Congress not to prohibit it! The majority writes:

> The section does *not* state that "nothing in Title VII shall be interpreted to *permit*" voluntary affirmative efforts to correct racial imbalances. The natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative action [Brennan, p. 10; emphasis in original].

This inference is either disingenuous or obtuse. The objection this added section was designed specifically to meet was that racial preference would somehow be required. No one thought it would or could be introduced voluntarily because "voluntary" racial preference precisely had been forbidden by the plain language of the earlier key section, 703 (a), cited above on page 48. Debate in the Senate went on for almost three full months. Never in that entire period was it argued, *by either side*, that employers could, of their own accord, give preference by race. Both proponents and opponents made perfectly clear their understanding that voluntary racial preference by employers, for blacks or for whites, was entirely precluded by the flat and unambiguous wording of those earlier passages, forbidding *any* employment practice that would "discriminate against any individual" because of that individual's race. To add that prohibition yet again, in 703 (j), would have been entirely redundant—and more importantly, it might have diluted the intended force of that particular passage, aimed narrowly at the objection that racial preference would otherwise someday be imposed by government.

That it was so aimed is made exquisitely clear by the difference in the phrasing of 703 (j) from that of the earlier, central sections of the Title. The earlier sections, prohibiting racial discrimination in employment universally, are directed specifically at the employer, and therefore begin: "It shall be an unlawful employment practice for an employer. . . ." Section 703 (j) is directed specifically *at possible federal enforcement agencies*, commissions, or courts, and therefore begins with language indicating that kind of target: "Nothing contained in this subchapter shall be interpreted. . . ." Now to infer, from the fact that this section does not repeat the prohibition already several times explicit in earlier sections, that it was the intention of Congress not to prohibit racial preference, is a transparently unsound defense of so grave a decision.*

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* The argument called a "negative pregnant" is technically described as one having the form *modus tollens:* if p entails q, and q is false, then p must be false. The form is valid, of course—but in this application of it the argument (in either of two possible reconstructions of it) is built upon a false premise.

Version A: "If Congress had intended to forbid all racial preference they would have said that explicitly. They did not say that explicitly. Hence they did not intend that." In this version the second premise is plainly false; the congressional ban against racial preference in Section 703 (a) is perfectly explicit.

Version B: "If Congress had intended to forbid all racial preference they would have expressed that intention explicitly in Section 703 (j). They did not express that intention there. Hence they did not have that intention." In this version the second premise is true but the first is false. There was no need for Congress to repeat, in Section 703 (j), the ban it had already made explicit earlier, and there was good reason not to do so.

Arguments relying upon false premises, even when valid in form, are not sound.

Lest there be any doubt, however, about the intent of the Congress *after* the addition of 703 (j), we can return to the debate itself. Senator Saltonstall, defending the Dirksen-Mansfield amendment including 703 (j), says of it, very plainly: "The legislation before us today provides no preferential treatment for any group of citizens. In fact, it specifically prohibits such treatment" (110 *Cong. Rec.*, p. 12691).

And yet again, in defending the amended bill against Senator Ervin's criticism that it "would make the members of a particular race special favorites of the laws," Senator Clark answers: "The bill does not make anyone higher than anyone else. It establishes no quotas." Employers, labor unions, employment agencies, remain free, Clark points out, to use normal judgment in their business activity—but:

> All this is subject to one qualification, and that qualification is to state: "In your activity as an employer, as a labor union, as an employment agency, you must not discriminate because of the color of a man's skin. . . ." That is all this provision does. . . . It merely says, "When you deal in interstate commerce, you must not discriminate on the basis of race. . . ."

In the event this be somehow misunderstood, he repeats himself in that speech:

> All it [Title VII] does is to say that no American, individual, labor union, or corporation, has the right to deny any other American the very basic civil right of equal job opportunity [110 *Cong. Rec.*, pp. 13079-80].

Senator Cooper, anxious to make the force of what was soon to become law unmistakably clear, also responds to Senator Ervin's concerns, saying:

> As I understand Title VII, an employer could employ the usual standards which any employer uses in employing—in dismissing, in promoting, or in assigning those who work for him. There would be only one limitation: he could not discriminate, he could not deny a person a job, or dismiss a person from a job, or promote on the sole ground of his color, or his religion, other factors being equal [110 *Cong. Rec.*, p. 13078].*

10.

But how, one asks, can the majority not have been fully aware of all this? They must have seen the draft of Justice Rehnquist's dissent, which makes the same points vividly. Did they, perhaps, find other evidence within the record of the debates in Congress, evidence that has here been left unmentioned, which might somehow permit a reading of congressional intent to permit racial preference? No, no evidence has been suppressed here. Like Vaas and Justice Rehnquist, upon whose guidance I have relied, I have scoured the pages of the *Congressional Record*; like them I have registered only a fraction of the evidence against the majority's interpretation. If, in all those pages, there were evidence that *any* Senator or Congressman had the intent that the majority ascribes to the whole Congress, we may be certain it would have been dug up and registered within the majority opinion. No such evidence appears there. Here again we may indeed rely upon a negative pregnant. In this majority opinion, in which every quotation from the congressional debates is presented that might contribute, even with arguments far-fetched or unsound, to an excessively strained interpretation of congressional intent, the absence of any passages that actually express that intent is very revealing.†

The plainest proof that the members of the majority in *Weber* cannot have been in ignorance of the actual intent of Congress, and after searching could find no evidence of contrary intent, is given by Justice Marshall himself. In a 1976 opinion, writing for the Court, he presents a careful analysis of the intent of Congress in Title VII. He quotes Representative Celler, saying Title VII was intended to "cover white men and white women and all Americans" (110 *Cong. Rec.*, p. 2578). He cites Senator Humphrey, Senator Clark, Senator Case, and Senator Williams in passages like those quoted above. Justice Marshall concludes that "Its [Title VII's] terms are not limited to discrimination against members of any particular race." He then substantiates this judgment by extended reference to the interpretation of Title VII given by the Equal Employment Opportunity Commission:

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* That Congress intended its prohibition of racial preference expressed in 703 (a) to be general, to ban preference for minorities as well as for the white majority, is strongly confirmed by the striking fact that in the one case in which they did wish to make an exception, permitting one very special kind of preference in one very special setting, they identified that exceptional case and delimited it narrowly in Section 703 (i), with carefully chosen words: "Nothing contained in [Title VII] shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which preferential treatment is given to any individual because he is an Indian living on or near a reservation."

From the specific inclusion of that one exception it is manifest that only by such specific language did Congress intend exceptions to be justified. No other such exceptions appear. Here is a negative pregnant—a valid *modus tollens* argument—worthy of respect: "Where Congress intended an exception to the general ban on racial preference it identified the excepted case explicitly. It identified no exception for private employers or unions save that regarding Indians on or near a reservation. Hence it intended no exception but this one." In this case the premises are all true and the argument is sound.

† Again the valid argument is in the form of *modus tollens*, and again its premises are true: "If Congress had intended to permit private racial preference in employment there would have been clear expression of that intention by at least some defenders of the Act in the course of lengthy debate. No such expressions appear. Hence Congress cannot be supposed to have had that intent." There is nothing wrong with *modus tollens*; its effectiveness in argument, however, depends upon the truth of the premises relied upon.

> The EEOC, whose interpretations are entitled to great deference, . . . *has consistently interpreted Title VII to proscribe racial discrimination in private employment against whites on the same terms as racial discrimination against non-whites,* holding that to proceed otherwise would "constitute a derogation of the Commission's Congressional mandate to eliminate all practices which operate to disadvantage the employment opportunities of any group protected by Title VII, including Caucasians.

Justice Marshall explains, representing the Court, that the history of legislative intent in adopting Title VII is *"uncontradicted"* (*McDonald* v. *Santa Fe Trail Transportation Co.,* 427 U.S. 273, at 278-80, 288; emphasis added).

Members of the House and Senate are quoted by the majority, to be sure. But the quotations serve to establish matters only tenuously related to the central point at issue. Repeated citations from the debates are given to establish that it was the larger purpose of Congress, in tackling this legislation, to promote employment opportunities for blacks. That, as we have seen, is not at issue, and does not speak to the question of what prohibitions were intended. Several citations are given to show, correctly, that one major concern in the Senate when introducing Section 703 (j), which precludes the requirement of racial preference by the enforcers, was to reduce the likelihood of federal interference with private business. That was an aim of many Senators; but showing that does not prove, or even tend to confirm the thesis, that Title VII as a whole was designed to permit nongovernmental racial preference.

One other citation by the majority deserves attention. To give credence to the claim that the distinction between private racial favoritism and federally required racial favoritism was before the congressional mind, the majority quotes from the House Committee report favoring the original bill. The passage says that "the enactment of Federal legislation dealing with the most troublesome problems [of social discrimination] will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination." The majority fastens on this sentence, even adds emphasis to the final phrase, suggesting that it proves that a voluntary racial quota in employment is one of those "other forms" for which the Civil Rights Act had created the atmosphere (Brennan, p. 8).

Fallacious would be the gentlest way to describe this argument—in view of the failure, not likely to be accidental, to quote the lines immediately following the cited passage. An explanation is given there of the distinction between "the most serious types of discrimination" and those other varieties for which voluntary attention might be encouraged. The serious types, types this House report there suggests *will* be dealt with by this bill, specifically include voting, public accommodation, *and employment*. The omitted passage reads:

> It is, however, possible and necessary for the Congress to enact legislation which prohibits and provides the means of terminating the most serious types of discrimination. This H.R. 7152, as amended, would achieve in a number of related areas. . . . It would prohibit discrimination in employment [*H. R. Reports*, No. 914, p. 18].

The forms of discrimination it was hoped might yield to voluntary action were those *other* than discrimination in employment, voting, and the like. Indeed, employment discrimination is mentioned repeatedly in the report as being of the most serious kind, the kind for whose prevention this legislation was specifically designed.

There is not a shred of evidence in this passage that the report actually envisaged voluntary racial *preference* of any kind, or that would have suggested to the House that such preference—especially in employment—was permissible under this Act.

II.

ONE HATES to flog a dead horse. But this horse came to life in an extraordinary opinion of a Supreme Court majority—so I report, finally, the understanding of the Civil Rights Act of 1964 as that understanding was registered in the final hours of debate on the Senate floor—after which it was returned to the House and approved as amended. The legislative decision was at hand. The advocates of the bill, now under cloture, had to give their final defenses and interpretations. On the point at issue here their remarks were unmistakably clear.

Senator Muskie:

> It has been said that the bill discriminates in favor of the Negro at the expense of the rest of us. It seeks to do nothing more than to lift the Negro from the status of inequality to one of equality of treatment [110 *Cong. Rec.*, p. 14328].

Senator Moss:

> The bill does not accord to any citizen advantage or preference—it does not fix quotas of employment or school population—it does not force personal association. What it does is to prohibit public officials and those who invite the public generally to patronize their businesses or to apply for employment, to utilize the offensive, humiliating, and cruel practice of discrimination on the basis of race. In short, the bill does not accord special consideration; it establishes equality [110 *Cong. Rec.*, p. 14484].

Very self-consciously, aware that it was making history, the Senate passed the amended Civil Rights Act on June 19, 1964, by 73 to 27, every member voting. The struggle in that body, as Vass describes it, had been "titanic and protracted." The meaning and force of every line, every phrase in the bill had been intensely scrutinized and explained with scrupulous care. The legislators knew precisely what they were prohibiting with this legislation, and we know exactly what they understood themselves to be doing because they took care, very deliberately, to put their explanatory accounts on record.

No impartial judge, properly attentive to the abundant evidence that establishes dispositively the true intent of Congress, could honestly conclude that its intent was to permit private racial preference in employment. Yet that is what the majority has concluded, in a decision that is, taken all in all, simply shocking.

12.

ARE THERE no redeeming features of the majority's decision? Yes, there are several—all respects in which the impact of the decision is explicitly limited. "We emphasize at the outset," writes the majority, "the narrowness of our inquiry" (Brennan, p. 4).

Although the impact of the decision will prove very substantial, it is, indeed, narrow in a technical sense. Its narrowness is a consequence of the explicit intention of the majority to decide the case entirely as one of statutory interpretation. What the majority decided about the Kaiser quota plan, it will be recalled, is no more than that Title VII of the Civil Rights Act does not forbid it. Restricting themselves to an interpretation of the statute was possible for the majority because, they said, "this case does not present an alleged violation of the Equal Protection Clause of the Constitution." It does not, they explain, because the racially preferential quota in question was entirely within "the private sector." The plan did not involve "state action" [*ibid.*].

This view of the Kaiser plan is at once reasonable and ironic. It is ironic because although this racial quota surfaced only in a labor-management agreement, it had been introduced there as a result of threats of contract cancellation by a federal enforcement agency. Threats why? Because Kaiser's work force was not racially balanced. In the language of the Office of Federal Contract Compliance, minorities were being "underutilized" by Kaiser. By devising job-training racial quotas in submission to that threat, Kaiser and the union showed how well-grounded were the fears of those who had wished to preclude not only the federal requirement of racial preference, but the federal coercion of it. The addition of Section 703 (j) sought to guard against the first of these dangers. Now its very language is used to realize the second, accomplishing indirectly what that language was designed to prevent directly.

In a historical aside that would be amusing if it did not reflect upon the highest court in the land, Justice Rehnquist cites a remark by Senator Sparkman in projecting the uses to which Title VII may one day be put: "Certainly the suggestion will be made to a small business that may have a small government contract . . . that if it does not carry out the suggestion that has been made to the company by an inspector, its government contract will not be renewed" (110 *Cong. Rec.*, p. 8618).

Yet the Court's distinction between state action and private action remains reasonable. However pernicious racial discrimination may be, it is right to distinguish between immoral acts done by private parties (even when arguably coerced) and the same acts done directly by a representative government. To accept that distinction is not to suggest that the majority is correct in holding this private racism lawful. Under any plausible reading of the Civil Rights Act, it is not. But not all private nastiness is public business, and we are wise to agree that, where state action *is* clearly involved in racial preference, the problem rises to a different and higher level of gravity.

Because the majority puts substantial emphasis on the distinction, introducing it at several points in its opinion, it is reasonable to conclude not only that the majority opinion does not cover public employers, but that public employers—government agencies, public universities, etc.—cannot rely in any way upon the permission here being given to a private employer.

Private employers also, as a matter of morality, might reasonably refrain from engaging in practices believed to be forbidden to public employers. There is an odious quality in conduct narrowly held lawful but which, if pursued by government, would create at least a serious question of constitutional right. Sooner or later the fundamental question will arise again in a context obliging a full-blooded constitutional response by the full Court. When that happens we may hope for a wiser result.

What is the likelihood of an eventual constitutional reversal of *Weber*? No one can say with confidence. The present Court is deeply divided on this cluster of issues. *Weber* was decided by a vote of 5 to 2. Justice Stevens, author of the opinion in support of Allan Bakke in that analogous case, excused himself because he had once served as an attorney for Kaiser. Justice Powell was kept from presence at the oral argument by illness, and also took no part in *Weber*. In any later constitutional resolution in which Justices Stevens and Powell participate it is exceedingly likely that both would find racial preference of every kind unacceptable. Powell has vigorously expressed his condemnation of racial preference, rejecting any "two-class" theory of the Equal Protection Clause. Justices Marshall and Brennan, the most vigorous defenders of racial preference on the present Court, are not in good health. When this matter is faced afresh, in the context of the Fourteenth Amendment's demand that no state "deny to any person under its jurisdiction the equal protection of the laws," the complexion of the Court may well have changed.

The majority opinion is narrow in the further sense that it gives almost no guidance to those who might wish to expand racial preference. No principles of acceptability for racial preference are advanced. The majority explicitly refrains from defining in detail "the line of demarcation between permissible and impermissible affirmative-action plans." It holds only that this plan, which gives preference to blacks over whites for job-training opportunities but not for employment itself, "falls on the permissible side of the line" (Brennan, p. 12). Any racially preferential program, therefore, that goes in any way beyond this one might immediately lose the support of one or more of the five members of the majority, thus failing on subsequent test. What is learned in *Weber* is that the Supreme Court now holds this precise plan not to be forbidden by Title VII of the Civil Rights Act of 1964—no more than that.

13.

FINALLY, there will be political repercussions from *Weber*, partly because they have been invited by the Court, and partly because the decision of the Court is very likely to provoke them.

Political response is invited by the fact that the majority opinion hangs entirely on its interpretation of the intent of Congress. It remains open to Congress to register its true intent so clearly that even this majority could not fail to perceive it. Justice Blackmun, exhibiting troubled reluctance in his concurring opinion, and reiterating his hopes for an early end to racial preference he had himself (in his *Bakke* opinion) called "ugly," concludes his opinion with an explicit invitation to the Congress: "And if the Court has misperceived the political will, it has the assurance that because the question is statutory Congress may set a different course if it so chooses" (Blackmun, p. 8).

That the intent of Congress to forbid all racial preference in employment already appears in the unambiguous words of Title VII, Section 703 (a), quoted above (p. 43) is indisputable. Yet it is possible that formal congressional reemphasis of its intent would cause the Court to desist in its efforts to rewrite the legislation to its taste. Congressional efforts to accomplish just this objective are likely to be undertaken, but the success of any such legislative shoring-up of Title VII is doubtful.

There is a provocative aspect of the majority opinion in *Weber*, however, that may actually drive the Congress to underscore its earlier demand for equal treatment of the races. This is a feature of the decision which, upon reflection, appears even more insensitive than the misreading of congressional intent. I refer to the callousness, manifest in the majority opinion, toward the interests of ordinary working-class people. Allan Bakke was ordered admitted to the medical school at Davis; blatant racial discrimination against him was not tolerated. Brian Weber, a working man without skills or influence, and without the organized support of the intellectuals, can be left to bear the burden, even though his rights may be infringed upon. The majority is explicit on this point. To advance the racial balancing they think good it may be necessary, they say, to "*trammel the interests of the white employees*" (Brennan, p. 12; emphasis added).

Five members of the Supreme Court may find this a comfortable position in which to rest; most elected legislators will not. It may be that by egregiously misreporting the intent of Congress, and then boldly expressing their own willingness to sacrifice the interests of one race to advance the interests of another, the majority in *Weber* has taken those provocative steps that will lead eventually to more emphatic legislative insistence upon the equal protection of the laws.

SOME POST-*BAKKE*-AND-*WEBER* REFLECTIONS ON "REVERSE DISCRIMINATION"

*Henry J. Abraham**

So much has been said, written, and emoted concerning the subject of "reverse discrimination" that it represents a veritably frustrating experience to endeavor to come to grips with it in a non-redundant, non-banal, non-breast-beating manner. The difficulty is compounded by the all-too pervasive substitution of passion for reason on the wrenching issue—one that, admittedly, invites passion. Indeed, passion informed not an insignificant number of the record filings of the 120 briefs *amicii curiae* in the first central "reverse discrimination" case of *Regents of the University of California v. Bakke,*[1] in which oral argument was presented to the Supreme Court of the United States in mid-October 1977. It took place in a sardine-like packed Court chamber, with more than 200 putative spectators waiting in line all night in the hope of perhaps hearing one three-minute segment of that potential bellweather decision—toward which the Court, in an unusual action, called for the filing of supplementary briefs by all parties concerned two weeks later in order to argue specifically the *statutory* question(s) involved in the application of Title VI of the Civil Rights Act of 1964. Passion similarly governed the denouement of the second major "reverse discrimination" case, *United Steel Workers and Kaiser Aluminum & Chemical Corporation v. Weber,*[2] which the Court decided in June 1979, almost exactly one year after the *Bakke* holding. And passion, however comprehensible emotionally, has clouded the arguments and contentions of even the most cerebral professional as well as lay observers of the "reverse discrimination" issue, the resolution of which may well constitute a watershed in this particularly crucial aspect of the race syndrome, of what Gunnar Myrdal more than three decades ago so pointedly titled "The American Dilemma."[3]

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[1] 438 U.S. 265 (1978).

[2] 99 S. Ct. 2721 (1979).

[3] G. MYRDAL, AN AMERICAN DILEMMA (1944).

In the hope of avoiding an abject surrender to the aforementioned passion(s), I shall do my best to discuss the matter in a rational manner while pledging to strive to eschew what Headmaster Stanley Bosworth of St. Ann's Episcopal School in Brooklyn so tellingly, if perhaps a mite expansively, identified as the "[p]iety, puritanism and guilt [that have] combine[d] to stir the worst semantic confusion" conceivable[4] in this emotion-charged policy spectrum. It would thus be helpful to try to identify at the outset what we are, or *should be,* talking about in any attempted analysis of the constellation of "reverse discrimination," and what we *should not be* talking about. To do that it is necessary to find what the concept *means.* "I only want to know what the words mean," once commented Mr. Justice Oliver Wendell Holmes, Jr., the judicial philosopher of our age, but he freely admitted, with E. M. Forster, that there is "wine in words."[5] A lot of wine and other rather less consumable liquids have been poured into the notion, into the alleged meaning, of "reverse discrimination."

II.

Stipulating the audience of these ruminations to be educated, intelligent human beings, who read, see and/or hear the news that informs our *vie quotidienne,* I am comfortable in assuming a basic familiarity with the issues involved. I also am aware that, and I daresay without exception, any reader will have strong feelings on the matter. So do I. We would not be human if we did not; while they operate on a host of levels and are triggered at vastly diverse moments, we all have consciences. Stipulating these facts, I should first endeavor to make clear what "reverse discrimination" is *not:* (1) It is *not* action, be it in the governmental or private sector, designed to remedy the absence of proper and needed educational preparation or training by special, albeit costly, primary and/or secondary school level preparatory programs or occupational skill development, such as "Head Start," "Upward Bound," etc., always provided that access to these programs is not bottomed on race but on educational, and/or economic need, be it cerebral or manual. (2)

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[4] The New York Times, Oct. 29, 1977, at 22, col. 3 (Letters).

[5] Interview with Francis Biddle (one-time clerk to Mr. Justice Holmes), Wynnewood, Pa., March 10, 1962.

It is *not* the utilization of special classes or supplemental tutoring or training, regardless of the costs involved (assuming, of course, that these have been properly authorized and appropriated) on any level of the educational or training process, from the very pre-nursery school bottom to the very top of the professional training ladder. (3) It is of course not the scrupulous exhortation and enforcement of absolute standards of non-discrimination on the basis of race, sex, religion, nationality, and also now, to a limited extent, age. (4) It is *not* the above-the-table special recruiting and utilization efforts which, *pace* poo-pooing by leaders of some of the recipient groups involved, are not only pressed vigorously, but have been and are being pushed and pressed on a scale that would make a Bear Bryant and Knute Rockne smile a knowing smile. (5) It is *not* even an admission or personnel officer's judgment that, along with sundry other criteria, he or she may take into account an individual applicant's racial, religious, gender, or other characteristics as a "plus"—to use Mr. Justice Powell's *Bakke* term—but only if that applicant can demonstrate the presence of demonstrable explicit or implicit merit in terms of ability and/or genuine promise. For I shall again and again insist that *the* overriding criterion, *the* central consideration, must in the final analysis be present or arguably potential *merit*. It must thus be merit and ability, not necessarily based exclusively upon past performance, but upon a mature, experienced judgment that merit and ability are in effect in the total picture either by their presence or by their fairly confident predictability. These five "nots," which are all aspects of the concept of "affirmative action"—are naturally not an exhaustive enumeration. Yet they are illustrative of common practices that, in my view, do *not* constitute "reverse discrimination"—always provided that they remain appropriately canalized within proper legal and constitutional bounds—for they give life to the basic American right of equality of *opportunity*. One of the major problems, alas, is that militant pro-"reverse discrimination" advocates insist on substituting a requirement of equality of *result* for the requirement of equality of *opportunity*—a requirement based on the dangerous notion of statistical group parity, in which the focal point becomes the group rather than the individual.

This brings me to the necessary look at a quintet of what "reverse discrimination" *is:* (1) It *is*, above all, what in the final analysis, the

Bakke and *Weber* cases fundamentally were all about, namely the setting aside of quotas—be they rigid or quasi-rigid—i.e., the adoption of a *numerus clausus*, on behalf of the admission or recruitment or training or employment or promotion of groups identified and classified by racial, sexual, religious, age, or nationality characteristics. For these are characteristics that are, or should be, proscribed on both legal and constitutional grounds, because they are *non-sequiturs* on the fronts of individual merit and ability and are, or certainly should be, regarded as being an insult to the dignity and intelligence of the quota recipients. "Our Constitution is color-blind," thundered Mr. Justice John Marshall Harlan in lonely dissent in the famous, or infamous, case of *Plessy v. Ferguson* in 1896, "and neither knows nor tolerates classes among citizens."[6] His dissent, which became the guiding star of the Court's unanimous holding in the monumental and seminal 1954 ruling in *Brown v. Board of Education of Topeka*,[7] now prompts us to ask the question whether, as the proponents of "reverse discrimination" urge, the Constitution must be color-conscious in order to be color-blind.[8] But to continue what "reverse discrimination" is, it is (2) the slanting of what should be neutral, pertinent; and appropriate threshold and other qualification examinations and/or requirements; double-standards in grading and rating; double-standards in attendance and disciplinary requirements. It *is* (3) the dishonest semanticism of what are called *goals* or *guidelines*, that the bureaucracy has simply pronounced legal and/or constitutional on the alleged grounds that they differ from rigid *quotas*, which admittedly would be presumably illegal and/or unconstitutional. Fully supported by Mr. Justice Powell's dismissal of them in the *Bakke* decision as a "semantic distinction" which is "beside the point,"[9] I submit that this distinction is as unworkable as it is dishonest—in the absence of, to use a favorite Department of Health, Education and Welfare, Department of Labor, and O.E.E.O. term, "good faith" vis-a-vis the far-reaching efforts of affected educational institutions and employers to function under the concept of "goals" or "guidelines." But while going to enormous length to deny any equation of "goals" or "guidelines" with "quotas," the largely unchecked enforcement personnel of the three aforementioned powerful and well-funded agencies of the federal government—personnel that, certainly in the realm of the administration of higher education, often lacks the one-would-think essential experience and background—in effect *require* quotas while talking "goals" or "guidelines." Indeed, within hours, if not minutes, of the *Bakke* decision, for example, Eleanor Holmes Norton, the aggressive head of the O.E.E.O., announced that the Supreme Court holding would make no difference, whatever, to "the work we have been doing."[10] Thus, there is extant an eager presumption of a lack of a good faith effort against the background-imposition of rigid compliance quotas, based upon frequently irrelevant group statistics, statistics that are demonstrably declared to be *ultra vires* by Title VII, Sec. 703(j) of the Civil Rights Act of 1964.[11] (4) Reverse discrimination *is* such a statutory provision—one recently challenged and declared unconstitutional by U.S. District Court Judge A. Andrew Hauk,[12] but also upheld by U.S. District Court Judge Daniel J. Snyder, Jr.,[13] who was affirmed by the United States Court of Appeals for the Third Circuit[14]—as that mandated under the Public Works Employment Act of 1977.[15] Under that Act, Congress enacted a rigid requirement that 10 per cent of all public works contracts designed to stimulate employment go to minority business enterprises. How does this law identify such enterprises? They are, according to its terms, private businesses that are at least half-owned by members of a minority group or publicly held businesses in which minority group members control a majority of the stock.[16] And who are these statutorily recognized minorities? They are, says the Act, blacks, Orientals, Indians, Eskimos, Aleuts, and what is termed the "Spanish-speaking."[17] At issue, in what has quickly come to be known as the "1977 Ten Per Cent Set-Aside Quota Law," are thousands of construction jobs and billions of dollars worth of Government contracts. But when the U.S. Supreme Court initially had the case before it a few days after the *Bakke* decision came down, it ducked the problem on the ground that the award involved had already been consummated and the money expended, the issue thus being moot.[18] However, the Court has since agreed to reexamine it with its docketing of the potentially seminal case of *Fullilove v. Kreps*,[19] for which oral argument was heard on November 27, 1979. And reverse discrimination *is* (5) the widely advanced notion, a favorite of officials at the very highest levels of all branches of our contemporary Administration that, somehow, two wrongs make a right; that the children must pay for the sins of their fathers by self-destructive actions; that, in the words of Mr. Chief Justice Burger's dissenting opinion in the pro-reverse discrimination *Franks* decision in 1976, of "robbing Peter to pay Paul."[20]

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[6] 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

[7] 347 U.S. 483 (1954).

[8] *See* Mr. Chief Justice Hale's dissenting opinion in De Funis v. Odegaard, 82 Wash.2d 11, 507 P.2d 1169, 1189 (1973).

[9] 438 U.S. at 289.

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[10] *Newsweek*, July 10, 1978, p. 29.

[11] 42 U.S.C. § 2000e-2(j) (1976).

[12] Associated Gen'l Contractors of Cal. v. Secretary of Commerce of the United States Dept. of Commerce, 441 F. Supp. 955 (C.D. Cal. 1977).

[13] Constructors Ass'n. of W. Pa. v. Kreps, 441 F. Supp. 936 (W.D. Pa. 1977).

[14] Constructors Ass'n. of W. Pa. v. Kreps, 573 F.2d 811 (3d Cir. 1978).

[15] 42 U.S.C.A. § 6705(f)(2) (Supp. 1979).

[16] *Id.*

[17] *Id.*

III.

It is, of course, the latter issue—one I have suggested as my fifth illustration of what "reverse discrimination" *is*—that lies at the heart of the matter. To put it simply, but not oversimplifiedly, it is the desire, the perceived duty, the moral imperative, of compensating for the grievous and shameful history of racial and collateral discrimination in America's past. Discrimination is a fact of history which no fair person can deny, and whose reappearance no decent or fair person would sanction, let alone welcome. America's record since the end of World War II, and especially since the *Brown* decision, is a living testament to the far-reaching, indeed exhilarating, ameliorations that have taken place, and are continuing to take place, on the civil rights front. This is a fact of life amply documented and progressively demonstrated, and I need not do so here.[21] Anyone who denies the very real progress *cum* atonement that has taken place, and is continuing to take place, in both the public and the private sector, is either a fool, dishonest, or does so for political purposes—and the largest numbers fall into that latter category. American society today is absolutely committed to the fullest measure of egalitarianism under our Constitution, mandated in our basic document by the "due process" clause of amendments five and fourteen and the latter's "equal protection of the laws" clause as well as in a plethora of legislation. But that Constitution, in the very same amendments, safeguards liberty as well as equality—a somber reminder that rights and privileges are not one-dimensional.

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[18] Kreps v. Associated Gen'l Contractors of Cal., 438 U.S. 909 (1978).

[19] Fullilove v. Kreps, 584 F.2d 600 (2d Cir. 1978), *cert. granted*, 99 S. Ct. 2403 (1979).

[20] Franks v. Bowman Transp. Co., 424 U.S. 747, 781 (1976) (Burger, C.J., dissenting).

[21] I have tried to document this record in my book H. ABRAHAM, FREEDOM AND THE COURT (3d ed. 1977), now in its third edition, which—ironically in view of my stance on "reverse discrimination"—encountered difficulties in certain parts of the country as recently as a decade or so ago because of its allegedly excessive liberality on the race issue. I presume it all depends, to utilize Al Smith's felicitous phrase, "whose ox is being gored"—and at which moment in history.

It is on the frontiers of that line between equality and liberty that so much of the "reverse discrimination" controversy, both in its public and private manifestations, has become embattled. It is here that the insistent, often strident, calls for compensatory, preferential, "reverse discrimination" action are issued—and, more often than not, they issue from a frighteningly profound guilt complex, a guilt complex that has become so pervasive as to brush aside as irrelevant on the altar of atonement even constitutional, let alone legal, barriers—witness, for example, the opinions by Justices Brennan and Blackmun in both the *Bakke*[22] and *Weber*[23] rulings. To cite just one or two cases in point: One argument that veritably laces the pro-"reverse discrimination" positions of the briefs[24] in *Bakke* and *Weber*, especially those by the American Civil Liberties Union, the Association of American University Professors, Harvard University, Stanford University, the University of Pennsylvania, Columbia University, and the NAACP, among others, is that the injustices of the past justify, indeed demand, a "temporary use of affirmative action including class-based hiring preferences and admission goals" in favor of racial minorities.[25] In other words, the record of the past creates the catalyst *cum* mandate for the imposition of *quotas* like the 16 places out of 100 admittedly set aside by the

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[22] 438 U.S. at 402 (separate opinion of Blackmun, J.).

[23] 99 S. Ct. at 2721 (Brennan, J. delivered the opinion of the Court); 99 S. Ct. at 2730 (Blackmun, J., concurring).

[24] *See, e.g.*, Amicus Curiae brief for The American Association of University Professors, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[25] Amicus Curiae brief of Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, June 7, 1977, p.X, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

Medical School of the University of California at Davis for the "special" admission of members of certain minority groups.[26] What the school did is entirely straightforward and clear: it *did* establish a quota; it *did* practice discrimination; it *did* deny admission to a fully qualified white applicant, Allan Bakke, on racial grounds—which, as Mr. Justice Steven's stern opinion for himself and his colleagues Burger, Stewart, and Rehnquist, makes clear, is clearly forbidden by the plain language of Title VI of the Civil Rights Act of 1964.[27] The University had justified its action on the grounds of redress for past racial discrimination (the University, incidentally, had *never* practiced discrimination—and had never been accused of such until it denied Allan Bakke's admission);[28] on the need for compensatory action; and a commitment to "genuine equal opportunity."[29] In the responsive, apposite words of a widely-distributed statement by the Committee on Academic Nondiscrimination and Integrity:

> Just as no one truly dedicated to civil liberties would contemplate a "temporary" suspension of, say, the right to counsel or the right to a fair trial as a means of dealing with a crime wave, so no one truly dedicated to equality of opportunity should contemplate a "temporary" suspension of equal rights of individuals in order to achieve the goal of greater representation. The temporary all too often becomes the permanent. It is not the ultimate ends we proclaim but the temporary means we use which determine the actual future.[30]

In *Weber,* the central issue was a similar type of quota arrangement, although it governed employment rather than education: the Steelworkers and the Kaiser Corporation, under pressure by government agencies to engage in "affirmative action," had devised a plan that "reserves for black employees 50% of the openings in an in-plant craft training program until the percentage of black craft workers in the plant is commensurate with the percentage of blacks in the local labor force."[31] Both the U.S. District Court[32] and the U.S. Court of Appeals[33] had ruled that the plan clearly violated Title VII, Sec. 703, of the Civil Rights Act of 1964, which *specifically* outlaws racial discrimination in employment because of "race, color, religion, sex, or national origin."[34] But while admitting the presence of the plain statutory proscription, Mr. Justice Brennan in effect sanctioned its violation on the basis of the *spirit* of the law rather than its letter.[35]

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[26] 438 U.S. at 275.

[27] 438 U.S. at 408 (Stevens, J., concurring in the judgment in part and dissenting in part).

[28] 438 U.S. at 305.

[29] Brief for Petitioner at 32, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[30] 45 *Measure* 1 (December 1977).

A related, although somewhat different justification advanced on the altar of redressing past wrongs by temporarily—or perhaps not so temporarily?—winking at legal and constitutional barriers, one I prefer to call the "I am not really pregnant, just a little bit," approach to the problem, is illustrated by Ronald Dworkin, Professor of Jurisprudence at Oxford University, in his following 1977 defense of the use of racial criteria in connection with the well-known 1974 Washington Law School "reverse discrimination" case of *De Funis v. Odegaard:*[36]

> Racial criteria are not necessarily the right standards for deciding which applicants should be accepted by law schools for example. But neither are intellectual criteria, nor indeed, any other set of criteria. The fairness—and constitutionality—of any admissions program must be tested in the same way. It is justified if it serves a proper policy that respects the right of all members of the community to be treated as equals, but not otherwise. . . . We must take care not to use the Equal Protection of the Laws Clause of the Fourteenth Amendment to cheat ourselves of equality.[37]

Which, of course, is exactly what he in effect counsels here—in addition to the inequality of "reverse discrimination." In other words, the desired end justifies the means—no matter what the Constitution may command. We have here another patent illustration of the guilt complex syndrome which, not content with equal justice under law and equality of opportunity, insists upon, in Harvard Law Professor Raoul Berger's characterization, the attainment of "justice cost what it may."[38] Yet it represents the gravamen of the concurring opinions in *Bakke* by Justices Brennan, Marshall, and Blackmun; the controlling holding in the *Weber* case via the pen of Mr. Justice Brennan; and that of the concurring opinion therein by his colleague Blackmun.

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[31] 99 S. Ct. at 2724.

[32] 415 F. Supp. 761 (E. D. La. 1976).

[33] 563 F.2d 216 (5th Cir. 1977).

[34] 42 U.S.C. §§ 2000e-2(a), 2000e-2(d), and 2000e-2(j) (1976).

[35] 99 S. Ct. at 2726-27.

[36] 416 U.S. 312 (1974).

[37] Dworkin, *Defunis v. Sweatt*, in EQUALITY AND PREFERENTIAL TREATMENT (M. Cohen, T. Nagel, and T. Scanlon eds. 1977).

Along with a good many others who consider themselves *bona fide* civil libertarians and are certifiable champions of civil rights, who decades ago fought the good fight for equal justice and nondiscrimination—when fighting it was far more fraught with professional and personal risks than it is now—I confess, however, that I do not have a guilt complex on that issue. Myself a sometime victim of discrimination, of prejudice, and of the *numerus clausus, i.e.,* of quotas, I know that two wrongs do not one right make; that any so-called "temporary suspension" of constitutional rights is a cancer upon constitutionalism; that there is no such thing as being a little bit pregnant. Because of our religious persuasion my parental family and I were exiled from, and a number of members of our family were exterminated by, a land where our ancestors had lived for 500 years. As relatively recently as 1952, I was told by an administrator at a major northern university—one of the first proudly to carry the *anti*-Allan Bakke banner twenty-five years later—that I could not be promoted then because "we have already promoted one Jew this year." To which he added, and he was wholly sincere, "no personal offense meant." Happily, those times are gone—and I, for one, will not support their return on the altar of siren-like calls for atonement for past wrongs, etched in socio-constitutional rationalizations and manifestations of preferential treatment, compensatory standards, and quotas that are based on criteria and considerations other than those of fundamental merit, of ability, of equality of opportunity, and of equality before the law.

IV.

There is one other matter *cum* issue that must be addressed as a complement to my exhortation of the legal process, the necessity of playing the proverbial judicio-governmental societal game according to its rules. That, of course, is the role of the judiciary in interpreting the Constitution and the laws passed (and executive actions taken) under its constellation. The line between judicial "judging" and "lawmaking" is of course an extremely delicate and vexatious one: what represents "judicial activism" to some represents "judicial restraint" to others, and vice versa. All too often an observer's judgments correspond to the answer to the question "whose ox is gored?" Jurists are human, as we all are, yet they, unlike laymen, are presumed to be professionally qualified to render objective judgment on the meaning, range, and extent of constitutionally and statutorily sanctioned or interdicted governmental authority and exercise of power. To be sure, in Mr. Justice Cardozo's memorable phrase from his seminal *The Nature of the Judicial Process,* "it is not easy to stand aloof" when one deals with so controversial a policy matter as the resort to discrimination as a cure for discrimination, for, as that great jurist and sensitive human being put it so poignantly, "[t]he great tides and currents which engulf the rest of men, do not . . . pass [even] the judges idly by."[39] And they assuredly have not done so—notwithstanding what would appear to be some crystal clear statutory, and some relatively clear constitutional, commands. *Au contraire,* these commands have served jurists as well as legislators and mere citizens as justifications and/or rationalizations along the pathways of coming to grips with the issue in settling fashion in either political, or socio-economic, or philosophical, or statutory, or, in the final analysis, judicially constructed terms.

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[38] "The Imperial Court," *The New York Times Magazine*, October 9, 1977, p.115.

But there are demonstrable limits to subjectivity and result orientation, even when these are viewed against the notion of an obligation to heed, as Mr. Justice Holmes put it, "the felt necessities of the time."[40] One of these limits is the ascertainable intent of lawmakers in enacting legislation. *De minimis,* courts have an absolute basic obligation to examine *statutory* language and *legislative intent* as evidenced by the printed record—and the "reverse discrimination" field is no exception. Admittedly, the *constitutional* ground is considerably less clear: for the very verbiage and concept of "equal protection" (and, for that matter, "due process of law") defy finite or categorical definition—regrettably all-too-often depending upon the eye of the beholder or the subject and object of the aforementioned ox-goring. Yet even on constitutional *qua* constitutional grounds it is difficult to deny the verity of Mr. Justice Powell's point in his majority opinion in the 1978 *Bakke* case when he noted that: "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."[41]

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[39] B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS at 168 (1921).

[40] O. HOLMES, THE COMMON LAW at 1 (1881).

Be that as it may, one who attempts to be a dispassionate commentator need not reach, as in effect the Court customarily tried very hard not to reach, the constitutional issue (here the fourteenth amendment's equal protection of the laws clause). For if words mean anything, the basic statute involved, namely the 1964 Civil Rights Act's Title VII,[42] would indeed seem to be crystal clear in *proscribing* the kind of racial quotas that the United States District Court[43] and the United States Circuit Court[44] found to have violated Brian Weber's rights, for example, but which, on appeal, the highest court of the land *upheld* in its 5 to 2 decision.[45] The controlling opinion, written by Mr. Justice Brennan, acknowledged the statutory, the linguistic command, but he and his four supporters found approbative warrant in the law's "spirit" rather than in its letter.[46] For the law's section 703(a) makes it unlawful for an employer to classify his employees "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely effect his status as an employee, because of such individual's race, color, religion, sex, or national origin."[47] And, perhaps even more tellingly, section 703(j) provides that the Act's language is not to be interpreted "to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group" to correct a racial imbalance in the employer's work force.[48] Further to buttress historical and factual documentation on statutory grounds that the authors of the Civil Rights Act were demonstrably opposed to racial quotas, one need only take a glance at the voluminous, indeed repeated, documentation to that extent in the *Congressional Record* during the debates that led to the passage of the 1964 Civil Rights Act. Thus, the latter's successful Senate floor leader, Senator Hubert Humphrey (D.-Minn.), in responding to concerns voiced by doubting colleagues, vigorously and consistently gave assurance that no racial quotas or racial work force statistics would be employable under the law. In one exchange with his colleague Willis Robertson (D.-Va.), he made the following offer: "If the Senator can find in Title VII . . . any language which provides that an employer will have to hire on the basis of percentage or quota related to color . . . I will start eating the pages one after another, because it is not in there."[49]

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[41] 438 U.S. at 289-90.

[42] 42 U.S.C. § 2000e *et. seq.* (1976).

[43] 415 F. Supp. 761.

[44] 563 F.2d 216.

[45] 99 S. Ct. 2721.

[46] *Id.* at 2726-27.

[47] 42 U.S.C. § 2000e-2(a)(2) (1976).

It is difficult, indeed, it is in fact impossible, to argue with the facts of the statute's language or with congressional intent. Mr. Justice Brennan's opinion attempted to vitiate those facts by (1) seizing upon the allegation that the joint Steelworkers-Kaiser Corporation agreement to hire one black for every white trainee was not *required* but was *voluntary;*[50] and (2) that, in any event, the program would expire upon reaching statistical workforce-by-race availability-in-the-community parity.[51] One need not embrace the angry and sarcastic language of Mr. Justice Rehnquist's dissenting opinion to support his documented contentions that, as to (1) anyone with any knowledge of the course of affirmative action programs knows that they are patently Government-*required;*[52] and that, as to (2), subsection (j) of Section 703—quoted above—(a) forbids such a program and (b) the notion that it would prove to be "temporary" is either naive or "Houdini-like."[53] Whatever one's personal views on the underlying issue, whatever one's sympathies, the Rehnquist dissent, as Professor Philip B. Kurland of the University of Chicago School of Law put it, is simply unanswerable in terms of statutory construction and congressional intent.[54]

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[48] 42 U.S.C. § 2000e-2(j) (1976).

[49] 110 CONG. REC. 7420 (1964).

[50] 99 S. Ct. at 2726.

[51] *Id.* at 2730.

[52] 99 S. Ct. at 2736 (Rehnquist, J., dissenting).

[53] *Id.* at 2749.

To a very considerable degree it was not the Rehnquist dissent, but that by Mr. Chief Justice Burger, which comes to the heart of the matter if one wishes to abide by the imperatives of the governmental framework under which we live. For he points to the salient fact that:

> The Court reaches a result I would be inclined to vote for were I a member of Congress considering a proposed amendment of Title VII. I cannot join the Court's judgment, however, because it is contrary to the explicit language of the statute and arrived at by means wholly incompatible with long-established principles of separation of powers. Under the guise of statutory "construction," the Court effectively rewrites Title VII to achieve what it regards as a desirable result. It "amends" the statute to do precisely what both its sponsors and its opponents agreed the statute was *not* intended to do.[55]

There *is no* response to the Chief Justice's admonition—for it assesses accurately the obligations accruing under our system's separation of powers and the attendant roles of the three branches. In brief, and calling a spade a spade, the Court *legislated*—a function in this instance demonstrably reserved to the legislature (Congress). The elusive line between "judging" and "legislating" is, to repeat, of course a monumentally difficult one to draw in a great many instances, and it represents *the* basic issue of controversy in the exercise of judicial power. But there is *no* controversy in the present instance: Congress spoke and wrote with uncharacteristic clarity! Nonetheless, a majority of five Supreme Court Justices, given the nature of the public policy issue at hand, would neither listen nor read accurately.

V.

A concluding word on the desirability of "reverse discrimination" *per se*. I hope I have demonstrated what I regard as its tenets; what it *is*, and what it is *not*. Whether or not one agrees with that position, and regardless of how one perceives or reads the inherent statutory and constitutional issues, what of the merits of the proposition of racial, or sexual, or religious, or nationality quotas, or by whatever other noun they may be perfumed? It is not easy to do for me—as my students and colleagues would testify—but I will endeavor to be brief: I shall call as my star witness upon someone whose credentials on the libertarian front are indisputably impeccable, Mr. Justice William O. Douglas. In his dissenting opinion in *De Funis v. Odegaard*, after finding that Marco De Funis had been rejected by the University of Washington School of Law "solely on account of his race,"[56] the justice lectured at length on that classification, styling it at the outset as introducing "a capricious and irrelevant factor working an invidious discrimination,"[57] and insisting that the Constitution and the laws of our land demand that each application for admission must be considered in a "racially neutral way,"[58] a phrase he italicized and one, incidentally, quoted with approval by Mr. Justice Powell in *Bakke*.[59] "Minorities in our midst who are to serve actively in our public affairs," he went on, "should be chosen on talent and character alone, not on cultural orientation or leanings."[60] Warmly he cautioned that

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[54] Letter to author, July 7, 1979.

[55] 99 S. Ct. at 2734 (Burger, C.J., dissenting) (emphasis in original).

> [t]here is no constitutional right for any race to be preferred . . . . A De Funis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner.[61]
>
> . . . So far as race is concerned, any state sponsored preference of one race over another in that competition is in my view "invidious" and violative of the Equal Protection Clause.[62]

Mr. Justice Douglas concluded on a note that, for me, hits the essence of the entire issue: "The Equal Protection Clause," he insisted,

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[56] 416 U.S. at 333 (Douglas, J., dissenting).

[57] *Id.*

[58] *Id.* at 334.

[59] 438 U.S. at 298.

[60] 416 U.S. at 334.

[61] *Id.* at 336-37.

[62] *Id.* at 343-44.

> commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. The purpose of the University of Washington cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for the Irish. It should be to produce good lawyers for Americans. . . .[63]

That, I submit in all humility, is the *sine qua non* of the matter. It is my fervent hope, though far from a confident expectation—especially given the unsatisfactory, multi-faceted, evasion-inviting response given by the Court in *Bakke*—that we will still, at this late hour, resolve to heed the now retired Justice's admonition and substitute for "lawyers" whatever educational, occupational, or professional noun may be appropriate in given circumstances in the justly egalitarian strivings of all Americans, regardless of race, sex, creed, age, nationality, or religion, for a dignified, happy, prosperous, and free life, blessed by a resolute commitment to, and acquiescence in, equal justice under law—which is as the cement of society.

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[63] *Id.* at 342.

What's Wrong with Affirmative Action

by Leonard Reed

The scene was a seminar room at the Federal Executive Institute in Charlottesville, Virginia, the think tank for the U.S. government's career executives, and the discussion was animated among the half dozen or so federal managers who had been brought from various parts of the country to—well, to think. Under discussion were the impediments that an overgrown government places in the way of intelligent and efficient management, and all of the participants were leveling some blunt indictments against the powers that be (who always dwell in the next echelon up). Perhaps carried away by the heat and frankness of the bull session, one of them cited, as among the most severe problems, the government's "affirmative action" program. The animation froze as abruptly as if E.F. Hutton were about to be quoted. The executives looked around uneasily, suddenly aware that they hardly knew each other. A taboo subject had been raised, one that a person discussed frankly only with intimates. The embarrassed speaker was left to extricate his foot from his mouth as best he could.

But if few executives will discuss it in public, doubts about the government's affirmative action programs are epidemic in the federal service. They are epidemic, most dramatically, among federal managers who have long considered themselves conscientious liberals. I know these people. They supported the civil rights movement, and they supported the affirmative action concept when it was first introduced. Today, when they glance around them to make sure they are alone before unburdening themselves of their doubts, one gets the feeling they are speaking with a frustration that comes from experience. There is something else too—an aura of resentment, born of the fear that prevents them from speaking more freely.

How did affirmative action, an idea spawned in an era of generosity of spirit, get from there to here?

Network-Busting

The great civil rights movement of the sixties culminated in the Civil Rights Act of 1964. Title VII of the Act, which became effective in the summer of the following year, prohibits discrimination based on race, color, religion, sex or national origin in hiring, firing and all other terms and conditions of employment. The concept of "affirmative action" as an adjunct to Title VII developed later, as a number of amendments and executive orders ensued throughout the seventies.

The concept has since taken on a life of its own, but the original impetus for it had a

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"If it was difficult to supervise Borman before—he is intelligent but very defensive—it was now impossible. He did virtually nothing for three years except work on his own discrimination case. Any assignment his supervisor tried to give him he regarded as an attempt to obstruct his preparation and would make notes accordingly. . . ."

powerful rationale. Prejudice and discrimination, both conscious and unconscious, are facts of life. In government, as elsewhere, managers looking to fill vacancies lean heavily on what have recently become popularized as "networks": applicants come to their attention after being passed along by a chain of people, the first of whom is a friend of the applicant and the last of whom knows the hiring official. Because white males have dominated the positions of power in the past, most networks have been white and male as have, inevitably, the successful candidates. (True, some women and some blacks have always managed to make it big on their own, but their success only served to emphasize their exceptionality.) Adding to the unconscious screening out of all but white males was the stubborn resistance of a great many employers and managers who thought that woman's place was at home or, at best, at the typewriter, and that blacks, although not terribly reliable, could be useful at menial jobs where they were not likely to meet the public.

Habits and attitudes like those, ingrained in the social and economic fabric, are not easily changed. Prohibitions against discrimination are fine, but charges of discrimination are hard to prove. If competent women and blacks were ever to get a fair crack at the job market something had to be done to break the logjam that blocked them out. Hence, "affirmative action," a concerted effort to increase the numerical representation of women and minorities in non-dead-end jobs. It is a fair assumption that a substantial majority of the American people see that goal as one with which they associate themselves.

That substantial majority, however, melts away when the "affirmative action" moves beyond active efforts to discover, recruit, train, and hire qualified women and minorities. Increasingly, the term "reverse discrimination" ruffles the surface of American life, and the word "quota" is pronounced in terms of bewilderment or disagreement. The federal government is no exception. What is exceptional about the government is the extent to which the bounds of the discussion are set by affirmative action leaders who seem to see the program as an ideology from which no heresy is permitted. "Let the issue of quotas and 'reverse discrimination' be put to rest," decreed Eleanor Holmes Norton, head of the Equal Employment Opportunity Commission, in a 1979 address. "Let 'reverse discrimination' be banished from the language." Patricia Harris, the Carter Administration's Secretary of Health and Human Services, talking of the need to increase the number of women in management, recently said, "I hear about so-called 'reverse discrimination' but I have never seen it."

Well, to a white male denied a job or promotion simply because he *is* a white male, "reverse discrimination" remains a valid part of the language, (as for Harris's observation, one can only suspect that she was playing in the sandbox with Ronald Reagan in that never-never land where *he* grew up unaware that there was a racial problem in America.) And when percentile figures are set on the number of women and minorities that a supervisor must hire, irrespective of relative qualification or performance, we can call it what it is, which is a quota, or we can follow the example of Alfred Kahn and call it a banana.*

The federal government is also different in that, because Caesar's wife must be above suspicion, affirmative action takes a more hard-nosed form there than in the private sector. The government's program is enforced by full-time Equal Employment Opportunity divisions within each agency. An agency's EEO not only investigates discrimination complaints, but it wields a variety of carrots, sticks, and clubs over the heads of the other agency managers whom it suspects of foot-dragging on the affirmative action front.

The question is whether this mechanism, as it has come to operate in practice, is simply a legal device to break down the barriers of prejudice, or a blunt instrument of intimidation, leading in many cases to frivolous charges and litigation, whose costs in terms of a functioning government overwhelm any contribution it may make to opening up jobs for truly competent and qualified minorities and women. Listening to federal managers frankly discuss their experiences—something most are willing to do only after guarantees of anonymity—suggests that the latter is the case.

"They're Not Out There"

An executive in the Department of Health and Human Services described the current atmosphere this way:

"Affirmative action has overwhelmed consideration of fairness and efficiency in the thinking of a federal manager. Each agency has its own 'equal opportunity' bureaucracy that can justify its existence only by keeping the fires hot. You are constantly on the defensive, it's on everybody's mind, and when the subject comes up you feel compelled to cite how many women you've hired, how many minorities you've promoted. Any second thoughts, any questioning of the thrust marks you as a dinosaur, someone whose future is behind him."

A critical element in the performance appraisal for all federal managers is the "minority hiring and promotion" factor. What the manager is expected to achieve in order to be adjudged satisfactory ranges from fairly general goals of "improvement in hiring practices" to "target goals"—that is, specific numbers or percentages of target groups (women, blacks, Hispanics, etc.) to be hired or promoted. In many fields the scarcity of qualified minorities plus the pressures to meet the quotas creates an impossible situation for the mid-level manager.

The head of one subdivision of a government agency involved in radio broadcasting was told by a recent director of the organization that he expected him to hire a "disproportionate" number of blacks for all subsequent vacancies. By disproportionate, he explained, he meant about 70 percent. The manager protested that of 190 applicants for the two available announcer jobs, he could identify only two as blacks and their auditions had not been even close to the passing range.

"I tried to explain to him," said the broadcaster. "I travel around the country. I advertise. I personally have written to 250 radio stations asking for their cooperation in finding black announcers. Finding women in broadcast journalism is no problem, but blacks are something else again. The total enrollment of minorities—blacks, Hispanics, etc.—in the communications schools nationwide is about 4 percent, way below the average for other professions. There are damn few black males going into this business. I'm competing, when I go out recruiting interns at the universities, with the best newspapers and TV stations. But I'm told when I get back to Washington that 'they're out there, you're just not trying.' I know they're not out there—not for us. I sought out recruits at Southern University, one of the largest black schools in the country, with a large communications department, and at Clark College in Atlanta, a first-rate school. Not one of the students applied. At Howard I interviewed 80 or 90 students. One applied. I resent being put on the griddle. Yes, there are applicants that nobody else wants. I resent being told that for them we should lower the standards. Well, it didn't do any good to explain—he told me that I fill the vacancies with blacks or not at all. The upshot was that the other announcers worked overtime and the taxpayers paid for it—and I was put in the position of being a damned racist."

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* The most recent banana was packed in a proposal by the Justice Department, concerning the PACE (Professional Administrative Career Examination)—the basic entry level exam for professionals wanting federal jobs. The PACE exam had been challenged in court by minorities who claimed the test favors whites because of their background. Instead of revising the test to eliminate any unfair questions, the government offered to guarantee that the number of blacks and Hispanics who would get jobs would be proportional to the number who took the test—or else the test would be rewritten until it produced that predetermined result. That is, if half the people who took the tests were black or Hispanic, then half the available jobs would have to go to blacks or Hispanics for the test to stand.

Frank Berndt was the general counsel of the National Highway Traffic Safety Administration, a job he had held since 1975. Since that time, his office had hired 30 lawyers, 19 men and 11 women, of whom two were black. "It's easier for me to get highly qualified women out of the law schools," Berndt told the *Washington Post*. "With minorities it's harder. The competition for them is fierce." The reason Berndt was talking to the *Post* was that he had become the central figure in an unpleasant flap. His boss, Joan Claybrook, had put Berndt in for one of the bonus awards now available to senior executives. The Department of Transportation's selection board vetoed the award without explanation. But after gossip leaked out that the EEO office had axed the award on the grounds that Berndt had a lousy affirmative action record, the office admitted killing it. But, said the EEO official, he took the action not because Berndt's minority hiring record was bad—but because it was only "ordinary."

An executive in another government department, who was asked to organize a top-level consulting staff, spoke of the shoals he ran into:

"My job was to put together a staff of 18, comprised of the best professional talent available. Once this wonderful vision had been laid out, the realities struck home. After having taken on four people, I was told flatly that although there wasn't exactly a quota, if I didn't get more women and minorities immediately I wouldn't be permitted to complete the staffing. I had 4 out of the 18 and the music stopped. Now, the fact is that available blacks in the professions are in short supply. So since you are under terrific pressure to assemble a staff with the precondition of affirmative action, you find yourself in a bidding situation. The candidates come to you and they make demands. They tell you that they are being interviewed by a number of agencies, they want to know when promotions will come, where they will sit, what perks they will have—and they are in a position to say that they'll only come if the price is right. You find that you really have to scramble to prevent their walking out the door.

"Well, I was in a very awkward situation. I needed people in substantive professional areas who had been in government at a fairly senior level for some time. And there, women—and particularly minorities—are scarce. And, finally, what you do, facing reality, you accept people who are the best of a very uncertain lot. I believe in upgrading people, not downgrading standards, but that's not where it is today. People get sent around from the Director's office with a 'Must Hire' tag on them. I have so far filled eleven of the jobs—seven of them with 'targeted' people. In the affirmative action element of my performance rating I was graded 'outstanding.' But whether the people I've put on staff are adequate is another story. The point is that the emphasis isn't on qualifications, it's on the quota."

GS-14 By Right

The emphasis on race or sex rather than performance, and the explicit rules and implicit fears by which it is enforced, can wreak havoc in a large organization even after the initial hiring decision is made. That, at any rate, was the point a lawyer in a relatively new section of a large federal agency was trying to make when he related this experience:

"Jim Borman was one of the original employees hired when this unit was set up. Although his credentials weren't super—he had an M.A. in urban planning from one of those degree-by-mail mills—that was glossed over in the interests of 'affirmative action.' Jim came on as a GS-11. The following year he asked for and received promotion to GS-12, although the fact is he had been a disappointment. His performance was poor and he had the kind of crummy attendance record—lots of 'sick' absences on Fridays and Mondays—that is more common in your clerical than professional staff. Nevertheless, after a year at GS-12, he asked for promotion to GS-13 [current starting salary, $26,951] and he also asked that he be reimbursed for law school courses he had begun to take at night.

"By that time he had come under my supervision and on the basis of performance I couldn't go along with the promotion. I also had to turn down his request for reimbursement, since the courses he was taking were not related to our work. Meanwhile, our unit was growing and Borman was transferred to another supervisor to whom he made the same requests with the same results. He then filed a grievance charging race discrimination in the fall of 1977. The case stayed in our agency but went through various phases over a period lasting three years. The department hired outside counsel and so did Borman.

"If it was difficult to supervise Borman before—he is intelligent but very defensive—it was now impossible. He did virtually nothing during those three years except work on his case behind closed doors—you know, keeping records, making calls and so forth. Any assignment his supervisor tried to give him, he regarded as an attempt to obstruct his preparation, and would make notes accordingly. Meanwhile, Borman finished law school and now he increased his demands: he now insisted on a promotion to GS-14 [starting salary, $37,871], on the grounds that if he had been promoted to a 13 when he felt he deserved it, by this time he could have been promoted again. Also, he wanted to be classified as a GS-14 *lawyer*. You get the picture?—a fellow with no legal experience at all while at the same time we have lawyers in the department with six or eight years' experience who have been at the GS-13 level for five or more years. Well, how do you think it came out? The finding in the case was that there had been *no* discrimination—but everyone's afraid of an affirmative action stigma, so all of Borman's demands were met anyway: retroactive promotion to GS-14 lawyer with back pay, reimbursement for law courses, and reimbursement for his legal fees.

"Do you realize what that does to the morale of the other professionals in our section? The hostilities it creates? And how it cheapens the success of those blacks who make it because they really have it? And there is something else here that is the Achilles heel of the whole affirmative action program—which is that it's only natural that a person who knows his strong card is not his qualifications for the job but his special status will press his advantage for all it's worth. And you can't run a railroad that way."

Management by Objection

Beyond how all that affects the cost of running the federal government, the atmosphere created by defining people in terms of race heavily burdens the possibility of decent working relationships. Many of the equal opportunity officials within each agency—usually themselves minority members—are minimally qualified for this delicate work; their belief that any problems involving minority hiring and promotion are a matter of prejudice and foot-dragging on the part of bigots is inevitably absorbed by the people it is intended to help. At the lowest levels the effects may be seen in the widespread surliness of office workers. (Conversation overheard in a Department of the Interior elevator: "Hey, Mora, Donovan wants that letter typed up this afternoon." "Yeah? Well tell Donovan to go f— himself.") These attitudes, of course, find particularly fertile soil in the civil service culture where the fear of job loss is non-existent, and supervisors are impotent. At the higher levels the effect is more subtle. Another federal executive:

"When, because of the pressure, you take on underqualified minority people you have another problem. I've found that any effort to provide guidance creates a very sensitive situation. In my work we have to provide polished reports. If I have someone whose writing is sub-par and I suggest that I'd like to enroll him in a free civil service course in writing style, his immediate reaction is one of suspicion: 'Are you saying that I write ghetto English?' or 'Are you suggesting that I went to the wrong schools?' Because of the atmosphere, attempts to bring someone along appear to have racial overtones. You find yourself walking on eggshells and you face the possibility that he will file a grievance.

It's only natural that a person who knows his strong card is not his performance but his special status will press his advantage for all it's worth. . . .

"You run into the same thing when you want to reward people who have done a good job. The quota mentality is so heavy in the air that when thinking of cash awards or commendations or promotions you have to figure out how you can balance things on a race and sex basis—and hope that there will be something left for the most deserving people. You end up having to toss something here, something there, even though it's not appropriate, just to be able to keep control of your staff."

Added to these feelings of frustration for many mid-level managers is the conviction that their own career horizons have closed in on them. The Nirvana they look forward to—admittance into the Senior Executive Service—has become appreciably less attainable.

It's hard enough to get anything done in the government. Affirmative action has added the burden of trying to get it done with people chosen, not because they are the best, but because they can threaten a lawsuit or fill a quota.

"I don't like to talk about it," said one manager who felt he was stymied in his career, "because it sounds like sour grapes. But I'm just part of a pattern that exists throughout government. I know a whole bunch of GS-15s in their middle to late forties or just turning 50 who had expected some day to be in top management posts. But these days the name of the game is minorities and women, and white males are reduced to telling bitter jokes (for example, Man tells wife he is contemplating sex change operation. 'But, dear,' she says in dismay, '*Then* what if you don't get the promotion?'). You see, the career corps of SES is made up primarily of long-timers who have been in for 20 or 30 years. Given the employment pattern of that era, they are mostly white males. So the heat is on to hire women and minorities to alter drastically the statistics."

Lepers

The zeal of the affirmative action crusade has blended with the tactics of the earlier anti-discrimination movement to produce a mass of litigation—affecting small businesses, giant corporations and government—charging discrimination on one basis or another. Discrimination on the basis of sex is, next to age discrimination, the fastest growing charge; last year there were seven times as many such charges as in 1970. (During the same period charges of race discrimination rose by a multiple of four.) It is impossible to say how many of these cases have merit as opposed to those that are frivolous or vindictive. What is clear is that in government the litigation involved has an inhibiting and destructive effect on those managers who would like to devote their energies to trying to make their organizations work. It's not hard to see why....

In September, 1976, Dorothy Crook, the editor of a magazine published by the U.S. International Communication Agency, received a letter from a young woman employed as a GS-5 in another government agency, inquiring about the possibility of transferring to USICA at the same level but in an editorial capacity. The woman was a graduate of Barnard College as was Crook, who, as part of the Barnard women's network, was pleased to lend a helping hand. Although she had no openings on her staff, she had a chat with her young fellow alumna. Crook then called Robert Korengold, a colleague who edited another USICA magazine, and asked him whether he would talk to the woman. Korengold was reluctant, explaining that he had no openings either, but he agreed to see her as one of those things you do to oblige a colleague. In that spirit, Korengold spoke with the woman in what he considered a counseling session—how to break into magazine work—rather than a job interview. Near the end of their talk, Korengold mentioned that a GS-12 position that called for six years' experience would be opening in a few months, one for which he told her, according to his subsequent deposition, she was in no way qualified.

Put yourself in Korengold's position for a moment. You have not called the woman into your office to destroy her hopes, but to be friendly. The last thing you want to tell her is "look, you're not good enough for this work." It is an embarrassing situation for most people, especially the soft-hearted ones—and a situation that usually produces a feverish mental search for an excuse that will allow you to turn someone down while leaving their self-esteem intact. Uncomfortably for those federal managers caught in this situation, the list of permissible excuses has shrunk considerably in the last two decades, and the one Korengold chose was a blunder: he added that since his professional staff consisted of ten women and only two men, he'd lean toward hiring a man for the sake of editorial balance.

Needless to say, the young woman then charged that she was rejected on the grounds of sex. She initiated litigation which, almost four and a half years after the original interview, is still going on. The file of court papers, now about six inches high, gives only a hint of the incredible number of hours that USICA officials and editors have put into documenting the information required by the attorneys for both sides. Understandably, agencies are apprehensive of becoming involved in such litigation—because of the stigma attached as well as the time consumed.

Official eagerness to steer clear of such headaches adds to the affirmative action pressures laid on federal managers, and to their proneness to treat as lepers any managers unfortunate enough to have a finger pointed at them....

One day in 1979, Bradley Jones, head of a small government chemistry lab, learned that his chief assistant was leaving for another job within a month. Jones began actively looking for a replacement. Among the many resumes from men and women that he reviewed, one that impressed him was from a woman we can call Elizabeth Bolton. He interviewed Bolton, who was then employed in a different agency, and he was satisfied that she was, indeed, his candidate. Jones put Bolton in for "clearance," a cumbersome process still required in so-called sensitive agencies and one that managers don't initiate without a definite intention to hire the applicant. After being cleared, Bolton came in to see Jones and informed him that she was pregnant but would like to take the job on a part-time basis. Jones told her he was sorry but that his need was for a full-time assistant and she'd have to take it on that basis if she wanted it.

Shortly afterward, Jones was notified that Bolton was bringing suit against him and his agency for violating the law by refusing to hire a pregnant woman. She claimed that contrary to Jones's version she would have taken the job full-time after a period of part-time employment. When he spoke to the Agency attorney about a defense against the charge, Jones received another jolt. The Agency, not wishing to get involved in a sex discrimination case, had arrived at a settlement with Bolton that involved a job offer (which she refused) and a payment of some money (the difference between her current salary and the larger salary she would have received as Jones's assistant). Further, the attorney told Jones, the Agency had agreed to prosecute the case against him, and he would do well to hire his own attorney. Facing dismissal or suspension without pay, Jones did hire a lawyer. There ensued a series of hearings conducted by the Equal Opportunity office of the Agency during which, Jones recalls with bitterness, his account of the interview was given no credence nor was he given any opportunity to confront his accuser. The upshot was that Jones received a reprimand which is now part of his record, and he was out of pocket $1,800 for legal expenses.

◆

You might expect Ronald Reagan to change all this. After all, he and his followers have never been advocates of affirmative action. Indeed, they do not even seem to understand the legitimate purpose behind it—the need to prevent those who have jobs to offer from slipping back into their comfortable networks of (mostly) white males, to make them reach beyond to find and develop the talent that is out there. So it is possible that the incoming administration not only will try to control the excesses of the program, but that in the process they will rip out its heart.

What is more likely, however, is that they will soon realize they can neither afford to antagonize an affirmative action lobby ready to pounce on any sign of Republican "insensitivity," nor arrest the enormous bureaucratic and judicial momentum behind the program. So they will content themselves with repeating conservative homilies, while those federal managers who care about their work will continue to be demoralized by a system that adds—to the already formidable obstacles to getting anything done in the government—the burden of trying to get it done with people chosen, not because they are the best, but because they can threaten a lawsuit or fill a quota. ■

Ignoring the People

VICTORIA SACKETT

Affirmative action can be viewed, in many important ways, as an issue not concerned with race. Public attitudes toward specific programs aimed at correcting historical policies of discrimination differ widely from attitudes toward minorities in general. The public is much more inclined to acknowledge the general need for corrective action than it is to approve specific proposals which claim to remedy past injustices. There is a definite cutoff point in support for policies aimed at ensuring equal opportunities for minorities and women. It appears where compensatory efforts cross swords with basic American values. Belief in individualism, an antipathy to preferential treatment and devotion to the principle of achievement through merit rather than ascriptive privilege prove to be stronger influences on public opinion than dedication to affirmative action programs.

One of the most comprehensive analyses of attitudes toward discrimination and affirmative action was compiled by Seymour Martin Lipset and William Schneider in 1978. They looked at nearly one hundred public opinion polls which covered every aspect of the issue from 1935 to 1977. Recently, *Policy Review* commissioned its own survey, conducted by Sindlinger and Company, which attempted to probe some of these same questions. A single poll, of course, cannot be exhaustive. Nonetheless, the *Policy Review* survey seems to confirm Messrs. Lipset and Schneider's earlier findings. People approve the idea of eliminating discrimination through laws. They balk at the notion of preferential treatment.

The *Policy Review* survey does not assess general attitudes toward minorities. However, the Gallup Organization in 1978 provided a comprehensive collection of surveys which serve to update earlier findings. The Gallup surveys showed a steadily increasing liberalization of attitudes on the part of the public, even in some of the most volatile areas of race relations. From 1958 to 1978, willingness to vote for a black for president doubled.

Question: There's always much discussion about the qualifications of presidential candidates – their education, age, race, religion and the like. If your party nominated a generally well-qualified man for president and he happened to be a Negro, would you vote for him? (Question wording varied slightly over the years.)

	Yes	No	No Opinion
1958	38%	53%	9%
1963	47	45	8
1965	59	34	7
1967	54	40	6
1969	67	23	10
1971	70	23	7
1978	77	18	5

Source: Surveys by the Gallup Organization, latest that of July 21-24, 1978.

The increasing acceptance of a proposed black for president was accompanied by a commensurate growth in acceptance of the idea of a woman or a Jew for president, adding strength to the notion that tolerance was on the increase for all minorities.

Question: Between now and the time of the conventions in 1980 there will be more discussion about the qualifications of presidential candidates – their education, age, religions, race, and the like. If your party nominated a woman for president, would you vote for her if she were qualified for the job?. . . . If your party nominated a generally well-qualified man for president and he happened to be a (Negro/Jew), would you vote for him? (Question wording varies somewhat over the years.)

	1937	1949	1955	1958	1961	1963	1965	1967	1969	1971	1975	1978
Woman for president												
Yes	32%	50%	54%	55%	--	57%	---	59%	58%	69%	76%	80%
No	68	50	46	45	---	43	----	41	42	31	24	20
Black for president												
Yes	----	----	----	42	55	51	63	57	74	75	----	81
No	----	----	----	58	45	49	37	43	26	25	----	19
Jew for president												
Yes	----	----	----	69	75	82	84	86	91	----	----	87
No	----	----	----	31	25	18	16	14	9	----	----	13

Source: Surveys by the Gallup Organization, latest that of July 21-24, 1978. In *Public Opinion*, Dec./Jan. 1980.

Over the same period, there had been a dramatic increase in tolerance expressed by whites toward blacks as neighbors – even when the question was weighted to elicit more negative responses by asking whether people would move if blacks came to live in the neighborhood in great numbers.

Question: If blacks came to live next door, would you move? (Among whites.)

	Yes definitely/Yes might	No
1963	45%	55%
1965	35	65
1978	16	84

Would you move if blacks came to live in great numbers in your neighborhood? (Among whites.)

	Yes definitely/Yes might	No
1963	78%	22%
1965	69	31
1978	45	55

Source: Surveys by the Gallup Organization, latest that of July 7-10, 1978.

Even on the sensitive issue of intermarriage between races, tolerance had grown. Approval among adults of marriages between whites and blacks from 1968 to 1978 increased from 20 percent to 36 percent. A majority still objected to intermarriage, but the "disapprove" response declined from 72 percent in 1968 to 54 percent in 1978.

Louis Harris and Associates conducted their own surveys between October and November of 1978.[1] In the interim between the Gallup and Harris surveys, and following the Lipset/Schneider analysis, the Supreme Court had decided the Bakke case. On June 28, 1978, the Supreme Court ruled in favor of Allan Bakke who had charged reverse discrimination in his efforts to enroll in the University of California medical school at Davis. The Supreme Court ruled that a university could not reserve a set number of places for minority applicants, thus denying white applicants the chance to be accepted for those slots, irrespective of their qualifications. At the same time, the Court stated that it was permissible for schools to include race along with other factors in deciding which applicants to admit.

The decision itself does not appear to have had a negative effect on overall white attitudes toward minorities, as the Harris surveys revealed. The Harris surveys sampled whites separately from blacks, never presenting a response for the mixed population. In 1976, a Harris survey showed 12 percent of white respondents favoring "separation of the races" when presented with the question "Generally speaking, do you favor full racial integration, integration in some areas of life, or separation of the races?" 28 percent supported "full racial integration" and 48 percent opted for "integration in some areas of life." The 1978 Harris survey showed 35 percent wanting "full racial integration," 42 percent favoring "integration in some areas" and 16 percent favoring "separation of the races." The largest increase appeared in the desire for full integration, though there was also a slight upturn in the number preferring the more absolutist "separation of the races" alternative. Among blacks, 66 percent wanted "full racial integration" in 1978, another 22 percent wanted integration in "some areas" and only 7 percent favored a "separation of the races." The Harris survey confirmed the Gallup 1978 survey concerning interracial dating and marriage. Though there was a large degree of white negativity toward such practices, there was also a steady easing of attitudes evident since the 1963 survey. Also, to quote from the Harris survey analysis "The biggest shifts downward in white aversion arise if 'a black family moves in next door to you' (24 points down), 'a close friend or relative marries a black' (24 points down), 'your child brings a black child home for supper' (22 points down), and 'a black tries on the same suit of clothes (or dress) before you do in a clothing store' (18 points down)."

Messrs. Lipset and Schneider found that "there can be no doubt that a large majority of white Americans have come to accept the proposition that discrimination in hiring is wrong and that government should guarantee operation of the competitive merit or achievement principle by outlawing such discrimination. But every major national study shows that a sizable majority of Americans are also opposed to remedying the effects of past discrimination by giving any special consideration in hiring or school admissions."[2]

It is this broad conclusion that the *Policy Review* survey confirms, whilst deepening our knowledge of public attitudes on this complex question. The Sindlinger summary of these findings interestingly states that this poll was "the most difficult survey ever undertaken by Sindlinger in recent years." Questions were pretested and pollsters received "high proportions of no opinions on questions where the response should have been clear-cut, and low proportions of no opinion when higher ratios were in order." As a result the questions underwent "numerous revisions." A special problem was presented by the topic, namely race relations, since on this "attitudes simply cannot be broken down by hard core pro- or anti-camps. There has to be room for variations." In all, the format of questions went through nine revisions.

Consequently, in the first group of questions, namely Questions 1(a) to 1(e), the Sindlinger poll provided a general introductory statement:

> In recent years, many people, including the U.S. Government, have endeavored to improve the social and economic status of minority groups such as Blacks or Hispanic-Americans – as well as women. Some of these activities on racial and sexual discrimination have become very controversial with some people – while other people have paid no attention or have not expressed themselves. I am going to read you some various positions being taken on the subject of minority or racial and sexual discrimination. As I read each position – will you please tell me your degree of agreement or disagreement. That is, where you agree – is your agreement strong or mild? Conversely, when you disagree – is your disagreement strong or mild?

The questions which followed were intended to be variations upon the general theme introduced in this statement and to offer respondents the choice of policies ranging from reliance on voluntary action to government enforcement of affirmative action quotas. The first question was worded as follows: "First is the position that government should take no action – instead we should rely on the people as citizens, business firms and universities to get rid of racial and sexual discrimination on a voluntary basis. How do you agree or disagree on this?" The responses were distributed as follows:

Agree	
Strong	32%
Mild	22

Disagree	
Strong	19
Mild	28
Total Agree	53
Total Disagree	46
No Opinion	6

Source: Survey by Sindlinger and Company, Inc., conducted for *Policy Review* January 17-30, 1980.

The question itself reveals some problems. First of all, it is an extremely long and complicated question to be read over the telephone, requiring a rather sophisticated retentive capacity on the part of the respondents. Its complexity, reflecting the fact that affirmative action is a complex issue, makes it rather difficult to gauge with precision what elements in it elicited the response. For instance, does the figure of 53 percent overall support for leaving the private sector to solve discrimination voluntarily reflect a widespread American belief that voluntary action is in general superior to government compulsion? And would the respondents continue to support voluntary action to the same degree if over a period it failed to reduce significantly racial and sexual discrimination?

We can get some indication of the answers by examining the breakdown of opinion into strong and mild agreement or disagreement. As the Sindlinger summary puts it, only 31.5 percent strongly agreed with the position of no government action, representing the "hard core of people who are firmly opposed to government intervention in matters of bias." On the other side of the argument, less than a fifth of respondents were strongly in favor of government action. About half the respondents, however, were composed of those who either mildly agreed or disagreed with a proposition. Sindlinger argues that the data show this combined group holding not dissimilar views – which are that a proper combination of government and private sector activity is required to eliminate racial and sexual bias. This interpretation receives some confirmation, as we shall see, from the replies to Question 1 (b)

Accuracy in polling demands utter simplicity in question wording. Each question must be a controlled laboratory experiment, filtering out complicating influences like language inferences and multiple ideas. Question 1(b) provides a good example of reliable questioning. Its only drawback is the possibility that some people would not be able to remember accurately the long introductory statement read before the first question.

Question 1(b): Second is the position that there should be laws to prevent all discrimination of any kind on the basis of race or sex throughout the nation. What is your position on this?

Agree	
Strong	48%
Mild	30
Disagree	
Strong	15
Mild	6
Total Agree	77
Total Disagree	22
No Opinion	0.8

Slightly more than three-quarters expressed approval of the notion that there should be legal prohibitions against discrimination on the basis of race nationwide. Approximately two-thirds of that approval was in the area of "strong agreement." It is clear that that some people who, in reply to Question 1(a), expressed support for voluntary action in preference to government enforcement to eliminate discrimination have crossed the floor in response to Question 1(b) and now favor anti-discrimination legislation. Strictly speaking, these two views are inconsistent. If we take this apparent contradiction in conjunction with the Sindlinger interpretation of Question 1(a) above, however, a possible interpretation emerges that a considerable majority of Americans, approximately 70 to 80 percent, favor the elimination of discrimination by voluntary action if possible, but by legal prohibition if necessary. But, as we will see, such strong favor of outlawing discrimination by no menas constitutes a mandate in favor of affirmative programs as they have been anacted so far.

The *Policy Review* survey reveals a marked objection to the lowering of standards in employment and school admissions in order to benefit minorities and women. It also shows a decisive opposition to the establishment of government-mandated quotas in these areas. Here we begin to see the conflict between American values and affirmative action.

Question 1(c): Third is the position that business firms, colleges and universities, and law and medical schools — as well as other institutions of learning — should have lower entry, hiring and promotion standards — especially for minority groups and women — who apply for entrance. What is your agreement or disagreement on this?

Agree	
Strong	7%
Mild	11
Disagree	
Strong	65
Mild	16
Total Agree	18
Total Disagree	81
No Opinion	2

Question 1(d): Fourth is the position that government should pass laws to compel all business firms and schools, colleges and universities to reserve a fixed percentage of entries — jobs — and management positions for minority groups and for women applicants. What is the degree of your opinion on this?

Agree	
Strong	12%
Mild	18
Disagree	
Strong	51
Mild	20
Total Agree	29
Total Disagree	70
No Opinion	1

For the purposes of comparison, we might refer here to an earlier Gallup question from 1977. It substantiates the hypothesis that Americans are reluctant to endorse a policy of preferential treatment.

Question: Some people say that to make up for past discrimination, women and members of minority groups should be given preferential treatment in getting jobs and places in college. Others say that ability, as determined by test scores, should be the main consideration. Which point of view comes closest to how you feel about this matter?

	Favor Preferential Treatment	Favor Selection On Ability	No Opinion
Nationwide	11%	81%	8%
By Sex			
Men	10	82	8
Women	12	80	8
By Race			
Whites	9	84	7
Nonwhites	30	55	15

Source: Survey by the Gallup Organization, October 21-24, 1977.

It is interesting and significant that nonwhites as well as whites reject preferential treatment in favor of selection on ability. Though it should be noted that preferential treatment and ability are not strictly mutually exclusive, as could be inferred from the question, the results leave no doubt that the public as a whole favors selection on merit rather than through special consideration. Nonwhites, by a smaller but still significant margin, agree with that configuration. Moreover, when presented with Question 1(e) in the Sindlinger poll, the respondents distinguished between "catch-up" educational programs and what they clearly regarded as unfair preferential treatment. Three-quarters favored government catch-up programs in order to compensate groups which had suffered discrimination in the past. This compensation option evoked relatively little objection, especially when opposed to the results of later questions on straight preferential treatment.

Question 1(e): Finally, there is the position that there should be special government sponsored job training and educational "catch-up" programs reviewed for minority groups which have suffered from past discrimination.

Agree	
Mild	34%
Strong	40
Disagree	
Mild	9
Strong	16
Total Agree	74
Total Disagree	25
No Opinion	*
(* = less than 1%)	

The picture of what the public wants in the way of government anti-discrimination programs that emerges from Questions 1(a) to 1(e) is very interesting. It appears that public opinion makes fine distinctions in the matter. Widespread support for anti-bias laws and government-sponsored "catch-up" educational programs is coupled with strong opposition to lowering of standards and quota systems to accommodate minorities. Four out of five people opposed the lowering of standards for the hiring of people by business and for admissions to higher education institutions and *two out of three were strongly opposed.* Seven out of ten people opposed a quota system for jobs and higher education admissions *with about half of all respondents expressing strong opposition.* In order to assist minority groups they regard as disadvantaged and suffering from the effects of past discrimination, Americans are prepared to diverge from stricter nondiscrimination – but only to the extent of providing special educational or training programs.

This impression is confirmed when the *Policy Review* survey turns to public knowledge of, and attitudes towards, existing affirmative action programs. Briefly, people objected to *de facto* reverse discrimination, that is, government programs which redounded to the benefit of a lesser-qualified minority or female applicant at the expense of better-qualified non-minority applicants.

Question 2(a): Under some recent U.S. Government programs – which were designed to help minority groups in jobs management positions and for higher education – it has happened that a minority person or a female applicant has been hired, promoted or admitted to an educational program like law school – with lower qualifications than non-minority applicants.

who were excluded. Are you aware of this?

Seventy-seven percent of respondents were aware that reverse discrimination had occurred. Twenty-three percent were not aware of it.

Question 2(b): To get your response to this question – I am going to give you four choices. Let me read each one before you reply.

ONE . . . It is fair 2%
TWO . . . It is unfair 19%
THREE . . . It is unfair but it is necessary to make up for the victims of past racial and sexual discrimination 17%
FOUR . . . It is unfair and the wrong way to make up for past unfairness 62%

These are surprisingly conclusive figures. Only 2 percent regard such programs as simply "fair." A full 81 percent felt that it is "unfair" in some sense to allow the less able minority or female applicant an advantage over the better qualified. Only 19 percent of respondents expressed any support for the idea of remedying the ills wrought by past discrimination if it meant sacrificing the idea of advancement by merit. And 62 percent of respondents condemned such affirmative action programs as both unfair and inexpedient.

Not only do people think that programs resulting in preferential treatment for minorities are unfair and the wrong approach, however, they also believe that such programs could actually harm rather than help attitudes toward minorities. When asked whether such situations reflected badly on all minority groups, or were likely to stir up resentments, nearly three-fourths of the respondents answered in the affirmative.

Question 3: With the situation developing where minority groups have received especially favorable treatment – do you regard such programs as likely to stir up resentment against the minorities. That is, does this have a bad reflection on all minority groups?

Yes	73%
No	23
Don't know	4

The Sindlinger summary added the interesting comment that monitering of the interviews had shown, in addition to the overall 3 to 1 margin, that many members of minority groups had expressed the belief that resentment would be a by-product of especially favorable treatment. Moreover, there is no difference of opinion between women who are among the beneficiaries of special treatment programs, and men on this matter. Yet, despite such an overwhelming margin of agreement on the resentment question, still more people professed that *their own attitudes* had not been affected. When reminded that government programs had sometimes resulted in less-qualified minorities and women being admitted into professions and schools, overwhelming numbers nevertheless say that minority or female doctors/lawyers are worth as much as others and they would not elect to avoid dealing with them, even if the avoidance could be accomplished without offense.

Question 4(a): This is our last question on minority and sexual discrimination: As we said – under recent government programs – minority applicants have sometimes been admitted to places of higher learning with lower standards than other applicants – and also a fixed number of college entrances and promotions have sometimes been reserved for minorities. For these questions – answer as yes or no or maybe . . . Has this affected your own attitude towards minority and women doctors and lawyers?

Yes	20%
No	76
Maybe	4

Question 4(b): Do you think the qualifications of a black lawyer or woman doctor are likely to be worth as much as those of other doctors and lawyers?

Yes	67%
No	17
Maybe	11
Don't Know	6

Question 4(c): If you could do so with without offense, would you, yourself, avoid dealing with a black doctor or a woman lawyer?

Yes	11%
No	84
Maybe	5
Don't know	*

(* = less than 1%)

Again, these are remarkable findings. Despite their disapproval of apparent quotas and lower standards for minority admissions to professional school, three out of four Americans claim that their attitudes to minority and women doctors and lawyers have not been affected by these programs. Nearly seven out of eight respondents say that they would not avoid dealing with a black doctor or a woman lawyer.

Does the same favorable attitude extend to the professions themselves? When people were asked whether quota programs would damage the professions either in fact or in the eyes of the public, the majorities exonerating the professions from harm were slightly reduced but still substantial.

Question 4(d): Do you think that these programs will damage the legal and medical professions as a whole?

Yes	24%
No	63
Maybe	10
Don't Know	3

Question 4(e): Do you think that these programs will damage the reputations of the professions in the eyes of the public?

Yes	25%
No	59
Maybe	13
Don't Know	3

Perhaps there is no great significance in this comparatively small statistical difference. If we allow ourselves some speculative interpretation of Questions 3 and 4, however, we might guess that the majority of Americans will oppose affirmative action programs provided that they can do so without themselves expressing anything that seems like racial or sexist bias. Thus, more people are ready to criticize such programs as harmful to the professions than are willing to express doubts about the minority and women doctors and lawyers.

This brings us back to our starting point – namely, that affirmative action can be viewed as a subject not concerned with race. This gains considerable support from the *Policy Review* survey. Another important finding, which confirms the arguments of Messrs. Lipset and Schneider, is that there is substantial majority support for "catch-up" educational and training programs – in sharp contrast to the overwhelming rejection of quotas or preferential treatment through lowered standards. What is less clear from the survey is the exact degree to which the public objects to government programs as such and to what extent its opposition is to the *principle* of preferential treatment. But this becomes immaterial when we see how strongly people oppose any guarantee of result other than simply opportunity.

So the government can find little encouragement in public opinion to embark on further activity which seems to conflict or interfere with meritocratic values. The results of the *Policy Review* survey confirm a public willingness to provide minorities with a starting point on the inside lane, but a belief that ultimately the race must go to the swift.

[Form the New York Times Magazine, Apr. 25, 1982]

Summing Up—A Chronicle of Two Decades of Social Experiment * * * and the Disillusionment That Swept Ronald Reagan Into the White House

(By Theodore H. White)

I had made myself a promise; the election of 1980 was to be the last in the series of stories about American politics that I had begun in 1960. But when the election was over, I found this story to be essentially different from the others. What I had been seeing in 1980 was not just a single campaign; it could be viewed only as a climactic episode in a stretch of history that went back for 20 years or more.

The election of 1980 was about that explosion of ideas which, over the past two decades, had torn American life apart and transformed its politics. I had watched the ideas take shape in the streets in riot and bloodshed, with horrors broadcast into every home. Then the ideas moved off the streets, toppling old walls; and, as the occupiers moved in, the occupation spread farther than anyone could understand. Of all the ideas, however, the most unsettling was the renascence of the oldest political idea in American history—equality before the law.

Old phrases only vaguely trace the hopes and turmoil of the storm decades: "liberation," "participation," "affirmative action," "outreach." And they were to add up finally to a paradox: What began as a quest to enlarge freedom and equality would ultimately require enlargement of Federal controls on a scale never envisioned by those who dreamed the dreams of the early 60's. New phrases like "quotas," "entitlements," "goals and timetables," "the protected classes" were to signal the change in the nature of American government. Those who cheered the changes and those who were horrified slowly hardened into two antagonistic camps; and, by 1980, two men—Jimmy Carter and Ronald Reagan—had emerged as their champions.

In all this, the original and most powerful motor drive was the revolt of the blacks. Memory flecks that drive with episode:

It is spring 1964, the mood of the time still settled by the assassination of John F. Kennedy and the visions he left behind. The Civil Rights Act, which Kennedy had brought before Congress in 1963, is now moving through Congress. If it passes, it will change American society. But as the debate boils on Capitol Hill, the action is elsewhere, so, as a political reporter, I am off to Mississippi, where the Student Nonviolent Coordinating Committee (S.N.C.C.) is mobilizing for the bloody adventure that will be remembered as the Mississippi Summer.

In Jackson, the capital, I pass through the black district. Parched lawns littered with trash; shack houses with peeling paint, boards cracked and broken; raggedy children sitting on porches, peering out on nothing. I pass a black cemetery, pillars of the gates leaning toward each other, the scraggly grass already very high in springtime, but unmowed and unkempt, sad, Faulknerian. It does its own mourning. And there, next to the Streamline Bar, is 1017 Lynch Street, S.N.C.C. storefront headquarters. It is unmarked but instantly recognizable—two students, one black and one white, are standing outside playing catch, and in the windows are those black and green stickers that say: One Man—One Vote.

Inside, the dominant presence is Bob Moses, the field marshal of the adventure drawing hundreds of students from all over the country. He talks with the lilt that New York schoolteachers have indelibly pressed on Harlem children for a generation, but he has a master's degree from Harvard. Blinking, soft-spoken, gentle, Moses has been here in Mississippi for three years, trying to rouse his black people to their rights. They must be taught to vote; they must be taught to do things for themselves; they must be taught to be unafraid. He is sweet and stubborn and strong, the stuff of martyrs; he will not kill but will not hesitate to die. Five blacks here in Mississippi have been killed by unknown men since the first of the year; Moses has spent 17 days in solitary confinement in jail; his people are organizing the Mississippi Freedom Democratic Party to challenge the all-white political structure of the state; his people demand their constitutional right to vote. And there is no one in authority to whom Moses can talk, no contact. No white official in Mississippi dares have contact with the blacks. More people will die this summer as they seek the right of blacks to vote.

It is a few weeks later, in New York, the evening before the opening of the 1964 World's Fair. The papers and television have been churning out the story of impending disaster. The blacks are threatening to drive in and stall their cars on all the highways feeding to the fair, blocking all traffic. I drive out to the storefront headquarters of the "stall-in" organizers, deep in the Bedford-Stuyvesant ghetto of Brooklyn. The storefront lies between a Chinese hand laundry and a meat market; its broken glass windows are boarded over. Inside, the blacks glower at the coming of a white stranger, not at all like the black smiles at S.N.C.C. in Jackson, Miss. On the wall, several signs: "No Statement Will Be Given Without Permission of the Chairman." "No Outgoing Calls After 10 A.M. By Order of Isiah."

Isiah finally arrives and consents to talk. He is Isiah Brunson, all of 22 years old, two years out of South Carolina, a carpenter's son. He is soft-spoken, deliberate, with a fine, sensitive face, hair close-cropped; innocent. But his conversation makes no sense; he is all but incoherent.

The entire New York police force will be mobilized the next morning; the dignitaries of the nation, from President Johnson on down, will leapfrog the demonstration and come to the opening of the fair by helicopter. All except Senator Jacob K. Javits, born in a New York slum himself and now approaching his great authority as Senator; he intends to go by subway, and walk into the fair on foot, black picket lines notwithstanding. I accompany the Senator on the subway, no television crowding us or hatching trouble in those days. And when we get off the subway stop, expecting to brave the chaos of demonstrations—there is nothing, nothing at all, Isiah's threat had been a nightmare mirage; there are no stalled crowds, no marching pickets, no banners.

In the late summer of 1964, the revolt moves on into politics. It is coming to the convention of the Democrats in Atlantic City. For, despite their sham and pageantry, the conventions are where new groups first knock for entry into the power circle. And at Atlantic City the black demands is to burst with a howl.

The howl comes in a closed and steaming room of committee hearings on credentials, to determine the legitimacy of delegates. Outside, a thin line of pickets, black and white together, ring the convention hall, singing, "We Shall Overcome." They insist that the Mississippi Freedom Democratic Party has a legitimate right to be seated in this national convention because Mississippi blacks have been excluded from the right to vote. Upstairs, in the hearing room, a black woman, Fannie Lou Hamer, is voicing the demand with a wail that torments everyone in the chamber, as she tells what happened in Mississippi when she tried to register to vote. She had been arrested, she says, and she continues:

"It wasn't too long before three white men came to my cell. . . . I was carried out of the cell into another cell where they had two Negro prisoners.

The state highway patrolmen ordered the first Negro to take the blackjack. * * * I laid on my face. The first Negro began to beat, and I was beat until he was exhausted. * * * The second Negro began to beat and I began to work my feet. * * * I began to scream. * * * All of this is on account we want to register * * * and if the Freedom Democratic Party is not seated now, I question America.

Three days later, the blacks of the Freedom Democratic Party have invaded the convention hall and occupied the seats of the all-white regular Mississippi Democratic delegation. But Lyndon Johnson holds the Democratic Party in his hand; his chief surrogate is the young Attorney General of Minnesota, Walter F. Mondale, who negotiates with black and white, with Johnson's whip to back him up. All together they work out a compromise: The blacks of the Mississippi Freedom Democratic Party are to be given two voting seats at this convention. But—far more important—beginning with the next convention, in 1968, no delegation will be seated from any state where the party process deprives citizens of their right to vote because of race or color.

The thrust of justice and equality was thus moving on into the political process. But already, seven weeks before the convention, Lyndon Johnson had signed into law an act that expressed the conscience of the nation—the Civil Rights Act of 1964—a watershed in American history.

All previous acts of regulation by the Federal Government had been regulations of things and standards—of railroads and wavelengths, of foods and drugs, of weights and measures. The Civil Right Act was a departure: It undertook to regulate behavior. Its purpose was to change the customs and manners of the American people.

The Civil Rights Act of 1964 guaranteed blacks access to all public accommodations across the nation: not just schools, restaurants and theaters, but hotels and motels (excluding only the hypothetical "Mrs. Murphy's boardinghouse," if it had five or fewer rooms). The new law instructed the Justice Department to sue if necessary to enforce desegregation of all such facilities.

It went further: a five-man Equal Employment Opportunity Commission was set up. All of American industry was to fall under its police power; and industry or union ("affecting commerce") that employed more than 25 workers could be summoned to account if it was suspected of discriminating against an individual "because of such individual's color, religion, sex or national origin." At one stroke now, women and ethnics were also to fall under the protection of the Federal Government.

All the powers of government, prodigious already, were to be invoked to enforce the new measures. Any program, any activity, any institution, any contractor benefiting in any way, small or large, from Federal funds would find those funds cut off it discrimination against anyone could be proved. Universities and hospitals, hotels and theaters, airlines and mail-order houses, unions and manufacturers, cities and states could now be summoned to account for their behavior.

One large limitation on the Civil Rights Act is worth stressing. Its purpose was to insure equality. The act warns that nothing in its text "shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer."

With the Civil Rights Act passed, Lyndon Johnson was now moving on to engage the motor of conscience with the driving wheels of politics—in the form of the Voting Rights Act of 1965. "That bill," said Johnson, in impassioned advocacy, would be "not the end . . . not even the beginning of the end. But it is perhaps the end of the beginning. That beginning is freedom; and the barriers to that freedom are tumbling down. . . . We seek not just legal equity but human ability, not just . . . equality as a right and a theory but equality as a fact and equality as a result."

A subtle change had transformed the quest for equality of opportuntiy to equality of result.

Within five days of the signing into law of the Voting Rights Act, the first of the ghetto riots of the 60's burst in the Watts section of Los Angeles. More followed, from Newark to Detroit to Boston. With black riots flaming the summer skies from 1965 to 1968, white conscience was tormented, but white fears rose. The cleavage between the races, in the streets and in the suburbs, mocked the high eloquence of those who still pursued the hope of harmony and a national community. At the executive level of American life and on television the ablest of the blacks would be increasingly accepted; at the grass-roots level, where the rub came, whites would begin to flee from anticipated violence.

My memory of polical movement is caught next by the youth revolt, and hangs on the Democratic convention of 1968 in Chicago, the most dramatic convention of modern times.

Youth had never been seen as a separate problem group in American history. "Youth" was accepted as a glandular episode that would, without doubt, be cured by the simple passage of time, when youths became parents and taxpayers in their turn. But by 1967 "student youth" had become a force in American politics.

In 1939, as American prepared for war, fewer than 1.5 million students attended the nation's colleges and universities. By 1968, this number had exploded to 6.9 million. So much had the country changed that college youth outnumbered farmers by 3 to 1 and railway workers by 9 to 1; college students were as politically important in carrying states like Wisconsin or Massachusetts as were coal miners in West Virginia or automobile workers in Michigan. And they had become a critical mass—ready to let go at the spark of ignition.

The spark of ignition was, by 1967, already there: the war in Vietnam, the most mismanaged war in American history. The war was, in the eyes of educated youth, illegal: No Congress had voted either a declaration of war or a national emergency, yet they were being drafted by Presidential command for a cause no one properly explained, and their lives were at stake.

Episodes of youth in revolt mark the dismal course of the war: The march of the Pentagon in October 1967. The sweep of the early 1968 primaries by students for Eugene J. McCarthy. The riots at Columbia University in the spring of 1968 and at Harvard in 1969. The tragic confrontation in 1970 at Ohio's Kent State University. But what remains fixed most sharply in memory is the student intrusion at the 1968 Democratic convention in Chicago.

I watched their climatic demonstration in Chicago—an almost all-white group of innocents and crazies all jumbled together, controlled by squawk boxes of the Mobilization Committee to End the War in Vietnam.

Down Michigan Avenue they march, chanting and yelling: "Peace now, peace now" and "Stop the war, stop the war." Police in triple ranks stand at the corner of Balbo Drive and Michigan Avenue, behind yellow barricades; cellophane sacks of toilet waste are being thrown at the police, bundled packets of leaflets are being hurled from hotel windows, trash cans tossed. In the swaying mass of demonstrators, momentarily halted, fly red flags of the revolution, the black flags of anarchists, Omega banners and the Vietcong flags of the enemy.

And then—*slam*—like a coiled spring, the police reserves from Balbo Drive burst in. Like a punch, they jolt. The police move, like a wedge, into the packed mob and split it; youngsters are hustled off by their elbows, their heels dragging on the ground; a woman is dragged along the pavement, her head bumping the concrete. The police club; tear gas bursts over the crowd. The squawk boxes of the mobilization call out: "Cool it now, lots of people are getting hurt. * * * Cool it, cool it. * * * Please don't throw things, don't throw things."

But memory of the choas must not obscure what the youngsters accomplished.

First, if the Vietnam War was lost, as it was to be, a major defeat had occurred on the streets of Chicago. "The whole world is watching, the whole world is watching," chanted the youngsters as television lights and cameras carried the scene around the world to Vietnam, encouraging enemy resistance in that Asian civil war that was to end with the victory of tyranny.

Second, the Democrats—swept by the noise and clamor, punished by television's snatches of the youngsters' sad confrontation with the police, seeking to mollify the protesters—would pass two resolutions to reform the party. These resolutions, designed to purify the way delegates were selected, required every state party to give youth, minorities and women proper representation at future conventions—or be excluded. No matter how ordinary Democratic voters might vote in the future at primaries or caucuses, these groups *must* be guaranteed representation in and of their own right, not as representatives of the general electoral constituency.

Third, most of the earnest youngsters of the 1968 insurgency of Eugene McCarthy and Robert Kennedy, as well as most of the youngsters of the 1972 campaign of George S. McGovern, would go on to jobs, careers, homes and families with the insurgency only a romantic memory. But thousands would not give up the memory. They had developed new techniques of vote gathering, learned how brittle were the old machines they had challenged, outwitted the old-style politicians over and over again, recognized computorial analysis and television manipulation as vital tools of the politics to come.

Blacks and youth had won their entrance to equality by violence and demonstration in the streets as much as by appeal to conscience. The next group would win, by appeal to conscience and reason alone, victories that may be even longer lasting. These were the women of America.

Women in America, as everywhere else, had been regarded as legal and social inferiors from the beginning. It was Thomas Jefferson who, in 1807, said: "The appointment of a woman to office is an innovation for which the public is not prepared, nor am I." For more than a century and a half, women were regarded, if not as chattel, as wards of the state and their families, protected in some cases by law, deprived in other cases of rights by the same laws.

The modern push for women's rights begins in the Kennedy Administration in 1961 with the calling together of a Commission on the Status of Women and moves on from there to the forming of the bipartisan National Women's Political Caucus 10 years later. Until the 1970's, women had been one claimant group among many, a group recognized sporadically and symbolically by token appointments in government or by the voters in elections where the quality of an outstanding woman might command loyalties. The National Women's Political Caucus was different: It meant not to plead but to demand; not to beseech but to mobilize power, by votes, at any point of vulnerability in the male power structure.

Here, again, memory pinpoints a place and time of breakthrough—the Democratic convention at Miami in 1972. For there was no doubt that among the many power groups jostling in Miami, a totally new, almost irresistible center of pressure was the recently formed National Women's Political Caucus.

The scene at their headquarters was that of a bad soap opera—the damp, dismal, sea-sprayed Betsy Ross Hotel, where the charge was $8 a night per room. Phones jammed; elevators were crammed. One remembers the littered rooms, the unmade beds, dressers strewn with yogurt cartons; the cockroaches and cooking odors; the mimeograph and copy machines in the corridors, which ran until the hotel's ancient fuses blew; and on the third floor, indelibly stained on the old rug in red paint: Women Power 1972.

But there was nothing comic about what they represented, or the force behind them. In a single year, from a standing start, the caucus had mastered the mechanics of politics. Women had been observing men practicing politics for years—but usually as handmaidens at conventions and campaign headquarters. They knew how to code names of delegates, how a boiler room operated, how to buttonhole, plead, lobby, threaten—and how to move whips about on the floor of an uncertain convention. These skills were now organized. Every one of the state delegations at the more than 40 Miami Beach convention hotels was circularized with bulletins, leaflets, news. Every night, blue-jeaned volunteers rode the buses to stuff the mailboxes, or slip reports under the door of every delegate. Their sisters on the floor were identified by cause and issue. They installed their own switchboard to link them to key delegations in the rival commands of McGovern and Hubert H. Humphrey.

There were several moments of recognition of this new force in being, this new call to attention:

One remembers the explosion on the convention floor of that issue which torments modern women most—abortion, for the first time publicly debated at a convention in the presence of television. Forced to floor debate by their caucus, opposed by the governing McGovern majority as a political disaster about to happen, the women are voted down. Nonetheless, there was the issue, now out in the open. Should not a woman have personal control over her own body's reproductive processes?

One remembers the overnight candidacy of a woman for Vice President, the campaign of Frances (Sissy) Farenthold, organized at 2 P.M. on Thursday, breaking through the thicket of rules and credentials so that shortly after midnight Thursday, Farenthold could astound the convention, and even those who voted for her, by gathering 404.04 instant votes.

And one remembers the triumphant passage of the women's plank in the 1972 Democratic platform, bringing that party out squarely for the nomination of a woman to the Supreme Court (which Ronald Reagan would do) and, far more important, for the equal rights amendment to the Constitution.

But women, while they waited for their amendment, would have to rely on the Federal courts to decide just how far the enlargement of their rights might legitimately go—and whose liberty must be chipped to enlarge their own. From the nation's beginnings, the idea of equality has rested on the courts' authority to translate that idea into law. As Alexis de Tocqueville had said so many years before: "There is hardly a political question in the United States which does not, sooner or later, turn into a judicial one."

The Supreme Court's role in the transformation of American politics started with its historic decision of May 17, 1954, on school desegregation, known as *Brown v. Board of Education of Topeka*. All previous decisions on race, from the Dred Scott decision of 1857 through *Plessy v. Ferguson* in 1896, were overturned. Segregation of children by the color of their skin—blacks to one school, whites to another—was declared to be the denial of equality.

Less noticed in the flow of events was the decision of the court a year later known as *Brown II*. This not only reaffirmed the first *Brown* decision but strengthened its mandate by conferring on all lower Federal courts the power of injunction to see justice done. Federal courts, however, are led not by Olympian selfless personalities but by individual men and women, subject to all the temptations of power, conviction and applause. Presented with this opportunity to make law, they moved into areas of custom and behavior that had previously lain within the authority of the states.

By 1962, the Supreme Court, which had traditionally removed itself from what it called "the political thicket," had moved forward a notch, ruling that each state must so apportion its local legislature that representation by districts must give each citizen an equal vote; dissenting Justice Felix Frankfurter called the majority decision "a massive repudiation of the experience of our whole past." By February 1964, the Supreme Court had entended the logic of equality to the Congress itself, ruling that "one man, one vote" must also apply to the apportionment of Congressional seats.

So far, so good. But by 1964, with the passage of the Civil Rights Act and the landslide election of Lyndon Johnson, the lower courts followed the lead of the highest court and, by injunction, gave busing its reach and its wings.

Boston was a case study. Its demography had been changing year by year as middle-class whites left for the pleasant Bay State suburbs, north and south. But between 1970 and 1980 Boston was to experience a panic flight of those whites who would not resist busing as did the Italian-Americans of East Boston or the Irish-Americans of South Boston. The white population decreased from 524,709 to 393,937, while its "minority population" increased from 116,262 to 205,155. Even more dismissing, in its schools—the first free public schools in the nation's history—the proportion of white to minority children began to drop. Whites made up 68.5 percent of the school population in 1968. In 1974, W. Arthur Garrity Jr., a Federal judge, issued his busing ukase. And, by 1981, outside of East Boston, only 26 percent of the city's public school children were white, White families simply refused to send their children into black neighborhoods they considered dangerous, and black families complained that all the burden of busing for equality fell on their children.

Across the nation, the same startling reversal of proportions in big cities repeated itself as Federal courts pressed Federal orders on the teaching of young children in their hometowns. The original decision in *Brown v. Board of Education* had not been a decision to *intergrate* schools but to *desegregate* them—to free black children in any neighborhood where they lived to enter that neighborhood's school, or black students in any type where they lived to enter their state university. Black children must not be shipped from their homes to schools miles away simply because they were black. But by the 1970's white childen could be ordered onto buses and directed to leave their neighborhoods for not other reason than that they were white.

And the courts' assumption of power continued to increase. The logic of equality that applied to schools everywhere was, ultimately, to apply by court order to municipal police systems, to fire departments, to Federal and local civil servants and to reach farther and yet beyond to unions and corporations. Braced by the mood of the times, the courts found their mandate for a central ordering of affairs.

An entirely new jurisprudence was born—the jurisprudence of class-action suits. This jurisprudence had begun with the classic case of *Brown v. Board of Education* which, theoretically, concerned itself with one child, Linda Brown, denied access to her all-white neighborhood school in Topeka, Kan., because she was black. Then, slowly, suits brought by individuals against institutions gave way to ever-growing numbers of suits brought by groups against government and institutions in "class-action" litigation. By the early 1970's, sometime in the Nixon Administration, it had become quite clear that for people who sought a new social or political goal, it was far more efficient to go to the courts than to go to the voters or move through Congress, where every step forward required the building of a new coalition in the House, in the Senate, in committee staff, in pressure groups.

The courts were now spraying the United States Constitutions into every nook and cranny of national life, into matters best left to state legislatures, or into trivia that in other times might have been left to city halls or town councils.

The Constitution was made by the Federal courts to address the issue of whether nude dancing constitutes freedom of speech; whether due-process protections must be observed before an unpaid water bill leads to service interruption; whether males have the right to receive alimony; whether males should have the right to buy beer at the age of 18 instead of 21, if females have that right in the same jurisdiction; whether female soldiers can confer benefits on their spouses; whether private schools have the right to reject a student not to their liking; whether a white homeowner has the right of refusal to sell his home to a black. Matters that once had been left to the judgment of private persons, communities or states were now raised to the level of national issues in which the national courts imposed their interpretation of the Constitution on state or community.

Such extension of appetite could not but arouse a naturally litigious nation to respond. Public-interest law firms constituted themselves public-interest guardians; they multiplied in Washington and multiplied again. At the bar of the Supreme Court, they could win—or delay—what the public conscience required. In 1961, the Supreme Court had entertained only 1,940 pleadings. By 1979, at the height of its invitation to pursue equality, it was entertaining 4,731 cases, intricate pleadings all, averaging more than 20 each working day. It was clearly impossible for any sober judicial mind to grasp them in all their complexity. Thus, perforce, opinions were shaped by law clerks and young lawyers, imbued with the vision of a Federal Government and a Federal court imposing equality and justice for all, establishing behavioral patterns in a nation that previously had thought behavior best left to local community judgment.

The courts were pioneers in the extension of Government's reach, but it was Congress that set the perimeters of that reach. And Congress entered the 60's with an illusion of limitless American power, at home and abroad.

A quick backward look sets the stage: Franklin D. Roosevelt had led the nation through two grand emergencies, the Depression and the war, and his Congresses, despite one or two revolts, had been wax for his modeling. After Roosevelt, it took 19 years for Congress to regain its old authority, but by the election of 1964 Congress and the President were partners again. That election had brought to Washington the famous 89th Congress, accompanied by a President who loved Congress, stroked it, massaged it, twisted it to his ends.

"Entitlements" at damn-the-cost has always been part of American history. From the Civil War to the New Deal, veterans, farmers, old folks had been successively entitled to special recognition of their needs. The Congresses of the Great Society, however, pressed the Government's reach into countless corners of American life where Federal dollars and Federal bureaucrats had never been seen before. In 1964 came a basic antipoverty program; a mass-transit bill for city dwellers; a permanent food-stamps program; a program for legal aid to indigents. In 1965 followed Medicare for over 65 years of age; Medicaid for the poor; aid to elementary and secondary schools across the nation; college loans and scholarships; the Voting Rights Act; expanded housing programs with subsidies for low-income families; regional economic planning and development programs.

Of the far-flung programs of entitlements passed by the Great Society Congresses and their successors, a number of very serious truths must be stated.

First, each program was pressed through Congress in the name of virtue. No single program could be denounced, vetoed or buried in committee without the objectors being shamed for their indifference to the call of conscience. Who, for example, could turn his back on the distress of the handicapped? If a regulation under the Rehabilitation Act of 1973 required that all urban transit systems which drew money from the National Mass Transportation Assistance Act provide ramps, wheelchair lifts and special aids for the handicapped, who would quibble about what it might cost? Who could object to scholarship loans to college students? Or object to a national recognition of the contribution of artists, writers, musicians, orchestras, dramatists, dancers, actors to the nation's well being? Congress, for almost 20 years, chose not to choose among programs, but to enact them all.

There comes next a second truth: All entitlement programs tend to grow in cost. In 1956, for example, Congress had passed a disability insurance amendment to Social Security, estimating it would rise in cost to $860 million by 1980. By 1980, it cost more than $15 billion a year.

There is a third fundamental truth to be stated about the growth of the Federal Government, the truth that recalls one of the oldest laws of American politics: All great reforms leave behind a legacy of bureaucracy. These bureaucracies harden from bands of reformers into collectives of time servers until, usually, they are packed with political figureheads who are engineered into decisions by their permanent staffs of true bureaucrats, controlled by the interests they were supposed to regulate.

Gradually, as the 1970's wore on and inflation began to bite, a change in mood crept over Congress. "Throwing money at problems" was becoming unfashionable—so Congress began to throw regulations at problems.

Agencies grew, and grew again. From 12 in 1970, the social regulatory agencies had grown to 18 in 1980, and their budgets from $1.4 billion to $7.5 billion. The older agencies of Congress—the Interstate Commerce Commission and Civil Aeronautics Board and Securities and Exchange Commission, for example—had been what students of government call vertical agencies: assigned to patrol a particular industry that had grown so large as to threaten the public interest, industries such as railroading, banking, securities and airlines. The newer agencies were horizontal. They could rove and patrol across the board, regulating and intruding into any factory, any school, any hospital built with Federal aid, any university that drew from Federal funds or whose students won Federal loans and scholarships.

As the agencies grew, the appetite of the regulators expanded. In 1970, the Code of Federal Regulations rested at 54,482 pages; by 1980, it had grown to nearly 100,000 pages. No Congressman or Senator had any but the vaguest idea of what the verbiage meant. But such regulations had the force of law and would be enforced by the courts; only skilled lawyers—and Washington flourished with new law and lobbying firms, staffed very heavily by people who had written the regulations—could understand one or another section. Only they knew the corridors or offices in which decision or relief might be found.

Good will lay behind all these steps to the federalization of the nation's Government—and many achieved memorable good. But one movement in the grand transformation slowly developed, year by year, into a monster whose shadow hangs over all American politics today: the division of Americans by race and national origin into groups entitled to special privileges. Beginning in 1964, the purpose of the Civil Rights Act has been twisted year by year, through executive order, judicial fiat and bureaucratic appetite, into a reverse discrimination never envisioned, and specifically forbidden, by the act itself.

By 1980, there were in Washington at least 18 jurisdictions that policed all institutions, private and public alike, in the pursuit of what was called "racial balance." Chief among these were the Departments of Justice, of Labor, of Commerce, of Health and Human Services, not to mention the Equal Employment Opportunity Commission and the Office of Management and Budget. All have had the power to define and discriminate among Americans—based on whether they belong to a "minority" group or to the nation's majority. The Department of Health and Human Services once listed seven categories of Americans; other departments list five. Generally, however, these are the groups of special racial or ethnic entitlement: Blacks ("of African origin"), Hispanics (sometimes called "Spanish-speaking" or "Spanish-surnamed"), American Indians and Alaskan natives (sometimes subdivided into Eskimos and Aleuts), Asians or Pacific Islanders (sometimes called Orientals), and whites ("not of Hispanic origin").

One must trace a glide from the old phrase "affirmative action" to the subsequent phrase "goals and timetables" to the present reality of federally enjoined "quotas."

Where the phrase "affirmative action" originated no one knows. It popped up for the first time in federalese in an executive order issued by John F. Kennedy on March 6, 1961. It was, in its purest sense, an effort of the Government to remedy past injustices in American life. Ancestors of the blacks had been shipped to America in coffles, without their consent, and broken to slavery. Ancestors of the Indians had been broken in spirit, driven from their hunting lands, penned in reservations. Now, however, "affirmative action" would seize the bureaucratic imagination, and those assigned to enforce it would expand the thought.

It was in 1969 that the phrase "goals and timetables" was introduced—during the Nixon Administration. And with "goals" came the Philadelphia Plan of defining just who is, or is not, to be employed on Federal construction projects. From there, goals hardened into quotas, although never acknowledged as quotas. By the twilight of the Carter Administration, the Philadelphia Plan had gone nationwide, with the goals set precisely for all major cities: In Philadelphia, 17.3 percent of a contractor's work force would have to be minority employees; in the District of Columbia, the figure was 28 percent. Moreover, 16 affirmative action steps would have to be taken under the new mandate by all 8,000 contractors working on projects funded with Federal money.

In the name of affirmative action, judges attempted to wipe out city and county boundaries in order to import white children to spread among blacks in the inner-city schools. A whole sequence of orders and decisions attempted to classify children and their teachers by the color of their skins, abolishing neighborhoods in the pursuit of equailty of rights. Even New York, that most liberal of cities, rebelled when teachers were ordered to register by the color of their skin so that, as the Federal court enjoined, black and white teachers be distributed across the city, away from their homes. The intent was that both black and white children might be equally exposed to black and white instruction.

Next came the decisions on municipal and state employment policies. There is not a single city in the United States that is not, in one way or another dependent on Federal funds. Thus, each may be subject to a Federal determination as to whether its employment or educational practices reflect equal opportunity. This reaches across the board. It has required San Francisco to teach Chinese students in Chinese and Hispanics in Spanish. It required Bridgeport, Conn., to employ all 84 black and Hisanic applicants for its fire department who had failed the written entrance tests given to all other candidates. It required Stamford, Conn., to hire one minority-group aplicant for every white applicant to its fire department until a quota of 17.5 percent was reached.

Such decisions, rising to the final judgment of the Supreme Court, came to a climax in a case denominated *Fullilove v. Klutznick,* in which Philip M. Klutznick, the Secretary of Commerce, was sued by H. Earl Fullilove.

At issue was one of the first acts President Carter had pushed through Congress, an emergency program of public works—$4 billion to stimulate the economy—of which 10 percent of the contracts must be awarded to "minority business enterprises."

In July 1980, the Supreme Court ruled the measure constitutional by a vote of 6 to 3. But who, then, was a minority? In one dissent, Justice Potter Stewart declared: "Today, the Court . . . places its imprimatur on the creation once again by Government of privileges based on birth. . . . Becasue of the Court's decision today our statute books will once again have to contain laws that reflect the odious practice of delineating the qualities that make one person a Negro and make another white."

With its ruling, the Supreme Court had passed an invisible mark in the struggle for civil rights. Back in the days when affirmative action was acquiring the force of morality, it had been the great effort of the Government to remedy the old wrongs visited by white Americans on blacks and indians. Now there was a race law, and an ill-defined race law. Americans had visited no harm on recent Chinese arrivals from Hong Kong or Taiwan. But as Orientals, they were entitled to privileges by birth—even though Chinese-Americans and Japanese-Americans were said to be among the highest-income groups in the United States.

Prejudice has always been a fact of American life. In the kind of country we made, each new wave of strangers had been warily accepted with suspicion by those already here. Experience had slowly forced older Americans to regard new arrivals as other Americans, and particularly after World War II, when their valor and service in war eroded old prejuduces. But now, by the late 70's, it was not equality of opportunity that was sought, but equality of result, stipulated in goals, quotas and entitlements, based not on excellence or merit but on bloodlines.

Newly arrived and "underprivileged" peoples had earned by law, regulation or judicial flat particular privileges as "protected classes." Women and young people were also "protected." Such people were active inside the arena of politics, they had claims to advance and new rights to protect. By the time of the election of 1980 they had become separate ingredients of politics, and when they were mixed with older claimants of privilege—farmers, veterans, banks, railroads, oil companies—American politics were splintered. By bunding the identifiable splinters, a voting majority could be assembled.

By 1980, 36 million Americans received their monthly Social Security checks; 22 million drew Medicaid benefits; 26 million more, Medicare; 18 million supplemented their budgets with food stamps; 15 million received veterans' benefits; 27 million children were nourished by school-lunch programs; 11 million drew from the Aid to Families with Dependent Children programs. Most of these categories overlapped, so that there was no way of determining their global numbers. Moreover, there were the millions of young people who enjoyed Federal shoolships and loans to go to college, and millions of women who, if denied the avenues to the careers they sought, could appeal to the courts to open the doors. All in all, perhaps half the population of the United States depended in whole or in part on Federal aid or protection.

All this had happened so gradually that few realized how much the nature of American government and politics had changed. Government had ceased to be, as Franklin Roosevelt once saw it, the umpire between business and labor, between the rich and the poor; it had become the nourisher of dependency. Convinced of America's limitless power and propelled by the best of intentions, the country's leaders and its dominant thinkers had pushed the old America entirely out of shape. It was as if one surgical operation here, another prosthesis there, had all come together crazily in a body that, if not crippled, had been transformed. No one had planned it thus. But there it was.

For conservatives, the slowly unfolding drama of the previous 20 years had been one of growing meanace. They had tried once with Barry Goldwater to upset the trend; they had tried again with Nixon, but he had turned out to be a closet regulator. Nixon had extended Government's control to the first effective environmental surveillance; he had imposed price controls, introduced grander school lunch programs, construction quotas, new safety and health regulations. This time the conservatives were going to try with a man they were sure they could trust.

The election of 1980, then, was to be a new capter in the old national debate: Just what was the nature of the Federal Government and what were its limits? The Democrats would build their campaign on defense of the old visions; the challengers, on a denunciation of those visions. That would be the central, underlying theme of the campaign.

But politics had changed both in substance and style, and the candidates would grope to make their messages clear in the clutch of circumstances beyond their control.

There was, first, the national humiliation, the sense of the old power lost, as Iranians held hostage and tormented 52 Americans whom we were powerless to rescue. There was moreover, the reign of television. Americans had once gathered to hear politicians at state fairs, at factory gates, or in lunch-hour crowds on city streets. They now gathered at their television sets—and television's evening news dominated the political process. Television dictated how, where, when the candidates would campaign.

But most important of all the underlying conditions was inflation. By 1979, a contagion of fear and anger had spread through America. Millions who had invested in savings bonds or put their dollars in savings banks to provide for their children's education or their own retirement years felt cheated. Promises had been made by their Government in the language of dollars, and now the promises were being repudiated in money that might, 20 years later, become all but worthless.

For three decades Republicans had warned of just such a disaster—and been ignored. But by 1980 they enjoyed the counsel of a corps of intellectual outriders of a quality not entertained by their party since Theodore Roosevelt gave up the White House 72 years before. From the Hoover Institute at Stanford, Calif., to the American Enterprise Institute of Washington, from William F. Buckley Jr. to Irving Kristol, conservative thinkers were furnishing ideas that ran counter to the liberal creed. They questioned the entire transformation of American life and government.

Of the Republican candidates approaching 1980, none was more enthusiastic about such new and conservative ideas than Ronald Reagan, 68, twice Governor of California, a candidate for the Presidency for almost 12 years. Reagan was a man who embraced causes, who had entered politics with a message. No one could speak more simply about large ideas than Ronald Reagan, once a Democrat, now a devout Republican.

His campaign rested on his message, a challenge to all the holy truths of the great transformation. But underneath lay a shrewd understanding of how the message could be amplified by dramatics, personality and anecdote to stir emotions.

His first testing was to come in New Hampshire in 1980. There, running against George Bush in the nation's first primary, he was to show his ability to draw voters to the polls.

Who were the Reagan voters? In New Hampshire, I found no one who gave an apter description of them than the chairman of the Reagan campaign, Gerald P. Carmen. Carmen was a businessman who had made his small stake in Manchester and, moving up, moved in on the strife-ridden local Republican Party. Who are we, he asked, repeating my question. "Most of us," said Carmen, "are the first generation of our community or family who went to college. Our people are on the make. We're middle class. Bush has the elite, the old Yankee aristocracy of the valley, but ours are people who've bought the first house in the family, who want to get ahead, and they don't want the Government to take it away. I'm at home when I talk to Ronald Reagan."

The Reagan message came in two parts: The first was the message of the personality. In a season of melancholy, his good nature pleased. The camera stimulates Reagan as catnip does a cat; he loves the one-line quip. He could quip about Carter's call for national austerity: "A man who tells you he enjoys a cold shower every morning will lie about other things." Or about the difference between a depression ("when you lose your job") and a recovery ("when Carter loses his"). As a person, Reagan could wring out of the people an echo louder than any of his opponents could inspire.

The second part of the message was the substance, the theme that was so elementary it could not be misunderstood, the theme so many Americans wanted to hear: Their Government was choking them, wasting their money, forcing up prices, poking its nose into local affairs.

In the years since 1966, when I had first followed a Reagan campaign in California, the message had changed but little. A few new quips were added now and then, but quips so banal that television would not carry them; they therefore seemed fresh and unworn to his live audiences, who chuckled along with him as once they had with Jack Benny of the Jell-O show.

I recall a capsule of Ronald Reagan's stump oratory, delivered in Cleveland just before the end of the exhausting primary campaign of 1980. Rain is about to fall as he rises, so he must hurry and skip the quips. There float up from my tape recording the disjointed phrases of his essential message:

"When he [Carter] took office, inflation was 4.8 percent and he said he was going to do something about it, and he did. It's now averaging 16.4 percent. * * * Time to turn this country around. * * * Everything that's been done means more taxes, more inflation, more unemployment. * * * Why don't we try to leave more money in your hands for you to spend the way you like. * * * Income-tax cut over a three-year period. * * * Reducing cost of Government. * * * Deficit monster. * * * Federal aid to education has become Federal interference. * * * I see the rain is coming down a little bit harder. Why don't we get to the closing point. * * * God bless you all. * * * Thank you, and I need your help on June 3."

The rain is pouring down now, the band plays "Glory, glory, hallelujah" and the crowd cheers.

The next day, after a jaunt through the Midwest, the candidate found himself in New Jersey. It was late afternoon when he finally directed his caravan back to Newark's airport. He was booked on a commercial flight to Los Angeles and then on home to Pacific Palisades and the ranch.

Throughout the campaign, he had been so amiable and charming that I had come to like him as a person; he is a decent man. I asked to speak with him.

Reagan came to sit beside me. As he talked, I realized that his personal charm concealed a political indignation as deep as Barry Goldwater's. This man was an ideologue. His basic outrage over the transformation of the country was not simply a trick theme for his speeches; it was built into the man, a part of the essential person.

He had once been a devout Democrat, a union leader—and I asked when he had turned. "Oh," he said, "the turning began back there in the 50's, when I began to warn against the growth of permanent institutions of the Government. They were beyond the control of the elected representatives of the people. Even back then, our party, the Democratic Party, had bought the new economics, which rested on a theory that a little planned inflation would not get out of control. * * * But you can't plan a controlled inflation, it's like radioactivity, cumulative. * * * There was a time back there when I said to Nancy, 'Every four years I've got to go out there for these people, and I don't go along with them.' "

Reagan went back to his political breakaway. "But out of the New Deal, interrupted by the war, came, I think, a permanent structure of Government that had in mind—not, as I believe Roosevelt had in mind, a temporary medicine for the ills of the Depression—they had in mind a permanent change in Government. The Federal Government would usurp functions which properly belong at the state level. * * * They acquired that strength that has made them almost more powerful than those we elect to office. The massive staffs of Congress are now definitely part of the bureaucracy. We hear that the people call for these things * * * you know, the truth is I can never recall the people ever asking for any of these things. Most legislation is born in the departments of Government. * * * Then they look around by way of a Congressional staff, or a Congressman, or a Senator, who will sponsor the legislation. * * * Once a Congressman came up to me and told me what would happen if he took on an important agency or opposed its budget: The first time your secretary calls that agency for any help, for information, they say, 'We don't have the manpower to do that.' "

He spoke of President Kennedy, who had upset him, especially in the Bay of Pigs incident. "We landed those men there," Reagan said, "and then we abandoned them." He talked about his reputation in the East as a reactionary—"some kind of 'right-wing fascist' "—and went on to say that in 1976, in his primary campaign against Gerald Ford, "I found when I crossed the Missisippi River coming east, the horns began to grow out of my head, at least in the minds of [those] people." He added: "It's much less today. * * * They've learned about my record as Governor."

We talked of issues. Busing? "It's a failure; it didn't work." It had created more bitterness than it had eliminated. Busing was a "waste of resurces."

Illegal immigration? He thought it was a broader problem than the United States could solve by itself; it needed an international understanding. "We're all ethnics," he said. "You and I are, too. * * * My grandparents came here in the potato famine, fleeing Ireland. * * * On my mother's side they came from England, where they picked up broken bricks at a brick factory and built an oven and baked and sold bread door to door so they could get the money to come here steerage."

I had held him now for a goodly time, and I began to realize that the man, despite his courtesy, was exhausted, and not just from this talk and this day, but from his five months on the road.

But one more question: Where did he think Jimmy Carter had gone wrong? Reagan groped for a reply, and the answer came out this way: "Well * * * What I think went wrong with him was, his hunger for the job and the office was so great that he said anything to get it. * * * It was not a desire to say, I want to do this, I want to do that. * * * I wonder whether he's confusing some of this own statements with having come from God."

We stopped. He went forward and settled down beside his wife to watch a movie. He enjoyed it; she drowsed. The primary ordeal was over; his nomination was locked up; the only problem before him was the election and the contest with Jimmy Carter.

Elections are important; they give Americans not only their chief sense of participating in their Government but, more importantly, a sense of control. Control is what politics is all about. But the campaign of 1980 was concerned not only with control but with national purpose. There was a sense in the nation that America had gone off the track, almost as if we had lost our way into the future. It remained to be seen whether Ronald Reagan could do better than Jimmy Carter or the Democrats had done in the previous 20 years. That was the gamble he had to persuade the American people to take in the months that lay ahead.

[Newsweek, July 10, 1978]

REVERSE DISCRIMINATION

(By George F. Will)

"You cannot spill a drop of American blood without spilling the blood of the whole world," Herman Melville wrote in 1849. "* * * Our blood is as the flood of the Amazon, made up of a thousand noble currents all pouring into one. We are not a nation, so much as a world." But government policy has been, increasingly, to divide the majestic national river into little racial and ethnic creeks. If that policy succeeds, the United States will be less a nation than an angry menagerie of factions scrambling for preference in the government's allocation of entitlements.

That policy was endorsed by the Administration's brief against Allan Bakke, a brief which urged that the nation should cultivate "race consciousness." The brief did not suggest how the government will decide, someday, that persons who have been "victims," personally or through "their forebears," have been "restored"—a strange choice of verb—"to the position they would have occupied" but for discrimination. The Bakke decision pleases the Administration.

Bakke won because a medical school, with no record of discrimination to rectify, adopted a numerical quota for certain minorities, and admitted some who were dramatically less qualified than he was. The Bakke decision has made little law. Therefore, most existing policies will continue, so the law can be riddled with racial considerations. With regard to higher education, the decision suggests broad tolerance for reverse-discrimination policies that are less raw than that which excluded Bakke. And Justice Powell's opinion for the Court can be read plausibly as somewhat permissive regarding considerations of race and ancestry in the alloction of other government benefits generally.

"SUSPECT" DISTINCTIONS

The opinion says racial and ethnic distinctions are "suspect" and require "exacting judicial examination." But when state distribution of benefits "hinges" on race or ethnicity, the racial and ethnic classifications are acceptable if they are "necessary" to promote a "substantial" state interest, such as diversity in enrollments. Four Justices even assert the constitutionality of programs like the one that excluded Bakke, programs that do not just use "minority status as a positive factor," but that "set aside a predetermined number of places" for minorities. These Justices say, not groundlessly: "For purposes of constitutional adjudication, there is no difference between the two approaches."

Powell says that the "equal protection" clause precludes "recognition of special wards entitled to a degree of protection greater than that accorded others"; he rejects a "two-class theory" of equal protection. But then he says there can be compelling state interests served by constitutional forms of discrimination which disadvantage whites for the benefit of preferred minorities. This necessarily means distinguishing two classes of citizens.

Powell says there is a distinction constitutional dimension between an "explicit racial classification" that "totally" excludes members of some groups from full participation in a program, and "properly devised" racial considerations that are "flexible" in treating race or ancestry as a "plus." But this can be a distinction without a significant difference. For most professional schools, the pool of qualified minority applicants is shallow. Schools that dip too deeply will produce striking disparities between the test scores and academic records of minorities and whites they accept. At some point such disparities must be *prima facie* evidence of a quota, whether it is acknowledged or surreptitious.

"STATISTICAL PARITY"

The Bakke decision does not necessarily mean the Court will say that reverse discrimination in employment and awarding contracts is "necessary" to a "substantial" state interest. But the Court may not seriously impede the bureaucratic drive to transform the core concept of American justice from "equal opportunity for individuals" to "statistical parity for government-approved groups." There is, indeed, a substantial state interest in broadening membership in the middle class, and especially in professions. But the Fourteenth Amendment guarantees equal protection to "persons," and any reverse discrimination grants special entitlements to preferred groups. Nevertheless, the Bakke decision will leave unscathed an array of programs by which the government encourages or compels public and private institutions to consider ethnic quantities more, and individual qualities less, when conferring benefits.

In 1945, the Court seemed on the way to saying what Congress subsequently seemed to say in the 1964 Civil Rights Act: race is an inherently unacceptable basis for state action. But now, in the Bakke case, the Court has refused to find that principle in the 1964 act, and the Court rejected that principle in cases before Bakke. For example, it held that states can tailor redistricting plans racially to create or preserve legislative districts that enhance the electoral power of preferred minorities (in the particular case, blacks and Puerto Ricans). The plan in question diluted the electoral strength of Hassidic Jews who do not enjoy government preference.

WARDS OF THE STATE

Reverse discrimination began as a means of ameliorating the condition of blacks, but it was equally claimed as a "right" by groups defined by race, ancestry or sex. It is demanded in spite of the fact that it devalues the achievements of its beneficiaries and stigmatizes them as wards of the state, unable to compete. This taint is not disguised by tactical euphemisms, such as saying that employers must "differentially validate" employment tests when they are required to set lower passing scores for preferred minorities than for whites. Whether called "affirmative action" or (as in the 1976 Democratic platform) "compensatory opportunity," reverse discrimination, and the quest for statistical parity for "underrepresented" groups, involve what Prof. Ben L. Martin calls the "sensory" theory of representation: "only personal qualities crude enough to be obvious to sense perception, such as skin color, language, or sex, are acceptable bases of representation." Martin explains reverse discrimination in terms of "the foot-race analogy":

"In a fair race, none is disadvantaged at the starting line. But if all begin with equal advantage, then all should finish together, because contemporary liberalism leaves virtually no personal quality—not character. personality, motivation, self-discipline, or any other personal trait—as the responsibility of the individual."

The premise behind reverse discrimination is this: an unfair start can be inferred from an unequal outcome. The traditional American premise is this: the equal status of citizenship is the basis on which a structure of inequality *should* be built by a population in which talents are neither equally distributed nor equally rewarded. Reverse discrimination is a betrayal, not a fulfillment, of American values.

John Hart Ely

The Constitutionality of Reverse Racial Discrimination

. . . If we are to have even a chance of curing our society of the sickness of racism, we will need a lot more black professionals. And whatever the complex of reasons, it seems we will not get them in the foreseeable future unless we take blackness into account and weight it positively when we allocate opportunities. But that must mean denying opportunities to some people solely because they were born white. Either way, it's no musical, and I confess I have trouble understanding the place of righteous indignation on either side of this wrenching moral issue.

On the surface at least, the constitutional issue is also quite troubling. We would not allow a state university to favor applicants because they are white, not even an iota, whether it called the adjustment a quota, affirmative action, or anything else. To allow it to favor applicants because they are black seems to be countenancing the most flagrant of double standards.

There is some authority, however, for the permissibility of "benign" racial classification. Closest to the mark, perhaps, is the Supreme Court's dictum in *Swann v. Charlotte-Mecklenburg Board of Education,* making

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explicit its view that a local community may bus children according to race, if it wishes, to remedy school segregation caused by residential patterns. No obvious distinctions come to mind by which voluntary busing plans can be distinguished from other "benign" discrimination. First, although the contrary claim is voiced all too frequently, it is incorrect to say that no one is hurt by busing. Children can be hurt by busing, not simply by the inconvenience of the transportation process itself, but also by the transition from a school environment in which they have grown secure to strange surroundings in which they are likely to find themselves in a racial minority for the first time. Second, the argument that busing hurts neither race more than the other—which may or may not be true, depending on the particular plan—is foreclosed, and rightly so, by cases like *McLaughlin v. Florida* and *Loving v. Virginia.* The fact remains that busing hurts people precisely because of their color. Third, it might be contended that, busing or no busing, every child will go to some school, whereas a preferential-admissions program for a given law school will mean, after its effects have trickled down the entire law-school hierarchy, that someone will be completely denied the opportunity to go to law school because he is white. But even assuming this is so, it points to a difference in degree that probably should not go to the constitutional point. Places in desirable public schools are also scarce resources: an opportunity to attend some school is not the equivalent of an opportunity to attend the most desirable school in the area.

The problem in relying on precedent here is that the Court has never told us what the constitutional point is. Voluntary busing plans may, for all we know, be approved by the Court for any of four reasons: (1) the state's goal, racial integration, is a "compelling" one; (2) the use of a racial classification serves that goal perfectly and not approximately; (3) such plans are benignly motivated and therefore not "suspect" in the first place; or (4) the Court believes that even the most apparently "de facto" residential segregation has a bit of state action in its family tree, and that since busing has been imposed as a remedy for de jure segregation there would be no point in forbidding school boards to adopt similar methods. Or it may be—and the delayed dodge of *DeFunis v. Odegaard* strongly suggests this possibility—that the Court simply cannot agree about the significance of its constitutional precedents.

The standard constitutional defense of preferential treatment for blacks accepts the principle that racial classifications are suspect and therefore subject to special, or unusually demanding, scrutiny. But that does not mean, the argument continues, that racial classifications are necessarily illegal: they can be justified, but only on the basis of a compelling state interest. It is true that the imposition of a compelling state-interest requirement has generally been a prelude to invalidation. But surely, the argument concludes, the promotion of racial integration must be compelling enough. The words certainly flow in logical sequence, but simple assertions of relative importance can never wholly satisfy; one might again respond "double standard," were "no standard" not obviously more appropriate.

I shall argue that reverse racial discrimination can be constitutional, but for reasons quite different from those in the conventional account. Rather than asserting that the demands of "special scrutiny" can be met—an assertion neither the Court nor anyone else has given us criteria for evaluating—I shall suggest that "special scrutiny" is not appropriate when white people have decided to favor black people at the expense of white people. On one level there is a double standard here too: whites can do things to whites they could not do to blacks. But on another, the principle I propose is a neutral one: regardless of whether it is wise or unwise, it is not "suspect" in a constitutional sense for a majority, any majority, to discriminate against itself.

1

The unconstitutionality of all racial discrimination, malign and benign alike, is sometimes urged on the ground that the Fourteenth Amendment, although it does not mention race, was enacted largely to outlaw racial discrimination. But the express preoccupation of the framers of the amendment was with discrimination against blacks, that is, with making sure that whites would not, despite the Thirteenth Amendment, continue to confine blacks to an inferior position. That this is the amendment's history surely cannot conclude the matter; given the historical context, discrimination against blacks is all the framers would have been concerned about, and the equal-protection clause has rightly been construed to protect other minorities. But at the same time, the amendment cannot be applied without a sense of its historical meaning and function. Responsible inquiry must seek to determine the reasons why courts give unusually demanding scrutiny to classifications by which the dominant white majority has advantaged itself at the expense of blacks, and to what extent those reasons apply where the majority chooses to disadvantage itself in favor of blacks.

As a prelude, it may be useful to examine the manner and rationale of the ordinary ("rational relationship") review accorded ordinary ("nonsuspect") classifications under the equal-protection clause. Consider a familiar example: a state statute that permits optometrists, but not opticians, to duplicate lenses. Consider further the plea of an optician who wishes to demonstrate that, although it may be true that most optometrists are better qualified to duplicate lenses than most opticians, he is in fact as well or better qualified to duplicate lenses than a number of optometrists he could name. The proffered proof would be rejected, on the theory that legislative classification on the basis of admittedly imperfect comparative generalizations—stereotypes, if you will—must be tolerated: unbearable cost would result if the government were obligated to create procedures for deciding each and every case on its merits.

Pushed to this concession, our optician's next argument would be that although classifications rooted in comparative generalization are sometimes permissible, the unfairness that results to a number of individuals, himself included, from this classification is so great that it cannot be justified by the savings it effects. If the fit between classification and goal could be made tighter at no cost, the court might label the classification "irrational" and demand that it be made more discerning. But where, as in virtually every case involving real legislation, a more perfect fit would involve some added cost—either the cost to society of permitting some unqualified people to practice or the cost to the government of creating a case-by-case test of qualification—the court would refuse to second-guess the legislative cost-benefit balance. There is no reason to suppose, at least in an "ordinary" case like this, that legislatures are any more likely than courts either to undervalue the unfairness of a rough or undiscerning classification or to overvalue the cost of reducing the incidence of unfairness. . . .

Two factors often mentioned to account for the special scrutiny accorded racial classifications are that racial minorities have been subjected to legal disadvantage throughout our history, and that race is "generally . . . irrelevant to any legitimate public purpose." Neither factor alone can adequately account for extraordinary scrutiny. Some minorities (extortionists, for example) have been repeatedly disadvantaged by the law with good reason. And the fact that a characteristic is irrelevant in almost all legal contexts (as most characteristics are) need not imply that there is anything wrong in seizing upon it in the rare context where it does make a difference. Still, these two factors in combination add up to something significant. The fact that a group has repeatedly been disadvantaged in ways that no one could rationally defend should make us suspicious of any legislation that singles out that group for disadvantage. There is reason to suspect that the prejudices that generated the plainly irrational legislation of past eras are also partly responsible for the facially more palatable classifications of the present day. That suspicion in turn would seem to support the Court's disinclination to credit the usually sufficient imperfect-but-plausible statistical generalization in such contexts. For the usual mode of review assumes that legislatures can generally be trusted to appreciate the unfairness of a loose-fitting classification and objectively balance that unfairness against the savings it effects. Where there is unusual reason to suspect a legislative desire generally and irrationally to subjugate the group disadvantaged by the classification, however, this usual assumption seems an inappropriate basis for a system of review.

Of course, it cannot be said with assurance that all classifications by race that disadvantage minorities were intended to do so. The word, however, is *suspect*. The soundness of the Court's decision to treat these classifications with suspicion, irrespective of what can actually be proved about the legislature's underlying motivation, is corroborated by another point of distinction from the usual classification (to which the "rational-relationship" standard is applied). Racial classifications that disadvantage minorities are rooted in "we-they" generalizations and balances as opposed to "they-they" generalizations and balances. Few legislators are opticians; but few are optometrists either. Thus, although a decision to distinguish opticians from optometrists incorporates a stereotypical comparison of two classes of people, it is a comparison of two "they" stereotypes, namely, "*They* [opticians] generally differ from *them* [optometrists] in certain respects that we find sufficient on balance to justify the decision to classify on this basis." Legislators, however, have traditionally not only not been black; they have been white. A decision to distinguish blacks from whites therefore has its roots in a comparison between a "we" stereotype and a "they" stereotype, namely, "*They* [blacks] differ from *us* [whites] in certain respects that we find sufficient on balance to justify the decision to classify on this basis."

The choice between classifying on the basis of a comparative generalization and attempting to come up with a more discriminating formula always involves balancing the increase in fairness that greater individualization will produce against the added costs it will entail. But in we-they situations two dangers inherent in this balancing process are significantly intensified. The first is that legislators will overestimate the costs of bringing "them" into a position of equality with "us." But the balance is likely to be skewed in another, though related, way—through an undervaluation of the countervailing interest in fairness. It is no startling psychological insight that most of us are delighted to hear and prone to accept characterizations of ethnic or other groups that suggest that the groups to which we belong are superior to others. The second danger is therefore one of overestimating the fit of the proposed stereotypical classification. By seizing upon the positive myths about our own class and the negative myths about theirs, or for that matter the realities respecting some or most members of the two classes, legislators may too readily assume that not many of "them" will be unfairly deprived, nor will many of "us" be unfairly benefitted, by the proposed classification.

2

An understanding of why the Court has approached racial classifications that disadvantage minorities with suspicion unfortunately generates no bright-line test to determine whether other, nonracial minorities should receive similar protection. The implication of that understanding for the present discussion, however, seems obvious. When the group that controls the decision-making process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and, consequently, employing a stringent brand of review, are lacking. A white majority is unlikely to disadvantage itself for reasons of racial prejudice; nor is it likely to be tempted either to underestimate the needs and deserts of whites relative to those of others, or to overestimate the costs of devising an alternative classification that would extend to certain whites the advantages generally extended to blacks. The conclusion is corroborated by the realization, given eloquent voice in Justice Jackson's *Railway Express* opinion, that the function of the equal-protection clause is in large measure to protect against substantive outrages by requiring that those who would harm others must at the same time harm themselves—or at least widespread elements of the constituency on which they depend for reelection. But the argument does not work the other way around: similar reasoning supports no insistence that one cannot hurt himself, or the majority on whose support he depends, without at the same time hurting others as well.

Of course, there will be cases in which it will not be clear whether the legislative majority or the allegedly benefitted minority has ended up, on balance, with the comparative advantage—or, more to the point, whether the decision makers intended a greater benefit to the "we's" or the "they's." In these cases we should be suspicious. Furthermore, preoccupation with a majority-minority analytic framework should not obscure the fundamental premise that racial and related prejudices can properly give rise to suspicion.

Such prejudice could obviously generate a "they-they" classification, and for that matter a classification that facially disadvantages the legislative majority but was intended, and will function, as a de facto they-they classification. Thus, there might be reason to believe that a law that apparently favors blacks over whites was specifically intended to disadvantage a subset of whites that is both inadequately represented in the decision-making body and the object of unusual prejudice. But where there is no reason to suspect that the comparative disadvantage will not be distributed evenly throughout the "we" class, a we-they classification that favors the "they's" does not merit "special scrutiny"—though obviously the court should take a careful look to make sure that the case presented fits this description. Whether or not it is more blessed to give than to receive, it is surely less suspicious.

3

Even if one accepts this conclusion in a vacuum, its adoption and enforcement by the courts, particularly by the United States Supreme Court, would entail some difficulties and side effects that are troublesome at the least, and might even suggest that a prophylactic rule banning all racial classification is the better course. The concern may be that a preference for one minority may not operate to the undifferentiated disadvantage of the majority generally, but instead may cause disproportionate harm to a discrete, disfavored, and relatively powerless subset of the majority. This is not, of course, an argument invented for purposes of this discussion: just such a fear has prompted certain Jewish groups to voice strenuous opposition to preferential admissions for blacks. Somehow, the concern seems to run, most of those "black places" will be taken from Jews. I do not for a moment discount the reality of anti-Semitism in our society, nor can we consider the feared scenario "just one of the costs" of pursuing racial equality. It is an unacceptable scenario, and an unconstitutional one as well. An American state legislature, unlike, perhaps, the Israeli Parliament, cannot legitimately pursue the goal of reducing the percentage of Jewish lawyers. Whites generally, not Jews in particular, are a majority in our society, and consequently racial discrimination is unsuspicious only when it runs against whites in general.

It is questionable, however, whether this danger can form the basis for a constitutional argument against preferences for blacks or other racial minorities. A "discretionary" system of selection already leaves room for various sorts of indefensible prejudice to operate: no matter how one might feel about the comparative merits and dangers of such a system—my own feeling has never been very positive—a decision to extend preferences to blacks does not significantly alter the problem. Administrators who incline toward anti-Semitism in the one situation will very likely incline toward it in the other. The chances of catching them, of demonstrating the illegality of what they are doing, are no greater in the one than in the other. And if a preferential-admissions program for blacks should be accompanied by an unexplained disproportionate drop in the percentage of Jews, or even by a shift to a selection system that left more room for anti-Semitism—a more discretionary system or a ceiling on the number of students from New York City—the appropriate judicial response would be clear. There would be reason to suspect that the idea was to prefer one ethnic minority at the disproportionate expense of another for reasons of religious prejudice, and the scheme should be invalidated. Anti-Semitism is a danger—one that should, in any event, be combatted by every available tool, including constitutional litigation—but the danger is independent of a decision to extend preferences to blacks. Perhaps in other situations it will be impossible ever confidently to conclude that the dominant majority is not favoring blacks over some white minority for reasons of ethnic prejudice. But as long as there are situations where the two problems are separable—and this seems to be the case in the law-school situation in which *DeFunis* arose—an across-the-board ban on preferential treatment seems unjustified.

Some of us used to worry that any employment by the government of racial classifications for "benign" purposes—particularly with the Supreme Court legitimation—would retard public acceptance and enforcement of decisions like *Brown v. Board of Education*. . . . The concern might have carried the day so long as there was reason to hope that simply removing racial access barriers would result in genuine integration of society's various institutions. Although the barriers have not yet been entirely removed—heated debate on "benign" discrimination must not fool us into believing that malign discrimination is a thing of the past—we have enough experience to suggest that an "open door" is not sufficient, that if we are to have any hope of defeating racial prejudice we will have to take race into account for some purposes. And if that is the course we are to take, then that is the message we will have to project, difficult though it may be to expose the "contradiction" as only apparent. . . . The question is whether the negative educative effects of using racial criteria to overcome centuries of discrimination are so inevitable, and indeed so threatening, as to outweigh the good that such programs may accomplish. It is a difficult question, but the basis for an affirmative answer can hardly be secure enough to support an absolute declaration of constitutional impermissibility.

A credible explanation of why "benign" racial classifications are not suspect, however, would require the Court to expose some of the considerations that have made malign racial classifications suspect, and that exposure poses arguable risks for the judicial process. Explaining that the Court has accorded special review to most racial classifications because they are often the product of irrational prejudice might prompt a charge that the Court builds its constitutional judgments on "sociology, not law." Even if the Court could sidestep that charge with an explanation phrased more in terms of the relative nonsuspiciousness of a group's decision to disadvantage itself in favor of another, it would still find itself in sensitive territory. The justices might feel awkward about publicly taking into account the racial or other composition of the decision-making body, or perhaps of its constituency, even assuming that the pertinent facts are obvious. . . .

Those who are troubled would be better advised to consider another alternative, eloquently elaborated in the earlier writings of Professor [Alexander] Bickel (indeed, "benevolent quotas" were one of the chief examples): denial of review. Powerful attacks have been mounted on the use of the "passive virtues" to avoid the invalidation of practices that are wrong on constitutional principle. The use suggested here is different, however, and is addressed to anyone who takes the (debatable) view that although the practice in question is not unconstitutional on principle, explaining why it is not would carry serious costs for the nation generally and the Court in particular.

By virtually inviting another *DeFunis* case, the Court seems to have indicated that it sees no great costs in writing the opinion, and I am inclined to agree. But that decision—and not the decision on the constitutional merits—is the hard one. Measures that favor racial minorities pose a difficult moral question that should, by one method or the other, be left to the states. There is nothing suspicious about a majority's discrimination against itself, though we must never relent in our vigilance lest something masquerading as that should in fact be something else.

The Case for Affirmative Action for Blacks in Higher Education

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Chapter Four

Response to the Critics of Affirmative Action

Ever since its application to higher education in 1971, affirmative action has been vehemently criticized by members of the academic community. For the most part, these critics have defined the arguments used in the debate over the concept and the implementation of affirmative action. In many instances they have popularized their opposition by using such code words as "quotas," "reverse discrimination," and "unqualified." These arguments tend to overshadow the real intent of affirmative action programs—to bring about equal employment opportunity in the field of higher education. Thus, this chapter is a response to the arguments of the critics. Briefly, their major contentions are that: affirmative action is unwarranted federal intervention in higher education; goals and timetables are euphemisms for hiring "quotas"; "quotas" violate the merit principle; and finally, no benefit of significance has resulted because of affirmative action.

First, it is obvious from chapter two that federal intervention is essential if higher education is to be opened to all. Historically, predominantly white institutions deliberately denied access to blacks on the basis of race. After segregation was declared unconstitutional and employment discrimination was outlawed, academicians made no serious effort to bring blacks into academe. In fact, data suggest that black faculty members dropped from 3 percent in 1960 to 2.2 percent in 1968 at a time when institutions were rapidly expanding. Further, chapter five illustrates the extent to which OCR has gone to cater to the so-called special needs of academia, while chapter six points out the extent to which many faculty selection committees have been recalcitrant in fulfilling their obligation to follow the spirit of Executive Order 11246.

If federal intervention is warranted in any particular area, it certainly is needed in institutions of higher education.

Goals and timetables are definitely not quotas. The HEW *Higher Education Guidelines* (Executive Order 11246) are clear on this point. In fact, the section on the establishment of hiring goals reads:

> Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work.[1]

Nor does affirmative action violate the merit principle, whereby allegedly the most qualified candidate is chosen, irrespective of "irrelevant" criteria, such as race. As chapter two clearly indicates, race was the most obvious criterion in limiting the career opportunities of black scholars. Such exclusion necessarily warrants the consideration of race as a means to rectify this injustice.

Past criteria for hiring have generally limited the supply pool to white males who were a part of the "old boy" network. Affirmative action seeks to correct this exclusionary practice. By expanding the supply pool to include more blacks, affirmative action does not violate the principle of merit. Instead it provides the opportunity for all qualified candidates, regardless of race or sex, to compete on an equal basis.

Affirmative action does bring benefits to blacks. Most important, it has helped to open the door of the academic marketplace to the black scholar. For the first time, black scholars are beginning to make significant inroads into higher education. As the 1973 Bayer study and the 1975 Carnegie Council report indicate, there has been increased hiring of blacks by the more prestigious research universities since the inception of affirmative action.[2] The recently released "Higher Educational Staff Information (EEO-6)" from EEOC shows a marked increase since 1972 in the total number of black faculty members.[3]

The above paragraphs summarize the overall arguments of the critics and offer brief counterarguments. The remainder of the chapter examines in detail the arguments of six critics who are viewed as the most vocal, and perhaps the most representative, of the wide range and diversity among the critics.[4] These critics include George Roche and John Bunzel, presidents of institutions of higher learning. Roche is the president of Hillsdale College, a private, liberal arts college in Michigan, which accepts no federal grants or subsidies. He is the author of *The Balancing Act: Quota Hiring in Higher Education,* a biased and distorted attack on affirmative action. Unlike his fellow critics, Roche attacks *all* forms and types of government regulation. Besides attacking affirmative action, he has been most critical of Title IX of the 1972 Education Amendment which bars sex discrimination at colleges and universities that receive federal funds.[5]

John Bunzel, president of the California State University at San Jose, is one of the most pronounced critics of the use of "goals and timetables" which he, like the other critics, has equated with "quotas." Other critics, Nathan Glazer, Sidney Hook, Paul Seabury and Thomas Sowell, reflect the attitudes of faculty members opposed to affirmative action. Nathan Glazer, professor of education and social structure at Harvard, is one of the most vocal critics of affirmative action. He has achieved notoriety through the recent publication of *Affirmative Discrimination: Ethnic Inequality and Public Policy.* Often quoted by critics, both inside and outside academia, this book is a bitter attack on affirmative action policies and programs in education, employment, and housing.

Sidney Hook, professor emeritus of philosophy at New York University and senior research fellow at the Hoover Institution, Stanford University, and Paul Seabury, professor of political science at the University of California, Berkeley, have opposed the implementation of affirmative action ever since its inception. Their common objections to affirmative action have led them to assume prominent roles in the Committee on Academic Nondiscrimination and Integrity. This committee, composed of over five hundred academicians, has maintained that appointments to college and university faculties should not be based upon race or sex.[6]

Thomas Sowell, professor of economics at UCLA, has been perhaps the most controversial critic of affirmative action. No doubt the novelty of a black academician actively attacking a program designed to benefit blacks has gained him access to the news media. In 1975 and 1976, he wrote several articles attacking affirmative action.[7]

Reaction to the Revised Order

Revised Order No. 4, issued by the Department of Labor in 1971, called for colleges and universities, previously exempt as federal contractors from developing affirmative action plans, to do so. This order, "shook the academic community from its posture of indifference."[8] But opposition to the Revised Order had been raised even before it had been applied to the academic community. Professor Edward Shils of the University of Chicago viewed the Revised Order as requiring colleges and universities to use race and sex as criteria for faculty appointments. The use of such criteria, he argued, would lead to unqualified or, at best, less qualified blacks being appointed to college faculties.[9] Shils intended to rally opposition to the application of the Revised Order to higher education, and he did gain the support of many prominent members of academe.

Sidney Hook adopted and elaborated upon much of the Shils argument. Hook, like Shils, was among the first to advance the argument that the application of affirmative action requirements constituted unwarranted federal intervention in the internal affairs of colleges and universities. According to Hook's argument, the limited presence of minorities and women on college faculties did not necessarily imply discriminatory practices. But Hook was more incensed that OCR would threaten to cut off federal support unless the numerical proportions of minorities and women were increased to reach their proportions in the total population.[10] This view was no less than a deliberate misinterpretation of the regulation. The order clearly stated that hiring goals should be determined by the availability of qualified minorities and women. Yet Hook argued that affirmative action plans would force colleges and universities to hire unqualified blacks and women.[11] Before the universities were covered by Executive Order 11246 and before a single affirmative action plan had been adopted, Sidney Hook had described affirmative action in higher education as "wasting time, effort, and taxpayer's money." He thought there was "sufficient work for the Office for Civil Rights to do in enforcing the Presidential directive in areas where minorities are *obviously qualified* and are *obviously suffering* from unfair discrimination" [emphasis added].[12] Before a single black person or woman had been hired under affirmative action, Hook had labeled them unqualified.

Opposition to Affirmative Action: "Unwarranted Federal Intervention"

For widely variant reasons, the critics of affirmative action characterize the concept and implementation of affirmative action as unwarranted federal intervention into higher education. Some assert, as does George Roche, that the federal presence in higher education is a threat to all colleges and universities.[13] The arguments of some of the other critics are not necessarily based on ideological opposition to the federal presence in higher education. Critics such as Sidney Hook and Thomas Sowell maintain that the program of affirmative action was not and is not needed. Both, particularly Sowell, contend that the 1964 Civil Rights Act and a more enlightened public opinion among Americans led to the breakdown of many racial barriers. Sowell maintains that before the issuance of the Revised Order in 1971, more and more colleges and universities were seeking to hire blacks.[14] While it is true that more colleges and universities were actively seeking black scholars for the first time, they did so in response to the demands of black students and in response to the assassination of Dr. Martin Luther King, Jr.

Sowell's assumption is largely based upon information found in a doctoral dissertation by Kent G. Mommsen entitled, "Career Patterns of Black American Doctorates." Mommsen did find that an "overwhelming" majority of the black doctorates he surveyed in 1970 believed that there was a greater demand for them than there had been twenty years earlier.[15] Sowell, however, fails to mention that Mommsen found that close to 70 percent of the black Ph.D.'s thought racial discrimination was either "prevalent" (49.5 percent) or "extremely prevalent" (18.9 percent) at white institutions. Another 30 percent thought that racial discrimination in hiring "existed somewhat." Thus, of 709 black Ph.D.'s surveyed in 1970, over 98 percent indicated that racial discrimination in hiring existed in white institutions.[16] This evidence clearly refutes Hook's argument that OCR should involve itself in areas other than higher education. Obviously, black Ph.D.'s did not share Professor Hook's optimistic viewpoint of equal opportunity in higher education. Moreover, this survey, conducted in 1970, raises serious questions of Sowell's assertion that a more enlightened attitude towards hiring minorities existed on most college campuses before the issuance of the Revised Order in 1971. For Mommsen, in explaining his data, suggests that "tokenism rather than a true lifting of racial barriers may be in part responsible for the current high demand levels for black American doctorates."[17]

Nor does Sowell discuss the numerical presence or nonpresence of minority academicians on white campuses during the late 1960s. In 1969, Andrew Billingsley, then the assistant chancellor for academic affairs at the University of California, Berkeley, commented on that institution's failure to employ minority scholars. Contending that the situation at Berkeley was neither better nor worse than at other major universities, he stated:

> On the Berkeley campus alone over one hundred new faculty members are hired each fall. Certainly one would think that in a reasonably open institution at least ten of these would be black, brown or red. . . . Out of a regular faculty of more than thirteen hundred, the university's Berkeley campus boasts six blacks, two Mexicans, and one American Indian.[18]

Such a scant number of minority faculty, particularly of black faculty, Billingsley felt, was a "rampant racism out of all proportion to the interest or qualifications or availability of black scholars."[19]

While critics such as Hook and Sowell maintain that affirmative action is unnecessary, they overlook the perceptions that black scholars have had of white institutions. Why do black scholars perceive white institutions as being discriminatory? That question neither Hook nor Sowell chooses to address. And, as the figures from Dr. Billingsley indicate, the perceptions of black scholars were not erroneous ones. Thus, even during a period when predominantly white schools were looking for black faculty, it was clear that "good faith" efforts were not enough.

Still, the critics base much of their opposition upon what they consider to be the federal government's involvement in the internal affairs of colleges and universities. One writer has gone as far as to suggest:

> Is the affirmative action program as applied to universities the Nixon Administration's humorous way of getting back at the anti-Nixon college community without rallying opposition on the left? One can imagine the outcry among civil libertarians had the administration sought to pry into faculty personnel files under any pretext other than fair hiring.[20]

Paul Seabury and Thomas Sowell do question the motivation of bureaucratic appointees of the Nixon administration in implementing affirmative action.[21] Such an argument is designed to draw suspicion upon an administration that has been viewed by many as both anti-intellectual and antiblack. However, the implementation of affirmative action programs extends from the Kennedy, Johnson, Nixon, and Ford administrations through the Carter administration. Thus, the implementation of affirmative action as decreed by Revised Order No. 4 cannot be seen as an aberration perpetrated by the Nixon administration. For affirmative action continued, although weakly enforced, under the Ford administration, another administration viewed by many as being anti-black. Increased support of affirmative action is apparently being voiced by the Carter administration. Key cabinet members, such as the attorney general, the secretary of HEW, and the secretary of labor, have made favorable comments regarding affirmative action.[22]

The Case for Affirmative Action

Aside from their claims that affirmative action is unnecessary, the critics fear the federal government's involvement in the faculty hiring procedure. Critics such as Sowell, Hook, and Seabury view the federal government's compliance power as posing a grave financial threat to universities receiving federal monies.[23] But these critics ignore the fact that institutional support was never supposed to rest upon the flow of federal money. Only certain institutions of higher education, such as Howard University, were originated with a federal commitment to existence and funding. Although it is highly improbable, any university could voluntarily refuse federal funds and thus avoid this federal intervention in their internal affairs. Since they do accept federal income, they are obligated by their contractual agreement to accept federal regulations on fair hiring practices.

Also, the federal government has been extremely reluctant to use its power to cut off funding for failure to comply with Executive Order 11246 and Revised Order No. 4.* No college or university has ever had its federal funds terminated because of failure to meet the federal regulations governing the contract compliance program. HEW and the Labor Department have consistently failed to implement sanctions when institutions have been in violation of the law.[24] There are approximately thirteen hundred institutions of higher education required to have developed affirmative action plans, but as of October 1977, only 107 plans had been approved.[25]

But the crux of the critics' contention of unwarranted federal intervention lies in their claim that academic freedom is being violated by the implementation of affirmative action. Academic freedom, as traditionally understood, means that professors have the right to teach, to conduct research, and to publish without outside interference.[26] In recent years, however, the concept of academic freedom has been expanded to include the maintenance of "university autonomy" and "faculty self-rule" in the face of government regulations.[27] Yet, this expanded meaning of academic freedom translates largely into a direct attack on only one government regulation: affirmative action. No other type of government regulation or legislation that is applicable to higher education—pension rights and retirement benefits, health and safety regulations, equal pay legislation, age discrimination legislation, student aid and veterans benefits, and student rights legislation—has been or is subjected to the wrath of members of academia as is affirmative action.[28]

*** See chapter five for a detailed discussion of federal enforcement of the Executive Order.**

For example, compared to their outcries against affirmative action, the critics have been remarkably silent in their public response to the Family Educational Rights and Privacy Act of 1974 or, as it is more widely known, the Buckley Amendment.[29] As applied to higher education, this act prevents the granting of federal funds to any college and university which bars students from inspecting their personal records. The lack of protest by the critics manifests the hypocrisy of their argument of academic freedom. They condemn the federal government's compliance power in enforcing affirmative action but raise no objection to the barring of federal funds to institutions not complying with the Buckley Amendment. They loudly condemn, in the name of confidentiality, attempts by the federal government to ensure fair hiring practices yet offer little protest of "confidentiality" when students are given access to their respective files. They maintain that confidentiality is betrayed when a department has to explain how it arrived at the decision to offer employment to a candidate but make little mention of confidentiality when a student has the right to read a professor's recommendation.[30]

This same self-serving use of the terms *government regulation* and *academic freedom* also marks some of the critics' views of affirmative action vis-á-vis government regulations for the handicapped. They disapprove of federal regulation to aid the victims of racial discrimination, but they approve of federal intervention to aid the victims of physical and mental affliction. This callousness has recently been expressed in the comments of George Will, the nationally syndicated columnist. Will has called affirmative action regulations "the most serious violations of academic freedom in U.S. history."[31] On the other hand, he writes, the new HEW regulations for the handicapped are reflective of a "touch of justice."[32]

Affirmative action, like several of the aforementioned laws and regulations, is an example of intervention into the affairs of higher education. But such governmental intervention is not unwarranted. Note the comments of Alan Pifer, president of the Carnegie Corporation:

> . . . I regret that it has become necessary, because of intransigence, or at least a lack of perceptiveness, on the part of higher education, for government to take coercive action (through Executive Order affirmative action requirements). Measures such as these seem to me to constitute an invasion of campus autonomy and an abridgement of academic freedom. On the other hand, government has a basic obligation to protect the rights of its citizens—yes, even women—and without the threat of coercion it seems unlikely higher education would

have budged an inch on the issue. Certainly, it had every chance to do so and failed.[33]

It is obvious that institutions of higher education have not taken an active role in recruiting and hiring black faculty. Their lack of positive action more than justifies federal affirmative action policies.

Opposition to Affirmative Action: Goals and Quotas

Although Revised Order No. 4 outlined the procedure under which colleges and universities were to establish goals and timetables to overcome their underutilization of blacks, the critics were quick to equate these efforts with quotas.[34] The word *quota* evokes from many educators bitter memories of religious and ethnic exclusion from colleges and universities in days past. The labeling of goals as quotas today has served only to intensify the emotional level of the debate over affirmative action.

Such reactions were demonstrated in the results of a 1975 survey of faculty attitudes by Everett Carll Ladd, Jr. and Seymour Martin Lipset. Although there were significant differences in opinion on social issues (such as legalization of marijuana) among younger and older faculty members, no such differences existed in regard to "quotas." According to the Ladd-Lipset findings, when asked if "benign quotas" are justified, nearly two-thirds of the professors surveyed did not believe that they were.[35] One can easily argue that this question was biased and designed to bring about the response that it did. Instead of asking the faculty if affirmative action were justified, Ladd and Lipset used the more emotionally laden words "benign quotas."

Supporters of affirmative action have been all too aware of how the critics have freely interjected the word *quota* into the debates. According to J. Stanley Pottinger, the former head of HEW's OCR, the word *quota* has become "a galvanizing symbol, a bogey-man, a rallying cry."[36] Pottinger's sentiments have been echoed by other supporters of affirmative action who view the quota argument as either a "red herring" or as "a phony issue."[37]

Critics such as Roche, Bunzel, and Hook have continually maintained that there is no difference whatsoever between goals and timetables and quotas.[38] But goals and quotas are not the same. Spokespersons from government agencies have repeatedly stressed the differences. Quotas, Pottinger argues, are "rigid numerical ceilings" whose use implies a deliberate attempt to limit or to establish a maximum. On the other hand, goals are "non-rigid" and "flexible" objectives whose use implies a deliberate attempt to include those blacks, other minorities, and women who historically have been excluded from teaching positions, *whereas quotas are exclusive, goals are inclusive*[39] (emphasis added). Peter Holmes, Pottinger's successor at OCR, reaffirmed the distinction between goals and quotas. Goals, he wrote "are not rigid and inflexible quotas which must be met."[40]

As the debate over affirmative action has intensified, officials of the Carter administration have reiterated the distinctions. Attorney General Griffin Bell has stated:

> I oppose quotas and favor goals. And I'll tell you the difference. A goal is something you do to alleviate past discrimination and looks to the day when the merit system operates. A quota is a fixed position.[41]

Likewise, HEW Secretary Joseph A. Califano, Jr. has often stated the difference between goals and "rigid, arbitrary, long-term quotas."[42] More recently, the U.S. Commission on Civil Rights has reemphasized the distinction between the two. In endorsing numerically based remedies, the commission stated:

> Experience shows that they have not been treated as fixed quotas requiring the hiring of minorities and women regardless of qualifications and circumstances, but rather as tools to remove institutional obstacles to equal employment opportunity.[43]

Yet critics such as Hook and Sowell have called for the elimination of goals and timetables.[44] Their arguments overlook the fact that goals are a mechanism by which institutions can measure their rate of progress and to what extent they are providing equal opportunity. Any retreat from the obligation to establish goals would only maintain the status quo, that is, the predominance of white males. Without the setting of goals, in spite of the critics' arguments otherwise, colleges and universities would once again be totally free to resume their old hiring practices. Such is the argument of Vernon Jordan:

> To rely on administrators' good will and self-policing would ensure that no changes are made in the widespread discrimination that exists. Self-styled "color-blind" policies would leave the buddy system intact and continue to freeze minorities out of the job picture.[45]

The critics' constant equating of goals with quotas continues to hamper the full and successful implementation of affirmative action, and they continue to reject any distinction between goals and quotas. To a large extent, the critics' arguments have so poisoned the intellectual atmosphere that affirmative action is immediately likened to "quota hiring." Their continued misuse of the term *quota* has been and is a deliberate attempt to undermine affirmative action by skewing public opinion and the opinions of policy makers. Pottinger convincingly established this point.

> Unfortunately, it is my impression that some critics who argue that goals are quotas are really not arguing against quotas at all. They understand the distinction between the two, and they understand that one need not inevitably become the other. Their insistence on crying "quota" to every discussion on affirmative action and their refusal to accompany their arguments with any alternatives that would appear to guarantee affirmative action without goals, lead to the conclusion that their real target is affirmative action itself.[46]

Through juxtaposition and faulty analogy, the critics argue that goals are quotas. Their constant equating of goals with quotas leads one to believe that the quota argument is a deliberate attempt to weaken the entire affirmative action program at a time when it appears that the program was making progress in bringing blacks into academe.

The Alleged Assault on Merit

Critics of affirmative action allege that affirmative action and merit are antithetical. They claim that under affirmative action a certain proportion of available faculty positions *must* be allotted to minorities under a fixed ratio. Furthermore, they argue, because of the limited number of minorities possessing the doctorate degree, these positions will be going to unqualified or lesser qualified minorities.[47] Paul Seabury maintains that such acts are a clear violation of the merit principle which, in theory at least, "advances and rewards according to ability and accomplishment, rather than according to status, preferment, or chance."[48] The defenders of this principle insist that the most qualified individual should be selected for a faculty position without the intervention of such irrelevant criteria as race or sex.

Critics such as Hook and Bunzel have repeatedly expressed their opposition to the use of "scholastically extraneous factors," such as race and sex, as an "exclusive or predominant criterion for faculty hiring."[49] But neither race nor sex is to be an "exclusive or predominant criterion." Nowhere in the Revised Order are such criteria listed. Had the criteria of race, sex, religion, or national origin never entered the hiring process for faculty members in the first place, praise for and strict adherence to the merit principle would be agreed upon by all. Because race has played, and continues to play, an important role in the hiring process, the Bunzel and Hook arguments that race is "irrelevant" or "scholastically extraneous" must be rejected. Professor Robert Staples offers a convincing rebuttal to the Hook and Bunzel statements. He writes:

> It is particularly interesting to watch people who have been around for twenty years talk about race as if it were no factor in the election [sic] of personnel. One can only wonder what they said ten years ago, when blacks were systematically excluded from white colleges on the basis of their race. If race were such an irrelevant factor in hiring faculty, I often wondered why so many white candidates bothered to list their race on the vitae I reviewed while serving on personnel committees.[50]

The critics have continually called for a strict adherence to the merit principle, although it is quite obvious that such an ideal was neither consistently nor uniformly practiced. According to the Ladd-Lipset survey, 51 percent of the professors polled believe that universities have not behaved meritocratically.[51] Dr. Mary F. Berry, former chancellor of the University of Colorado and now HEW assistant secretary for education, points out that "at the very least, 20 percent of the mediocre white males now employed on university faculties *initially obtained and now retain their jobs solely because they did not have to compete with minorities and women, or even other men for them.*"[52] Even critics of affirmative action agree that the merit principle is not infallible. Agreeing in part with Dr. Berry, John Bunzel has admitted that some unqualified faculty members have been hired under the guise of the merit principle. Nevertheless, he argued that "failure to act always according to principles does not discredit the principle. Rather than abandoning it, we should concentrate our efforts on making it more consistently honored."[53]

In spite of his awareness of the abuses of the merit principle, Bunzel has called for the maintenance of the merit principle as it has always operated. But as Bernard Rosenberg and Irving Howe have written: "It is the people on top who are most inclined to find the principle of merit a social convenience, for they are persuaded, of course, that their dominance is a consequence of merit."[54] In more terse language, Vernon Jordan has stated: "The academic community appears to have elevated concepts of 'merit' and 'excellence' to the heights of mythology in its efforts to preserve the prerogatives of white males."[55]

These comments do not suggest that supporters of affirmative action are antimerit, as implied by Paul Seabury in "The Idea of Merit."[56] Rather, affirmative action and merit should be seen as copartners. Brewster C. Denny, professor at the Graduate School of Public Affairs, University of Washington, has argued that "merit, equal employment opportunity and affirmative action are all soldiers in the same cause—a just, whole, fair, productive and representative society."[57]

Yet the critics maintain that affirmative action programs violate the merit principle in favor of "reverse discrimination."[58] Although they offer no clear-cut definition of reverse discrimination, it is usually assumed to mean that "more qualified" white males are being, and will be, turned down for faculty positions so that "less qualified" or even "unqualified" minorities or females may be hired.

Critics such as Hook and Seabury allege that "reverse discrimination" permeates academia.[59] Moreover, they equate "reverse discrimination" against individual white males with the systemic discrimination against blacks. But white males, by no stretch of the imagination, are being excluded from college faculties as blacks and women have been for over one hundred years. As journalist Tom Wicker has indicated:

> White males once shut out women and minorities from faculties and student bodies in a deliberate, systematic, discriminatory manner. . . . That they must finally share the opportunity of access to those institutions, and compete fairly for that access, is not "racism in reverse" or "sexism in reverse" but simple justice, long overdue.[60]

What evidence of reverse discrimination do the critics offer? They make numerous references to recruiting letters that express a preference for either blacks or females.[61] Yet the critics, particularly Sidney Hook and George Roche, cite these letters as evidence, even after the issuance of the Holmes memorandum to college and university presidents in December 1974.[62] That memorandum, welcomed by the critics, stated in part:

> The affirmative action process must not operate to restrict consideration to minorities and women only. . . . Job requirements must be applied uniformly to all candidates without regard to race, color, sex, religion, or national origin.[63]

But Hook and Roche, in 1975, still denounced letters which HEW had already declared to be violations of Executive Order 11246. Several of the critics also refer to a letter, written at least as long ago as 1972, to a rejected white male candidate:

> I am sorry to report that although our department saw you as our top candidate we will not be able to make you an offer for our new position. Our university is an affirmative action employer and the department must attempt to fill the new position with an individual from a recognized oppressed minority group.[64]

The critics of affirmative action use these particular letters as a "bloody shirt," designed to inflame the anger of those already opposed to affirmative action. Others have labelled the letters for what they truly are, smoke screens. The particular department in question did not hire a woman or a minority for the vacancy. Instead, it hired a less-qualified white male candidate from the same graduate school attended by the white male chairman of the department.[65] Critics such as Hook have repeatedly stated that they have discovered more than one hundred instances of "racially determined preferential selection."[66] But have the critics relied solely on letters received by rejected candidates in these cases or have they sought to discover who was actually hired? One wonders how many of these other instances of supposed "reverse discrimination" are really instances of administrators and department chairmen playing games with affirmative action for the purpose of disguising the "old boy" system of hiring by personal influence or old school ties.

These letters deserve strong criticism. Not only do they contradict the spirit of the Executive Order 11246, Revised Order No. 4, and the Holmes memorandum, but they smack of both hypocrisy and deceit. It appears, and strongly so, that the letter writers were out to discredit both affirmative action and the persons hired. Moreover, it is astounding to see the new-found "honesty" on the part of college administrators, since college administrators never have been so candid in their comments to rejected black applicants.

Although an ardent critic, Thomas Sowell has not joined the swelling chorus of those who cry reverse discrimination. Sowell has argued that the scarcity of jobs in academia "means that many aspiring academics would necessarily have had their career hopes disappointed, regardless of affirmative action."[67] Furthermore, he has written:

> Now, when a hundred white male applicants are rejected, they can all blame it on one or two minority or female academics who were hired—even though 90 percent of the white males could not have been hired anyway, and there are

> probably 10 or 20 other white males hired for the one or two affirmative action professors. But administrators can, of course, *tell* rejected applicants that they lost out because of affirmative action, whether it is true or not, because that may be easier than telling them the real reason.[68]

Sowell's argument against reverse discrimination has been partially repeated by a white, male letter writer to the *Chronicle of Higher Education.* Like Sowell, he contends that colleges and universities use affirmative action as a scapegoat. He also writes that, "until I see much more evidence that black people are getting such a great shake at the hands of the mostly white male education establishment, I think this kind of racism must be fought against."[69]

The other critics, most notably Hook and Roche, freely cite the arguments of Sowell, but it is most interesting that not one of them cites his argument against reverse discrimination. Moreover, the Sowell argument effectively refutes the Hook and Seabury contention about the pervasiveness of reverse discrimination. It is difficult to comprehend how reverse discrimination against white males could permeate academia when the vast majority of those being hired are white males.

The critics contend that "lesser qualified" or even "unqualified" minorities have been and are being hired.[70] These are highly subjective statements for, as the comments expressed by several respondents from Oberlin College and Florida State University indicate,* in the absence of objective criteria it is difficult to determine who is "qualified" or who is "better qualified." Nor do the critics reveal how blacks are "unqualified." Is their graduate training suspect? Studies indicate that most black Ph.D.'s received their academic training from the most prestigious graduate schools.[71] Such a fact has led William Moore, Jr., and Lonnie H. Wagstaff to suggest that the critics of affirmative action are calling the graduates of their own respective institutions unqualified.[72] Rather than indicting "unqualified" blacks, the critics should be criticized for the unsubstantiated claims they are leveling against graduates of their respective institutions.

While the critics assail affirmative action as a violation of the merit principle, they make no mention of what is to be done in the case of several qualified candidates, one of whom may be black. In a situation where all factors are equal, that is, when the degree obtained and publications are comparable, preference should be given to the black candidate. The results of the Moore-Wagstaff survey support this position.

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* *See* case studies in chapter six.

When polled, black educators on predominantly white campuses stated that preference be given only when blacks and whites are "equally qualified."[73]

The Alleged Effects of Affirmative Action on Minorities and on Institutions

Several of the critics of affirmative action argue that not only has affirmative action infringed upon the rights of universities and led to "quota hiring" and "reverse discrimination," but that it benefits neither blacks nor colleges and universities. Thomas Sowell, Nathan Glazer, and Sidney Hook have been, and continue to be, in the forefront of those who maintain these views. Thomas Sowell, in particular, has achieved much of his notoriety as a critic by insisting that affirmative action actually reduces the chances of blacks achieving true equality in academia.[74] Sowell has argued that there is very little evidence that affirmative action benefits blacks in general because the proportion of the labor force that has benefited from affirmative action is very small.[75]

But affirmative action is not limited solely to the higher education universe. As the numerous court cases cited in chapter three indicate, affirmative action, if enforced, brings benefits to black workers in many sectors of the economy. The comments of journalist and commentator Carl Rowan and Stanford law professor William B. Gould support this finding. According to Rowan:

> The little progress that has occurred where black jobs are concerned has resulted from bosses spelling out guidelines and goals. Where such goals do not exist, personnel people regard talk of *fair hiring* as just lip service to be ignored.[76]

Echoing Rowan's comments, Gould contends that "results have been far more effective with goals and timetables, even in economic scarcity, than in boom conditions without goals and timetables."[77] While Sowell, Rowan, and Gould would probably agree that the current unemployment statistics for blacks reveal that affirmative action has not been the economic godsend to end black joblessness, Rowan and Gould do view affirmative action as a positive step in that direction.

Nathan Glazer advances an argument similar to Sowell's. Like Sowell, he contends that affirmative action was adopted after "the remarkably rapid improvement" in blacks' economic position during the 1960s. Further, Glazer contends, affirmative action does not benefit all blacks, but only the skilled.[78] But affirmative action was not implemented as a cure for black unemployment. Affirmative action was not designed to create jobs; it was designed to erase the racial barriers that have historically existed to hinder equal employment opportunity in business and industry and in colleges and universities. The regulations do provide that affirmative action programs apply to all levels of a contractor's work force. More importantly, the regulations clearly state that special employment programs for minority youth, such as after-school, work-study, and summer jobs should be set up.[79] In addition, "motivation, training and employment programs" are to be set up for the hard-core unemployed.[80] Thus, the regulations require contractors to provide training and jobs to those, particularly minority teenagers, who comprise a good part of the unemployed. Instead of venting their wrath at a so-called shortcoming of affirmative action, Glazer and Sowell should direct their concern towards the achievement of a full-employment economy.

While Glazer criticizes the concept and implementation of affirmative action in general, Sowell particularly lashes out against the implementation of affirmative action in higher education. In what is perhaps on the surface the most damaging argument against affirmative action, Sowell maintains that affirmative action "amounts to a moratorium on recognition of *achievements* by such groups [minorities and women], or their achievements tend to be subsumed under the notion of conferred benefits." This, he maintains, helps to perpetuate racism rather than to eliminate it.[81] Finally, he asserts, "what all the arguments and campaigns for quotas are really saying, loud and clear, is that black people don't have it, and they will have to be given something in order to have something."[82]

In viewing the Sowell argument, one should ask to whom is it addressed—black academicians or white academicians. His argument only serves to reinforce the preexisting attitudes of many in higher education. This is evident by the number of critics of affirmative action who parrot this particular argument of Sowell's.[83] Moreover, it is reflected in the attitudes of faculty. During the mid-1960s, as even Sowell notes, the appointments of black faculty members were sometimes viewed suspiciously by whites as "tokenism."[84] Less than a decade later, the appointments of blacks are often viewed with the same, if not increased suspicion.[85] One strongly suspects that it is not the procedure by which blacks are appointed, but the actual appointing of blacks that so unnerves many of those in academia.

Response to Critics of Affirmative Action

If, as Sowell suggests, affirmative action is so damaging to blacks, then why have so few blacks been among its critics? This does not imply that blacks are not averse to criticizing the ideas of other blacks. For example, several blacks in academia, most notably W. Arthur Lewis of Princeton and Martin Kilson of Harvard, have been among the staunchest critics of black studies programs.[86] However, aside from Sowell and his disciple, Walter Williams, blacks in academia have not publicly criticized affirmative action. Perhaps, to paraphrase Robert M. O'Neil, support for affirmative action among black scholars comes from many who see the need for the program and who do not feel "stigmatized" by its existence.[87]

Aside from his contention that affirmative action is damaging to blacks, Sowell contends that affirmative action has brought about very little change in academia. In reality, affirmative action has forced institutions of higher eduction to seriously consider blacks for employment, often for the first time. To support his argument, Sowell cites data from the American Council on Education (ACE) which found that blacks made up 2.2 percent of college teachers in 1968–69 and 2.9 percent of college teachers in 1972–73.[88] These findings, he maintains, are "hardly revolutionary changes."[89] What Sowell has done is to compare data from 1968–69, before the implementation of affirmative action in institutions of higher education, with that from 1972–73, *the first full academic year that affimative action regulations had been in effect.* Moreover, Sowell only presents the percentage figures and does not explain what they mean. While the change in percentages over the four-year period was small, Alan E. Bayer, the conductor of the studies, concluded that those universities most dependent upon federal contracts did slightly increase their hiring of blacks.[90] Economist Richard B. Freeman has reviewed the same ACE data as Sowell, yet he reaches a different conclusion. Freeman contends that the increases were "large percentage gains for a four-year span but ones which still left a sizable gap between academic employment" of blacks and whites.[91] The more optimistic assessments of Bayer and Freeman have been substantiated by a 1975 report by the Carnegie Council. Although the report did not provide a comprehensive study of the hiring of minorities, it concluded that the percentage of minorities hired during the academic year 1973–74 "tended to be significantly higher than among total faculty members."[92]

The recently released EEO-6 data collected by EEOC provide a more detailed test of the success of implementation of affirmative action than does the Sowell analysis. Based on figures collected during the academic year 1975–76 from the overwhelming majority of the nation's colleges and universities, blacks composed 4.4 percent of the faculty members.[93] While this percentage remains low in terms of proportionality, it does show a 52 percent increase in the total number of black faculty members in a three-year period. Thus, affirmative action can produce results when colleges and universities make attempts to comply with affirmative action regulations.

In addition to their claim that affirmative action programs do not benefit blacks, the critics contend that affirmative action does not benefit colleges and universities. Among the critics, George Roche is the only one to state that affirmative action is destroying the black college and university. But Roche offers no statements from black scholars and administrators or any other evidence to support his contention that "black schools are losing their most qualified faculty members to those large, prosperous, predominantly white institutions that can afford to pay substantially higher salaries."[94] The Mommsen dissertation, which was designed to measure effects of the "brain drain," reported that the loss of black scholars to white institutions was small in relation to the number of black Ph.D.'s who stay on black campuses.[95] Moreover, several black college and university presidents such as Dr. James Cheek, president of Howard University, Dr. Andrew Billingsley, president of Morgan State University, Dr. Walter J. Leonard, the newly appointed president of Fisk University, and Dr. Hugh Gloster, president of Morehouse College, are on record in support of affirmative action.[96]

The critics also contend that affirmative action has no positive benefits in terms of costs and results for the predominantly white colleges and universities. Several maintain that affirmative action is "too costly" to implement, particularly in an era of retrenchment.[97] They make repeated mention of the fact that the University of Michigan spent $350,000 in developing its affirmative action plan.[98] Yet no similar criticism is raised over the costs involved in the implementing of other government regulations. Ohio State University, for example, has to spend $250,000 a year to comply with the Buckley Amendment; the University of Illinois may have to spend $557,000 to correct a violation of the Occupational Safety and Health Act.[99] And it is estimated that George Washington University may have to spend more than $5.2 million, and the University of Minnesota $7.2 million, to make the necessary physical changes in compliance with the new regulations for the handicapped.[100] Judging from their silence in most other instances, it is not the cost of complying with all federal regulations that so angers the critics, but only the costs of complying with affirmative action.

Moreover, the costs of implementing affirmative action should not be evaluated in a vacuum. A recent ACE study on the costs of implementing federal programs at six institutions indicates that compliance with the regulations cost these institutions beween $9 and $10 million. The equal employment opportunity laws, the affirmative action regulations, and the age discrimination laws combined cost these institutions roughly $1.7 million. That figure looms less and less imposing when one realizes that the same six institutions paid $5 million in increases in social security taxes.[101]

Affirmative action does require that colleges and universities spend money to develop and implement plans. Contrary to the critics' point of view, the costs involved in implementing and developing affirmative action plans and programs are justified in that they broaden the recruiting network.

The critics also contend that affirmative action has no positive educational benefits for the predominantly white colleges and universities. The very presence of minorities brings a much needed racial and ethnic diversity to academia. There minorities can and do serve as effective role models for both black and white students. Nor will the increased presence of minorities on college and university faculties lead, as Hook has implied, to the lowering of standards for both scholarship and teaching.[102] Affirmative action, rather than lowering standards of scholarship will instead broaden them.

Minority scholars bring both expertise, often not readily available, and different perspectives to predominantly white institutions. Many minority scholars are interested in minority problems and solutions. Their work in such diverse fields as history, sociology, anthropology, economics, political science, psychology, foreign languages, literature, art, music, and urban planning reflect both their interest and concern. Their training enables institutions of higher education to offer a broader range of courses to deal with societal problems. Besides expanding academe's search for knowledge, affirmative action poses no threat to classroom teaching since teaching is generally regarded as one of the strengths of black educators.[103]

Affirmative action is not to be seen as the death knell for either black or white institutions. Instead, affirmative action, as it is envisioned here, encompasses the recruiting, training, and hiring of more black graduate students. Such a process helps to ensure that a large pool of qualified candidates exists from which both black and white institutions may choose.*

Alternatives to Affirmative Action: The Ideas of the Critics

The six critics included within this report have been most critical of either the concept or the implementation of affirmative action programs. Several of them freely condemn affirmative action but offer no suggestions on how to increase the numbers of blacks on college and university faculties. Paul Seabury has frankly admitted that he is "genuinely baffled" when faced with the question of how to achieve "social equity" on college and university faculties.[104] George Roche is not at all baffled. Citing the example of Jews, Roche claims that racial discrimination can be overcome through "ability and effort."[105] One cannot object to the Roche statement. Clearly, blacks who receive the Ph.D. have exhibited both "ability and effort." However, affirmative action ensures that the hiring process is made more fair.

Thomas Sowell offers no real substantive plan on how to increase black faculty members. Sowell does propose that a better matching of institutions and black faculty could come about by the "vigorous enforcement of nondiscriminatory hiring policies." "*Over a period of time*," (emphasis added) he contends, such policies would lead to the presence of black scholars on campuses where they will be respected.[106] What Sowell has suggested is a gradualistic approach, but black scholars are no longer inclined to wait for higher education to reform itself through "good faith" efforts.

Both Sidney Hook and John Bunzel call for increases in the number of minority graduate students. In vague generalities, Hook has called for the implementing of "all effective measures—financial, psychological, social and pedagogical, that increase the number of minority graduate students."[107] More recently, he has called for improvement in elementary and secondary education, the establishment of remedial educational programs, and "open enrollment and universal access to postsecondary education" so long as standards are maintained.[108] The Hook suggestions provide long-range goals, but in the meantime remedial steps such as affirmative action are needed to deal with present discriminatory treatment. One also questions whether Hook's statements are only idle lip service to equal opportunity. Hook has yet to make these statements in a situation in which he is not denouncing affirmative action.

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* *See* chapter two.

Unlike Hook, John Bunzel has proposed a seemingly sensible plan to increase minority and female candidates on college faculties. In language similar to that of the Revised Order, Bunzel has written:

> A serious search must be made for qualified women and minorities when faculty appointments are being made. At the departmental level, where academic recruitment is initiated, procedures should be established to include a current and realistic estimate of the pool of qualified individuals from which candidates will be drawn. Carefully balancing professional interests and priorities as it sets its own programmatic needs, the department must constantly strive to attract the best faculty possible. To this end it should demonstrate that it has reached out in its search for women and minorities.[109]

To increase the number of minority graduate students, Bunzel has called for increased support, financial and other, from federal and state governments, foundations, and business and industry. To expand the ranks of the qualified, Bunzel calls for programs to publicize and to promote graduate students.[110] Bunzel's concrete proposals in essence do not differ in the main from those suggested by Stephen J. Wright, a former vice-president of the College Entrance Examination Board. Earlier in 1972, Wright had proposed that more fellowship programs be set up to aid minority graduate and professional students.[111] If either of these programs had been implemented in 1972 or earlier, then much of the resulting furor over the lack of qualified minorities might have been avoided.

Ever since the application of affirmative action to higher education, the arguments of its critics have dominated most discussions of the concept and implementation of the program. This chapter has demonstrated how the critics' misreading and misinterpretation of Executive Order 11246 and Revised Order No. 4 have lead to unfair and distorted depictions of the program. With their repeated outcries of "violation of academic freedom," "quotas," and "reverse discrimination," the critics have stigmatized all efforts to achieve equal employment opportunity in institutions of higher education. But their charges and labels are largely straw issues, unsupported by solid evidence and designed solely to increase the opposition to affirmative action. They have engaged primarily in distortion, juxtaposition, and inference in presenting their arguments.

Nor have the critics offered much constructive criticism. While all are conscious of past discrimination against blacks, they remain unmindful of its recurring effects. Although the critics pay homage to the goal of equal employment opportunity, they present no viable and immediate alternatives to affirmative action.

The Reverse Discrimination Controversy

A MORAL AND LEGAL ANALYSIS

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Discrimination and the Constitution

INTRODUCTION

Does the Constitution permit preferential hiring? Does it prohibit all discrimination on the basis of race? Does it guarantee equality of opportunity? Does it provide a right to equal consideration in employment (RTEC)?[1]

The Fourteenth Amendment to the Constitution guarantees to each person "the equal protection of the laws."[2] This Amendment, which is the only place in the Constitution where equality is spoken of, has been used by the Supreme Court, beginning with the watershed decision in *Brown* v. *Board of Education* in 1954, to attack the whole structure of racial distinctions and preferences that permeated American law and social practices. As far back as the 19th century, however, Justice Harlan had urged the view that the Amendment forbade racial distinctions of the sort not struck down until the 1950s and 1960s. In his famous dissent in *Plessy* v. *Ferguson* in 1896, he had said: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."[3]

The Reverse Discrimination Controversy

If the Constitution is color-blind and the Fourteenth Amendment does not tolerate racial distinctions, what then of court orders and consent decrees and federal regulations which require or permit racially preferential hiring? In handing down their orders and in defending their decrees, the lower courts have seen the need to make at least some passing attempt to square their decisions with the Constitution, but their efforts have been half-hearted and have not been notably successful in clarifying the principle of equal protection. One court in 1967 tried to set matters straight this way:

> The Constitution is both color-blind and color-conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes a harm, or imposes a burden must not be based on race. In that sense the Constitution is color-blind. But the Constitution is color-conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. The criterion is the relevancy of color to a legitimate governmental purpose.[4]

This leaves something to be desired as a clarification.

Although the Supreme Court has decided a great many cases dealing with race, it has never decided a constitutional challenge to the practice of preferring blacks in hiring. Thus, the lower courts have had to undertake the defense of racial quotas without benefit of a direct authoritative precedent. By and large, the individual courts devote little effort to the constitutional question; they are content to rely upon a small number of appellate decisions which are invariably cited as proof of the constitutionality of their orders. These influential decisions, however, are themselves unpersuasive and badly argued.[5] The need for the Supreme Court to directly address the constitutionality of preferential hiring is pressing. In the meanwhile, we must try to draw constitutional inferences from the Court's other equal protection decisions.

THE SUPREME COURT AND THE FOURTEENTH AMENDMENT

What does "the equal protection of the laws" command? It cannot command that the laws treat all (literally) equally. Such a command would subvert the very process of legislation. "The legislature, if it is to act at all, must impose special burdens upon or grant special benefits to special groups or classes of individuals."[6] To interpret "equal protection" so that it would, for example, prohibit legislating tax relief for the elderly would be absurd. Thus, however we are to understand it, constitutional equality must be compatible with laws which impose differential obligations and confer differential rights.

Perhaps, then, equal protection commands not that all be treated equally but that all who are equal be treated equally. This might be taken two ways. We might take it to mean that government should treat similarly all the members of a class defined by legislation. However, since the legislature can define statutory classes as narrowly or broadly as it pleases, this way of understanding equal protection emasculates it as a standard for evaluating the validity of legislation. Thus, it is better to take the command to treat equally all who are equal to mean that the government should treat similarly those who are similarly situated with respect to legislative goals.[7] With some qualifications, this is, indeed, essentially the standard used by the Supreme Court. It applies a "rational basis test" to most legislation, asking if a legitimate state purpose is served by the statute under review and if the classification embodied in the statute is reasonably related to that purpose.[8] The classification, however, need not perfectly include all of those similarly situated with respect to the purposes of the statute nor perfectly exclude all those dissimilarly situated.[9] Moreover, it is a well-established rule that Congress may attack one part of a problem without attacking all parts.[10]

When the Court applies the rational basis test, it seldom invalidates the legislation it is reviewing. It will sustain all but the most capricious and patently arbitrary classifications; "a discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[11] "[W]e will not overturn . . . a statute," the Court has written, "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational."[12] It is quite evident that if the equal protection clause of the Fourteenth Amendment demanded no more than that legislatures make classifications that are reasonably related to their purposes, the standard of equal protection would place only the weakest of checks on governmental discrimination.

The equal protection clause has been used by the Court, however, to strike down countless state and federal laws which discriminated against blacks. It is clear that on some occasions the Court requires more of a legislated discrimination than that it serve more or less effectively some conceivable public purpose. If certain "triggering" factors are present in a challenged legislative classification, the Court will impose "strict scrutiny."[13] The triggering factors are of two sorts. First, the legislation under challenge may touch upon a "fundamental interest" or "fundamental right."[14] Second, the legislation may employ a "suspect classification."[15] If either triggering factor is present, the Court will require the legislation to meet a more stringent standard of justification than usual.

Consider, first, the approach to that legislation which bears unequally upon our fundamental interests. Many of our basic interests as persons and citizens are explicitly recognized and protected in the Bill of Rights—our interests in unrestricted speech, choice of religious worship, freedom from arbitrary search and seizure, and so on. However, the Supreme Court has also found in the Constitution other "fundamental interests," or rights, deserving protection against state interference. For example, the Court has discerned a right to privacy although neither that word nor a synonym is mentioned in the Constitution.[16]

The Court has struck down several statutes in Fourteenth Amendment cases because they unequally affected other fundamental interests that it has found in the Constitution. Found to be fundamental are interests in voting *(Reynolds* v. *Sims, Harper* v. *Virginia Board of Elections),* interstate travel *(Shapiro* v. *Thompson, United States* v. *Guest*), access to criminal appeal procedures *(Griffin* v. *Illinois, Bounds* v. *Smith),* procreation and family companionship *(Skinner* v. *Oklahoma ex. rel. Williamson, Weinberger* v. *Wiesenfeld).*

When a discriminatory policy touches upon a recognized fundamental interest, it cannot be justified unless the state can demonstrate that the policy is indispensable to the promotion of a "compelling state interest."[17] When the Court imposes this standard of justification, challenged legislation is not likely to survive.[18]

Why have interests in travel, voting, procreation, and so on, been identified by the Court as deserving special protection against legislated inequality? It is hard to find a rationale in the Court's decisions. Many have criticized the Court's willingness to raise certain interests to the status of constitutional rights for no other apparent reason than that it deemed them very important. In a 1969 dissent, Justice Harlan argued that "when a statute affects only matters *not* mentioned in the Federal Constitution and is not arbitrary or irrational . . . I know of nothing which entitles this Court to pick out particular activities, characterizing them as 'fundamental', and give them added protection under an unusually stringent equal protection test" *(Shapiro* v. *Thompson* at 662). In a 1973 decision the Court appeared to take this criticism seriously. Writing for the majority in *San Antonio* v. *Rodriguez,* Justice Powell declared: "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws" *(San Antonio* at 33). He denied that "importance" of an interest was a criterion of fundamentality and that the Court had ever "made up" rights not already found in the Constitution. Although Powell's avowals may have signaled a drawing back of the Court from the development of the fundamental interest approach to equal protection, they left unclear how the recognized fundamental rights are to be accounted for.

In any case, what is important for our immediate purposes is that the Court has never recognized any fundamental rights to employment or employment opportunities. There is no constitutionally protected right like RTEC. The Court has been quite willing to uphold legislation which established employment favoritism or preference. For example, in *Kotch* v. *Pilot Commissioners,* it held that a Louisiana law which allowed state-appointed river pilots to "select their relatives and friends as the only ones ultimately eligible for appointment as pilots" did not violate the Fourteenth Amendment. The Louisiana practice, held the Court, "is not without relation to the objective of securing . . . the safest and most efficiently operated pilotage system practicable" (*Kotch* at 553). The Court reasoned that

> the advantages of early experience under friendly supervision in the locality of the pilot's training, the benefits to morale and *esprit de corps* which family and neighborly tradition might contribute, the close association in which pilots must work and live in their pilot communities and on water, and the discipline and regulation which is imposed to assure the State competent pilot service after appointment, might have prompted the legislature to permit Louisiana pilot officers to select those with whom they would serve. (*Kotch* at 563.)

The Court offered this as a conceivable set of facts that connected the practice to legitimate aims of safety and efficiency. That this was sufficient to justify the practice indicates that the Court applied the very weakest test to the challenged statute, not the kind of stringent standard called for when a statute touches upon a fundamental interest.

That employment interests have never been accorded the status of constitutionally fundamental is quite evident from the long history of legal acceptance of veteran's preference in public employment. Giving preferences to veterans has been a feature of public employment for most of this century, and it has been subject to many legal challenges. These challenges have typically invoked the equal protection clause. In a recent case, the plaintiff urged that a provision of the Pennsylvania Veteran's Preference Act which granted a ten-point bonus to the score of any veteran passing the state civil service examination violated the Fourteenth Amendment rights of nonveterans, in particular the "right to be fairly considered in public employment" (*Feinerman* v. *Jones* at 257). The court conceded that the practice of preferring veterans denied the plaintiff "the opportunity to be considered equally with veterans," but denied "that the abstract right to be fairly considered for public employment is a fundamental right for the purposes of equal protection analysis."[19] The right to fair or equal consideration in employment was not among the fundamental rights discoverable in the Constitution.[20]

Now, if as a matter of constitutional law the government need not be fair or equal in its own hiring practices (subject to qualifications about suspect classifications to be discussed shortly), then it will surely be difficult to infer from the Constitution any general right of an applicant to be given a job if he is demonstrably the best qualified for it. Nothing like RTEC has constitutional recognition under the regnant doctrine of equal protection. Employment practices which may seem unfair to those excluded from effective competition may serve social goals. This should be enough to defend those policies under the rational basis test. Government policies which result in employment preferences for some will not trigger strict scrutiny by the Supreme Court—not unless the policies touch upon some other interest which the Court has designated as fundamental or unless they use *suspect classifications*.

SUSPECT CLASSIFICATION APPROACH

Generally, the Supreme Court will ask of a legislative classification whether it is reasonably related to a state purpose. Some classifications, however, have been identified as inherently questionable, as "suspect." When legislation employs a "suspect classification," the state must carry a "heavy burden of justification";[21] such a classification must serve a "substantial regulatory interest,"[22] "an appreciable public interest,"[23] or "some overriding statutory purpose."[24] Although suspect classifications must stand against a heightened judicial scrutiny, the Court has never made precise the more stringent standard to be used, adopting different phraseology in different decisions. In *San Antonio* v. *Rodriguez* (1973), the Court appeared to assimilate the test for suspect classifications to the test for legislation touching upon fundamental interests: the classification must be necessary to serve some compelling state interest (*San Antonio* at 17–18).

The primary suspect classification is race *(McLaughlin* v. *Florida, Loving* v. *Virginia).* Other classifications that are suspect, or virtually so, are those based on national origin *(Hernandez* v. *Texas, Korematsu* v. *United States),* alienage *(In re Griffiths, Sugarman* v. *Dougall, Graham* v. *Richardson),* illegitimacy *(Levy* v. *Louisiana, Glona* v. *American Guar. & Liab. Co.).* Sex has not yet been firmly established as a suspect classification; Supreme Court decisions are undecided on this. Nevertheless, classifications based on gender are subject to heightened scrutiny and must meet more than the rational basis test.[25]

The Supreme Court, then, will approach constitutional questions raised by preferential treatment of blacks in employment by way of its suspect classifications doctrine rather than by way of its fundamental interests doctrine. If Title VII or E.O. 11246 actually permit or require the use of racial preferences, how might we expect the Court to respond to a constitutional challenge?

RACE AND THE CONSTITUTION

The state's use of a racial classification will be viewed with special severity by the Court. Critics of reverse discrimination would urge the Court to prohibit any use of race by the state. They are fond of quoting Justice Harlan's famous remark in *Plessy* v. *Ferguson* that the Constitution is color-blind. They take this to mean that the equal protection clause categorically forbids the use of race. Any use of racial quotas is unconstitutional.

Although this view is popular, it does not square with the Supreme Court's own decisions. It has never said that the use of race is by itself always unconstitutional. On several occasions it has permitted the explicit use of race (although none of these uses touched on employment). In *Swann* v. *Charlotte-Mecklenburg Board of Education,* the Court upheld a plan whereby children were assigned to schools within the school district on the basis of race. The aim of the plan was to bring about a racial balance in the schools of a previously segregated system. Similar plans involving racial assignments and busing have been sustained by the Court.[26]

A more recent case was *United Jewish Organization of Williamsburgh, Inc.* v. *Carey*. In order to achieve full compliance with the Voting Rights Act of 1965, the New York State legislature redrew legislative districts in Kings County to enhance black voting strength in the districts. The Supreme Court sustained the New York plan, agreeing that the state's purposeful use of race to comply with the Voting Rights Act did not violate the Fourteenth Amendment (*United Jewish* at 1009–1010).

Finally, in the recent, much-publicized decision in *Regents of University of California* v. *Bakke,* the Court, although invalidating the specific racially preferential admissions procedure used by the Medical School at Davis, appeared to approve of some uses of race in admitting candidates into professional schools. In three different ways, then, the Court has permitted race to be used as a factor in government action: in assigning children to public schools, in fixing the boundaries of voting districts, and in selecting applicants for admission to institutions of higher education.

If the Constitution permits some use of race, what is the principle that distinguishes permissible from impermissible uses? How are we to fit different cases into the Court's analytic framework? In looking at the Court's decisions, we find uncertainty here. The standard against which racial classifications are to be judged remains vague.

In *Bakke,* Justice Powell declared that when political policies "touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear is precisely tailored to serve a compelling governmental interest" (2753). Now, this is the standard that, when deployed in fundamental interest cases, invariably proves "insurmountable" (in the words of Chief Justice Burger). If the standard is one of such extreme stringency, then our expectation would be that when it is applied to racial classifications the use of such classifications will never surmount the standard either, except in extreme or emergency situations.[27]

However, it would be a mistake to stand on that expectation. The standard is too vague for us to conclude that the state interests to be served must be *literally* compelling. In the *Bakke* case, for example, Justice Powell held that "the interest of [student body] diversity is compelling in the context of a university's admissions program" (2761). He held against the preferential admissions scheme at Davis not because he judged the school's use of race to serve no compelling interest but because, in his view, its use of racial preferences was unnecessary (2761-2764).

Other goals the university might have had, such as producing more minority doctors or increasing the number of doctors who practice in minority communities, were found by Powell not to be "compelling" (2757-2761).[28] It would seem, on the face of it, that these goals are intrinsically more valuable than the goal of an "ethnically diverse student body." What raised this relatively modest interest (among a university's many interests) to a higher significance was the fact that it attached to the university's interest in shaping the quality of its educational offering, this latter being an interest protected by the First Amendment. Even under such an umbrella, however, it is difficult to understand what is "compelling" about the interest in student diversity.

It is a mistake to look for literalness in the Court's expressions of its standard for judging suspect classifications. For example, in *Bakke* Justice Powell first expressed his standard of review as requiring that a racial policy be "precisely tailored to serve a compelling governmental interest," then re-expressed the same standard as requiring that such a policy be "necessary to promote a substantial state interest" (2764). The phrases that occur in the Court's many decisions—"compelling state interest," "substantial state interest," "appreciable public interest," "overriding legislative purpose," and so on—must not be viewed as descriptions of a test but as alternative designators for a test whose character remains largely opaque. We can say that a state interest has to be non-trivial in order to justify a racial classification, but the exact threshold of seriousness is left mysterious.

The vagueness of the standard for reviewing racial classifications is due partly to the particular history of its development. From 1954, when the Court began to use the Fourteenth Amendment extensively in attacking racial segregation, until 1971, every racial classification that came before the court was found unconstitutional. In dealing with a vast array of segregation legislation, the Court felt no need, one surmises, to be precise about its standard of review because it could not conceive of any discrimination against blacks which might pass the test. It is only in the past half-dozen years that the Court has begun to encounter uses of race to benefit blacks rather than harm them, and it has not succeeded in making clear the principles underlying its responses to these cases. *Swann* and *United Jewish Organization* turned primarily on the need for public agencies to bring themselves into compliance with the law. Only the *Bakke* decision attempts to spell out the nature of the general standard to be applied to racial policies which benefit blacks, and it does not succeed in clarifying the matter.

The vagueness of the standard of review used in *Bakke* (and in other cases) is troubling. It calls forth a question: in what circumstances would legislation which favored whites over blacks pass constitutional muster? Could there be circumstances in which a college could exclude blacks in order to attain diversity? If the race of a black can be considered a positive factor in some decisions, can it not be a negative factor in others? If the standard of review is terribly vague, how can the Court know it is applying the standard consistently?

These problems in describing the standard of review in cases like *Bakke* are generated by the fact that racial classifications apparently require "strict scrutiny" and thus must be tested more stringently than ordinary legislation. But why must all racial classifications be subject to strict scrutiny? Why may not racial classifications which benefit blacks be viewed with less hostility than those which harm them?

This is what the University of California tried to persuade the Court to believe in *Bakke.* It urged that strict scrutiny should be reserved for legislative classifications and state policies that disadvantage minorities (2747). When the use of race disadvantages only some members of a majority, the Court should apply the same test it applies in most cases: the rational basis test. Not all uses of race should be viewed as "suspect."

This position would make it easy constitutionally to justify some forms of reverse discrimination. But it faces one obvious objection: it seems to make the equal protection clause express a double-standard. How can it be plausible to interpret a principle of equality in this paradoxical way?

Special Protection. One way might be to argue that the Fourteenth Amendment must be interpreted in light of its original purpose, which was to accord special protection to the rights and liberties of the newly freed blacks. In the *Slaughter-House Cases* of 1873, five years after the Fourteenth Amendment was adopted, Justice Miller wrote that

> in light of . . . events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of these amendments, no one can fail to be impressed with the one pervading purpose . . .; we mean the freedom of the slave race, the security and the firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppression of those who had formerly exercised unlimited dominion over him.

Miller went on to predict: "We doubt very much whether any action of a state not directed by way of discrimination against negroes as a class, or on account of their race, will ever be held to come within the purview of this provision" (referring to the enforcement clause of the Fourteenth Amendment).[29]

Some modern commentators have similarly urged that the interpretation of the equal protection clause be governed by the intent and purposes of the framers of the Amendment. One, for example, indicates that the "dominant purpose of the framers was to achieve for blacks and other minority groups . . . freedom from their racial underclass status by obtaining their equality with whites," and argues from this that the Amendment "must be construed in light of the social ends which the framers sought to achieve."[30] To so construe the Amendment would, presumably, allow us to treat racial preferences asymmetrically. Whereas white-favoring policies would be subject to strict scrutiny, black-favoring policies would not, since the latter could often serve the "social ends which the framers sought to achieve."

Does this line of argument overcome the paradox inherent in interpreting equal protection as permitting a racial double-standard? There is no question that the Fourteenth Amendment was framed in light of the special problems facing the newly emancipated blacks and that it was aimed at protecting their rights. This does not require, however, that we view the Fourteenth Amendment as limited in its purpose to protecting the rights of blacks (Justice Miller's view), nor that we read the Amendment as expressing a double-standard, nor that we restrict its interpretation to the intentions of the framers.

In light of the history of Supreme Court decisions under the Fourteenth Amendment, such views are not plausible. Justice Miller's prediction has not been borne out. The Fourteenth Amendment has been applied to issues and classifications having nothing to do with race. For example, the Supreme Court has applied the equal protection clause to the rights of women,[31] to legislative apportionment,[32] and to the rights of criminal defendants.[33] Achieving equality for women was not among the "social aims" of the framers, nor was interference with the manner in which states drew their electoral districts or organized their criminal procedures.

Moreover, it is even dubious that the racial equality envisioned by the framers was the same as the racial equality today protected by the Court. Indeed, when in 1953 the Supreme Court asked the parties to *Brown* v. *Board of Education* to submit briefs on the history of the debate on the adoption of the Fourteenth Amendment, the NAACP found that there was little evidence of a uniform understanding at the time of adoption that the Amendment would imply the integration of schools. In fact, there was evidence that many of the framers believed that the Amendment would not require black and white children to attend school together.[34] Given the prevailing social beliefs in the 1860s, there is no reason to believe that those who wrote, debated, and adopted the Fourteenth Amendment shared the same view of racial equality as that possessed by modern Americans.

The Supreme Court is justified in not hewing slavishly to the framers' intent because whatever their specific and multiple purposes, the framers cast the Amendment in perfectly general language. [35] Unless we judge that they did not understand what they were doing, we must assume that their choice of broad, sweeping language was deliberate and that they were willing for future generations to construe that language on its own terms.[36] An interpretation of equal protection must stand on its own, deriving its persuasiveness from the cogency and power of the conception of equality which it expresses. Without some more compelling ground than appeal to what the framers had in mind, it is objectionable to construe the principle of constitutional equality as a principle of unequal protection!

Insular Minorities. The University of California presented a different argument for the Court's adopting a double-standard of scrutiny for racial classifications. It relied not on the framers' intent but on a prior characterization by the Supreme Court of the Fourteenth Amendment as a tool to combat "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily relied upon to protect minorities, and which may well call for a correspondingly more searching judicial inquiry."[37] Since the racial preferences at Davis, argued the University of California, did not adversely affect any "insular minority," they did not require a "more searching judicial inquiry" *(Bakke,* 2747–2748).

Justice Powell rejected this argument. "Racial and ethnic distinctions of any sort are inherently suspect," he wrote, "and thus call for the most exacting judicial examination" (2749). Historically, the Court has viewed equal protection rights as individual rights (2748);[38] it has treated the guarantees of equal protection as universal in their application (2750); and it has consistently viewed racial classifications with suspicion. "It is far too late," concluded Powell, "to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others" (2751).[39]

Apart from these considerations, Powell noted one further difficulty with what he termed the "two-class theory" of the Fourteenth Amendment. This theory requires that we be able to distinguish those minorities which deserve special protection from those which do not. But, Powell points out:

> There is no principled basis for deciding which groups would merit "heightened judicial solicitude" and which would not. Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effect, and the consequences of past discriminations were undone, new judicial rankings would be necessary. (2751–2752.)

The weight of the Court lies against the double-standard interpretation of equal protection.

THE BRENNAN-WHITE THESIS

The rejection of the double-standard approach does not, however, exhaust the possibilities for viewing some uses of race with less hostility than other uses. There are real distinctions to be made among different uses of racial preferences. There is no *a priori* reason why every racial classification should receive the same response or even be tested against the same standard. Unless the "compelling state interest" test is actually a sliding scale of standards, one may ask why it should be the sole test of racial classifications. There is an alternative approach which is at least as cogent and which seems to me more desirable.

Justice White, writing the majority opinion in *United Jewish Organization,* said:

> There is no doubt that . . . the State [of New York] used race in a purposeful manner. But its plan represented ***no racial slur or stigma*** with respect to whites or any other race, and we discern no violation of the Fourteenth Amendment. . . . (*United Jewish* at 1009–1010. Emphasis added.)

In a separate, concurring opinion Justice Brennan made the same point. He held that equal protection was not violated because New York's actions were made "in a remedial context with respect to a disadvantaged class rather than in a setting that *aims to demean or insult any racial group*." Had the state's behavior been "motivated by racial animus," the Court, claimed Brennan, would have come to a different conclusion (*United Jewish* at 1012; emphasis added).

Brennan advanced a similar argument, concurred in by White, in *Bakke*. Although the Court invalidated the particular admissions scheme used by the Medical School at Davis, "this should not and must not," urged Brennan, "mask the central meaning of today's opinions: Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice . . ." (*Bakke* at 2766).

Implicit in these assertions is the idea that racial classifications can be either demeaning or non-demeaning and that non-demeaning uses of race are more tolerable than demeaning uses. There is the idea that, although all uses of race require heightened judicial scrutiny, stigmatizing uses of race must be measured against a more stringent test than other uses. Not every use of race is suspect, although every use must meet more than the rational basis test. When classifications express an official hostility or antipathy toward a race or foster stigmatizing racial stereotypes, they are particularly pernicious.[40] When a use of race is non-stigmatizing and when it does not harm a relatively powerless minority, the use should be measured against a lesser test than the "insurmountable" compelling state interest test. Instead, the state should be required to show "an important and articulated purpose for its use" of race and must show a "substantial relationship" between the use and the purpose (*Bakke* at 2785).

Brennan and White (along with Justices Marshall and Blackmun) found the admissions scheme at the Davis Medical School to be constitutionally acceptable. Although the scheme arguably excluded Allan Bakke because of his race, the Medical School policy did not "stigmatize" Bakke with the badge of racial inferiority. The policy was aimed, moreover, at increasing the number of black professionals, an aim of no small importance for our society.

The Brennan-White approach, thus, allows some uses of race to meet a lesser judicial test. When a racial classification stigmatizes or implies state antipathy, it must be shown to be utterly necessary to a compelling state need. When a racial classification does not stigmatize or imply hostility, it must be shown to serve an important state interest, one with which the classification is substantially connected. Some uses of race might meet this test.

Justice Powell included the Brennan-White approach under his condemnation of the "two-class theory" (*Bakke* at 2751, note 34). However, he is mistaken in viewing it as another double-standard interpretation. On a double-standard approach there is more than one standard of constitutional review, and what determines the strength of the standard to be used to test legislation which racially discriminates against an individual is the individual's race. On the Brennan-White thesis (as I have construed it) there are likewise multiple standards of review, but the criterion for applying one standard rather than another is racially neutral. It is the effects of the tested legislation which are relevant. Legislation which stigmatizes any individual, black or white, must meet one test, legislation which does not must meet another. The Brennan-White approach merely elaborates the already standard approach of the Court in applying the rational basis test to some legislation and one or more stronger tests to other legislation. There is no reason why the Court may not use various judicial tests. So long as the application of the tests is not geared to the racial identity of individuals, the use of multiple tests involves no racial double-standard.

However, the use of the Brennan-White approach will produce outcomes not dissimilar to those produced by the use of a double-standard. That is, it will tend to treat discrimination against whites less harshly than it has treated past discrimination against blacks. This does not reflect, however, the use of a double-standard; it simply reflects that as a matter of fact past discrimination against blacks has been stigmatizing, demeaning, and motivated by racial antipathy, while as a matter of fact recent discrimination against whites has not. Powell's strictures against the double-standard interpretation of equal protection do not tell against the Brennan-White thesis.

CONCLUSIONS

I suggested that the Brennan-White approach to the use of race is more promising than Powell's. This may be a mistake. It may be that the same results gotten from the Brennan-White approach can be gotten from the proper application of the compelling state interest test. Or, it may be that the proper application of the Brennan-White test should condemn racial schemes like the one at Davis, just as the compelling state interest standard would. What makes this so speculative is that neither approach is articulated with enough precision to generate deductive consequences. As a result, it is far from obvious what conclusions should be drawn on either approach.

To think that things have been made clearer by speaking of "important interests" and "substantial connections" rather than "compelling interests" and "necessary connections" is to be mesmerized by word-play. We can, at least in the context of

Bakke, see that Brennan's group is willing to view "benign" racial classifications with more tolerance than "malign" ones. We may presume that Powell does not view the two uses of race as on par, but he nevertheless appears to be more hostile toward even "good" uses of race than the Brennan group. This much, of course, is obvious from the opinions in the case. I believe that we can say very little more about the exact differences between the standards they used in their opinions.

This much, I think, can be said. The Court's past decisions on equal protection do not constrain it to reject a multiple approach to race like that suggested by the Brennan-White thesis. There is much to be said for avoiding a rigid or clumsy standard of review in dealing with racial policies because the factors that make one use of race an affront to equality may not be present in another use. Clearly the moral quality of racial preferences designed to help minorities victimized by past discrimination is different from the moral quality of racial preferences designed to oppress them. There is room in the Court's opinions to take an approach to racial classifications which reflects this moral difference. There is, in its doctrine, room for the Court to approve a program like the one which excluded Brian Weber or the one which excluded Allan Bakke.

As a matter of fact, the Court did not approve of the program at the Medical School at Davis. The *Bakke* decision, however, cannot be considered the last word about the constitutionality of racial preferences. In that decision, only five justices examined the constitutional question, and four of them were disposed to approve the Medical School's use of race (Brennan, White, Marshall, and Blackmun). The other four justices (Stevens, Burger, Stewart, and Rehnquist) found the Medical School program illegal under Title VI of the Civil Rights Act of 1964. Thus, the constitutional disapproval of the California program rested on the singular judgment of Justice Powell.

A Selection of Fine Whines

Sour Grapes Are Spoiling the Federal Anti-Discrimination System

by Nell Minow

ILLUSTRATIONS BY WILLIAM COULTER

I am a lawyer for a large federal agency, which I'll call the Department of X in order to protect the innocent, namely me. In the course of my work I review cases before the agency's Office of Civil Rights, which exists to fight discrimination against DOX employees. Recently I received a letter from an attorney representing an employee who claimed he was the victim of age discrimination. What were the grounds? His supervisor had called him "old-fashioned."

That, I am sorry to say, is not just a comic anecdote. A high percentage of the complaints filed with our OCR are completely ridiculous. Yet each one activates an expensive, ponderous, lawsuit-like procedure that can treat even the most mundane water-cooler spat like *Brown v. Board of Education*. And the source of these complaints is intriguing. Of the 120 discrimination complaints pending against DOX, 40 were filed by OCR employees against the management of OCR itself. To put that in perspective, DOX as a whole has about 10,000 employees. Its OCR has about 30 employees. So 33 percent of the discrimination complaints are being filed by less than half of one percent of the agency's employees.

Is the OCR, by some supreme irony, a hotbed of the very discriminatory practices it was designed to stamp out? No. It seems, rather, a hotbed of the self-centered absurdity that is government at its worst, and I suspect things aren't much different at the OCRs in other agencies.

Nowadays almost every major federal agency has an OCR. These offices were formed beginning in the 1960s, and their mission was an honorable one—to combat the evil of discrimination. Discrimination once made it extremely difficult for minority men, and women of all races, to get equal treatment and equal career opportunities within the federal government. The situation is better now, but discrimination still holds back deserving employees in some cases. The situation is better, in part, because agency OCRs are available to act on complaints. But when real and serious instances of prejudice come up, they must wait in line behind the frivolous complaints so often generated by the OCRs themselves.

The disproportionate number of OCR employee complaints is caused, I think, by three factors. First, OCRs have traditionally been a dumping ground for incompetent or difficult employees. This is in keeping with the expansion-team theory of federal office forma-

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tion. Most new offices are staffed largely by civil servants from existing offices. Naturally managers of existing offices do not want to give up their best people; on the other hand, they are dying to get rid of their nincompoops and malcontents, since under civil service rules such people can rarely be fired. So federal managers hand over their worst workers when a new agency or office is being created. In the case of the OCRs, managers also figured the anti-discrimination function would be so remote from the main mission of the agency that employees banished there couldn't screw up anything too important. As a result, DOX's OCR has a high number of employees who have beaten the agency in lawsuits of one kind or another (particularly anti-discrimination suits), forcing the government to provide them with high-level positions whether merited or not. This doesn't mean everyone in DOX's OCR is either ill-tempered or incompetent. Obviously not. But the percentage of undesirable employees is dangerously high.

The second reason OCR is the source of so many discrimination complaints is that it is under such pressure to set a good affirmative-action example, it sometimes places unqualified minority people in leadership positions. Thus we have an office loaded with unqualified, litigious employees led by executives of doubtful qualifications, a deadly combination in light of the third factor: OCR employees, who administer the discrimination-complaints process, know better than anyone else how easy it is to manipulate the system.

At the risk of setting loose an avalanche of new complaints, let me describe some of the discrimination allegations employees at DOX have filed recently. Because these complaints are treated confidentially (unless they go to full courtroom trial), I cannot give real names. They are, I assure you, not composites.

- A man I'll call Tucker filed eight complaints in less than six months. One of them contained 17 separate allegations claiming discriminatory acts against him. One alleged act of discrimination was that, after Tucker admittedly disobeyed his supervisor's express instructions, she came into his office and criticized him for it.
- Tucker also filed a complaint about a conference all 12 members of his office attended, the purpose of which was to help them learn to work together better. As part of the program, all participants were asked to write statements about each other, without identifying the author or the subject of the statement. During an encounter-type session, the statements were read aloud. One statement was "This person speaks another language in the office." Although the statement could have referred to at least three people in the room—including the one Tucker believed wrote it—Tucker decided it discriminated against him and filed a complaint.
- Tucker brought another complaint because someone told him that someone said (yes, third-person information) that he (Tucker) "would have a fit" if a new employee were assigned to work with him. Tucker had filed numerous complaints in the past when people were assigned to work with him.
- A woman I'll call Hammond brought a complaint claiming she had been discriminated against because her supervisor denied her permission to take a course at government expense. Her supervisor pointed out that the course was not sufficiently related to her current responsibilities, but was directly related—in fact was a prerequisite for—a new career Hammond had announced she was going to pursue after her retirement at the end of the year.
- A man I'll call Rogers applied for a position requiring certain college-level coursework. The personnel office rated him unqualified because he had received three Ds in the courses. It is DOX policy not to recognize coursework in which Ds are received. As it happened, even if Rogers had passed the courses he still would not have met the minimum requisite coursework. Nevertheless he claimed the "unqualified" rating resulted from racial discrimination.
- Another man filed a complaint alleging that two pages of shorthand notes from the desk of his supervisor's secretary said something bad about him. He refused to explain how he came into possession of the notes. When translated from shorthand the notes made no reference to him at all.
- Another woman brought not just a personal complaint but a class-action complaint over DOX's policy of giving points to job applicants with Ph.D.s. She claimed that because young people were more likely to go to graduate school than old people, giving points for Ph.D.s constituted age discrimination.

Your Decade in Court

Many of these complaints (and those of Lancaster, the complaint-filing champ described in the sidebar) were brought by high-level (GS-13 and above) employees of the OCR. These are people whose entire jobs revolve around a clear understanding of what discrimination is (and who are paid very well—$32,000 and more—for their efforts). Either these people are so far from understanding the fundamentals of their own profession that they simply do not know what a legitimate discrimination complaint looks like, or they are filing complaints for some other reason. Before we speculate as to what that reason may be, let's look at the complaint process.

The rules governing discrimination complaints were developed by the Equal Employment Opportunity Commission, an independent federal agency, and apply to all OCRs. Let's say that Bayshore, an Aleutian male, applies for a promotion and is turned down. He believes it was because of his race. Bayshore must first discuss the matter with an Equal Employment Opportunity counselor. Counselors are DOX employees (not from the OCR) who perform this function in addition to their other duties. At an informal session, the counselor will try to resolve the complaint, meeting with Bayshore's supervisor if necessary. If the complaint cannot be resolved informally, the counselor notifies the OCR, and Bayshore files a formal complaint. Federal regulations specifically prohibit the counselor from attempting to dissuade someone from filing a complaint, no matter how frivolous.

The formal process begins with the filing of a simple form, which allows Bayshore to check off the grounds on which he alleges discrimination. OCR reviews the complaint to make sure it complies with procedural rules. Then an OCR investigator is assigned to the case.

The investigator interviews Bayshore, anyone Bayshore mentions in connection with his story, and anyone else who might have something to add. A file is prepared that includes the investigator's report, affidavits from those interviewed, evidence supplied by Bayshore or the witnesses, and other relevant documents. In Bayshore's case, such documents would include a breakdown by race and sex of the promotions in his office during the past year.

This file is turned over to Bayshore and an adjudicator, another OCR official. The adjudicator meets with Bayshore (and, if he has one, Bayshore's attorney) to see if there is any possibility of a settlement. If not, the adjudicator makes up his mind as to the rights and wrongs of the case, gets the approval of his supervisor and the signature of the OCR director, and sends his decision to Bayshore.

Sound reasonable? That's just the beginning, not the end, of the process. If the adjudicator finds that no discrimination occurred, he must notify Bayshore of a right to a hearing before an examiner of the larger Equal Employment Opportunity Commission. This is a full-scale administrative hearing—with lawyers, witnesses on the stand, and a court reporter taking it all down. In this hearing the EEOC examiner goes over exactly the same material that has been reviewed by the investigator, adjudicator, supervisor, and OCR director, all of whom found that no discrimination occurred. The EEOC examiner prepares a "proposed decision," which is sent to the Secretary of X himself for review. The Secretary of X may approve, amend or reverse the examiner's decision.

Now, the secretary of a major agency has more important things to do than review proposed findings about how some GS-13's feelings were hurt at a transactional analysis session. Besides, it usually takes so long to get to this point—often years—that the events complained about happened during a previous administration when some other secretary was in charge. So what happens? The proposed decision is sent right back to the OCR, the office whose original determination is being reviewed.

Let's say the EEOC examiner proposed a finding of no discrimination. Of course that was OCR's position in the first place. Appeals proceed up the ladder only when each rung is a finding of no discrimination, since if discrimination is found the complainant wins and the process stops. So the office is likely to recommend concurrence. But Bayshore isn't finished yet. He has the right to have the EEOC review the Secretary of X's decision based on the recommendations of the OCR, based on the EEOC examiner's proposed findings, based on a review of the OCR adjudicator's decision, based on the OCR investigator's report, based on affidavits, and based on evidence supplied by the witnesses. In all these there is almost certain to be some irregularity. And if even these avenues fail, Bayshore can go to court.

Needless to say, all this takes time. For example, one DOX complaint filed in 1978 finally went to a hearing in March 1981. Remember, that's just the second stage. Completing the rest of the process could easily take another three years, and years more if the complaint goes to court. One drawback of alleging age discrimination is that you may be in a nursing home by the time your case is decided.

What offenses do all these reviewers look for? Well, the Supreme Court is still grappling with a definition of what discrimination is, and nearly every new term finds some new piece to add to the puzzle, further confusing any complaints in progress and providing the inspiration for new filings. For the purposes of simplification, it is enough to say that Bayshore must show that 1) he is a member of a protected class, like a racial minority; 2) that his performance has been satisfactory; and 3) that he was treated differently from comparable employees. If he proves these things, the agency must show there was some legitimate, nondiscriminatory reason for what happened—in Bayshore's case, the denial of a promotion.

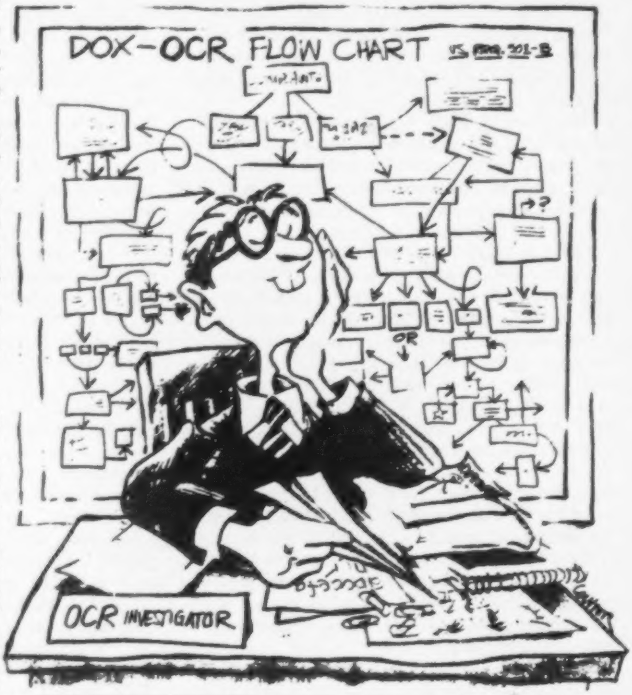
Yet, as the examples show, discrimination complaints seldom involve anything so clear-cut (or important) as a promotion. Many involve highly subjective judgments about passing slights or squabbles of no consequence whatsoever. Then why do federal employees, except those who genuinely have been damaged by discrimination, bother filing all these complaints?

It turns out the advantages of filing a complaint are many, and the disadvantages, if any, are few. The complaining employee literally has nothing to lose.

When Bayshore files his complaint, he lays the groundwork for future complaints. Complaints can be based on allegations of discrimination because of race, sex, origin, age, or handicap. But they can also be based on allegations of *reprisal*—that is, allegations that the complainant was harassed because he had brought previous complaints.

Remember, Bayshore's complaint about being denied a promotion takes a few years to wend its way through the system. You would think that during this period, the complaint does Bayshore no good. But as soon as his complaint has been filed, anything Bayshore doesn't like can be the excuse to file a complaint of reprisal. Employees have filed reprisal complaints protesting the terrible injustice of being assigned work, alleging that work interferes with the time they need to prepare evidence of their original complaint. Let me run that by one more time to make sure that you heard it correctly. Federal employees earning full salary have claimed that assigning them work—*any* work—constitutes discrimination, and have demanded years of exemption from *any* responsibilities. Discrimination complaints become a form of extortion.

Filing complaints is so tempting because government personnel management has so many complications. The Federal Personnel Manual is six volumes long, constantly changing, and internally inconsistent. Agencies add another layer of confusion by developing their own rules. Thus there are few events which occur in federal personnel management that are completely in accord with all applicable rules. This is especially true of the kinds of actions likely to give rise to discrimination claims—promotions, selections, and reorganizations. An error in promotion or reorganization may not mean the official responsible is prejudiced; the error could be, well,



just an error. But officials are afraid to expose themselves to the years of tedious procedures and *j'accuse*-class scrutiny of fighting a discrimination complaint. Most complainants understand this, and lodge frivolous complaints even though they know the actions involved do not represent any meaningful offenses.

To add injury to insult, the process is skewed substantially in favor of the complainant. By characterizing the process as "non-adversarial," the EEOC was able to get away with procedural rules that are almost draconian in their denial of due process to those accused of discrimination.

Agency employees who are the target of complaints are called "alleged discriminating officials," or ADOs. (It may not be a scarlet A, but it's almost as stigmatizing.) The discrimination process places the ADO on "trial," for the adjudicator, EEOC examiner, or agency head can order actions taken against him—ranging from further training to a reprimand to dismissal. Of course, we would all want a truly prejudiced official dismissed from the government. But it's the innocuous-sounding "reprimand" that does the most damage. In the civil service system one "reprimand" on an official's record can close off any hope of promotions or choice assignments; the official is doomed to a dead-end career. Yet the ADO in danger of such punishment because of the "trial" has little right to defend himself.

DOX lawyers normally represent agency management in discrimination proceedings. We refer to them as "clients," but in the context of the complaints process, we can't offer them meaningful representation. Since the process is officially "non-adversarial," we are not permitted to advocate the ADO's position; that is, we cannot say, "But consider my client's side of the story." In discrimination hearings ADOs are told that the action is against the agency, not them personally, but they may be personally damaged by the outcome. If an ADO wants legal advice about his position, he must hire private counsel. The extortion value here is obvious. A federal worker can file an unlimited number of complaints at no cost or risk to himself, but each complaint an accused official chooses to fight costs him money for lawyers and puts him in jeopardy of severe damage to his career.

"DR. MARK GROSS, an abortionist in Phoenix, failed to notice that his patient was eight months pregnant, and so had a live birth to deliver. Mother and infant daughter doing fine, thank you. 'We can't always be perfect,' a spokesman for the clinic said afterward. True enough, but it's interesting that when an abortionist makes a mistake, the patient lives."

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Originally, ADOs were not even permitted to see the allegations which had been made about them. Now they are allowed to see any portion of the investigative file which mentions their names, but they are not allowed to review the charges, or even be present at the hearing when the complainant speaks against them. Furthermore, the right to pursue the complaint through the many stages described above is given only to the complainant. Neither the ADO (nor the agency) has any right to appeal a finding against him (or it) at any stage. So if there is a mistake about evidence or a blunder by an examiner, the judgment stands; apparently you can add discrimination to the system but you cannot subtract it.

Real Complaints, Take a Number

OCR encourages informal resolution of discrimination complaints, as it should. But it often does so by telling the ADO that OCR will propose a finding of discrimination if management does not settle. Since OCR will not allow agency management to review the file to see if the complaint is a bluff or represents a real injustice, it's impossible for management to determine what a fair reparation would be. This slant in favor of the complainant has tipped the scales of justice so far that basic constitutional guarantees may not be provided to the "accused." A system that protects rights for some by denying rights to others is no system worth preserving.

But the cost, the wasted time, and the shabby treatment of ADOs are not the biggest problems of the system. The biggest problem is the suffering it causes for those who really have been shackled by prejudice. Real, substantive complaints take years to resolve because the system is so choked with phony complaints. The whiners and the manipulators not only slow the system down, they pollute it—fortifying the cynicism of all those involved in the process and scaring legitimate victims of discrimination away. Legitimate victims of discrimination are usually people with pride and self-respect, and they fear the embarrassment of being associated with a process widely viewed as a refuge for losers. So the complaints of legitimate victims are delayed

Meet Mr. Congeniality 1981

CHAMPION 1981
COMPLAINT

Filing frivolous discrimination complaints has become the national sport of the federal government. Many people play, and competition is heated, but for my money the reigning champ is a man I'll call Fred Lancaster (because, as explained in the main story, confidentiality rules forbid me from using his true name).

Lancaster is a middle-level official of the federal agency for which I am a lawyer. In the past few months he has:

- Filed a complaint because his friend in the office was suspended for two weeks. Lancaster claimed this was actually discrimination against him. The friend was suspended for threatening to kill two OCR employees.
- Filed a complaint alleging that someone told him that someone told him that someone said (that's fourth hand) that Lancaster's boss was going to get him out of the office.
- Filed another complaint alleging discrimination because his supervisor gave an assignment to Lancaster's assistant without going through Lancaster. During the investigation, the supervisor explained that she did this because Lancaster had refused to speak to his assistant for several weeks.
- Filed a complaint because a fellow official had threatened to strike him. Lancaster alleged that prejudice was the motive. The fellow official is of the same sex, age group, and ethnic group as Lancaster.
- Filed complaints practically every time someone criticized his work or gave him assignments he didn't like. He also filed complaints each time his supervisor, unable to correct Lancaster's inadequate work, attempted to assign it to someone else. In all he filed more than 30 complaints in just over a year. That's one complaint every eight working days.
- Last summer, two female college interns were assigned to Lancaster's office. He and another employee invited them to his apartment so he could "help [them] with their SF-171s," procedural forms. At the apartment, he made what used to be called improper advances. The interns spoke to Lancaster's supervisor. The supervisor told Lancaster he was not to see the women socially. Lancaster filed a discrimination complaint for sexual harassment.

These complaints are now in a complex, lawsuit-like formal hearing process, where they may remain for years. The Equal Employment Opportunity Commission rules forbid dismissing complaints merely because they are ridiculous. At no step of the way are federal officials permitted to toss these complaints back and say, "Aw, come on Lancaster, what do you take us for?" But that may not be necessary. It's very clear what Lancaster takes them for.

—*N.M.*

or go unheard, while millions of dollars and thousands of hours are wasted on a process known by all its participants to have little if any meaning.

There are, I think, some simple steps that would uncomplicate things. First, agency offices of civil rights should be done away with. (Some OCRs have other functions besides processing complaints; these functions could be transferred to other parts of the agency.) All discrimination complaints should be heard by a single agency, probably the EEOC. This step alone would eliminate several redundant layers of procedure. It has been suggested repeatedly in the past. Second, other stages should be eliminated, particularly the EEOC-level review, which is just a replay of previous reviews. EEOC investigators and adjudicators could consider each case and propose findings, which would become final unless amended or reversed by the head of the agency accused of discrimination. Formal court-like appeals would not be automatic, but limited to a strict standard of review where gross miscarriages of justice were indicated. Third, ADOs should be informed of the charges against them and given a full right to respond. Lastly, there must be a way of weeding out the worthless complaints in order to free the system to address legitimate ones. I believe the best way is for any sanctions to come from an objective third party, rather than the complainant's supervisor (who is usually the ADO). The most convenient objective third party is the adjudicator, who would be authorized to dismiss groundless complaints. (Under my scheme the adjudicator would be an EEOC, not an OCR, employee, so he would not work for the agency under investigation.)

These changes would, I think, make the federal anti-discrimination system more efficient and equitable without removing necessary safeguards against prejudice. As it stands the OCR process is a practical joke, useful mainly to inept or malicious employees obsessed with selfishness. Only when both bigotry and selfishness are expelled from government can the system truly achieve its goals, public service and the spreading of justice. I hope these ideas don't strike you as old-fashioned. ☐

The Merit Criterion of Employment: An Examination of Some Current Arguments Against Its Use

Judy Wubnig

What are the proper criteria for employing people? Until recently, it was taken for granted that the only proper criterion was the ability to do a particular job. For example, it would have been assumed that the criterion for employing someone as an engineer was his ability as an engineer.

Practice that did not conform to this ideal was continually criticized. Such practices as denying blacks jobs because of their race were criticized by reference to this ideal, that is, these practices were criticized because a person's race is not a criterion of his ability to do a job. As a result of such criticism, legislation such as the U.S. Civil Rights Act of 1964 was passed to prohibit some of the practices that did not conform to this ideal, such as using criteria of race or sex for employment.

In recent years, however, in the course of apparently criticizing practices that did not conform to this ideal, such practices have been advocated. There has been a plethora of arguments to justify appointments on the basis of race, ethnic group, and sex. I propose here to examine several of these arguments: the compensation argument, the quota argument, and the biased-judgment argument.

The Compensation Argument

The compensation argument is that members of a given racial, ethnic, or sexual group X should be given preference in employment because members of group X in the past were denied such employment in the past because of their membership in group X. This is supposed to be compensation to members of group X for the past wrongs done to members of group X in denying them employment because of this membership. For example, the argument is that if in the past qualified women were not employed as engineers solely because they were women, therefore, now, in compensation, qualified women should be hired as engineers because they are women.

This argument suffers from several related defects. It is based on a confused notion of compensation; it implies an endless retributive feud principle; and it is inconsistent.

a) Compensation: I can compensate someone, for example, Bill J., if I have done him some wrong and can make up that wrong. Suppose, for example, that I dislike redheads, and I have refused to employ Bill J. to tune my piano because he is a redhead. One can then argue that I have denied him employment for a bad reason and so have treated him unfairly (and have thereby lost the services of a piano tuner!). In this case, I could compensate Bill J. for this unfair treatment by hiring him, or perhaps by some other means.

The wrong to be compensated for is the wrong done to the individual wronged. Bill J. receives no compensation if I hire another redhead, Tom S., and Tom S. cannot receive compensation for the wrong done Bill J., because the wrong was not done to him; that is, Tom S. was not denied employment because of his red hair.

The current compensation arguments, however, make this elementary mistake. It is argued, for example, that blacks should be hired *because* they are blacks, in compensation for past unfair, racially discriminatory practices. But John P., a black, who suffered from such practices in the past, is in no way compensated by the present hiring of Paul R., also a black. And Paul R. deserves no compensation now, since he was not previously wronged by being denied employment because of his race.

b) Infinite Retributive Redress: The compensation argument depends on the assumption that one does wrong to someone else if one refuses to employ a person because of his membership in some particular racial, ethnic, or sexual group. Hiring Paul R. now, because he is black, rather than hiring nonblack S because he is not black, is doing wrong to nonblack S, according to this assumption. So, according to the compensation argument, he or other nonblacks deserve compensation. Thus, in compensation, members of this group should be hired because they are nonblacks. This, in turn, will wrong blacks, who will then deserve compensation, and so on ad infinitum. Thus, the attempted compensation will not right wrongs but will continue the wrongdoing forever.

c) Inconsistency: The compensation argument is inconsistent. It assumes both that it is wrong to hire people because of their membership in a given racial, ethnic, or sexual group and that it is right to do so. Employing members of group X now, because of such membership, in preference to members of group non-X, is to do precisely what is condemned. Using the word *positive* or *affirmative*, as in "positive (racial, ethnic, or sexual) discrimination" or "affirmative action," changes the fact not one iota. The condemned past policy could just as well have been termed *positive discrimination* or *affirmative action*, and the discriminatory policy presently advocated is just as "negative" against members of group X.

If policies of hiring people according to racial, ethnic, or sexual criteria were bad in the past, they are bad now. If they are not bad now, they were not bad in the past.

In summary: the compensation argument is confused about who gets compensated for what. It entails an infinite redress of wrongdoing and subsequent compensation. And it contradicts the principle of proper employment practices, whose violation is supposed to be compensated for.

The Percentage-Quota Argument

The percentage-quota argument is that a quota of *K* percent of any given kind of job should be given to members of a given racial, ethnic, or sexual group X because members of group X makes up *K* percent of the total population. If everyone were treated fairly, according to this argument, then the percentage of people in any subgroup of employed, such as engineers or mathematicians, would be the same as in the population as a whole. For example, approximately 50 percent of the popu-

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lation are women. Therefore, if people were treated fairly, according to the argument, 50 percent of engineers and mathematicians would be women. The percentage argument is that if 50 percent of engineers and mathematicians are not women, it must be made to be the case by hiring on the basis of sex, so that 50 percent of engineers and mathematicians are women.

This argument assumes that what would have been is known, that theories of what would have been are a sounder basis for practice than knowledge of what is, and that it is fairer to treat people according to what they might have been rather than according to what they are.

a) What would have been: The percentage argument assumes that fair employment policies are those that allow for the hiring of individuals according to their merits. The argument is that, if in the past all individuals had been hired according to their merits, then the percentages of people of different racial, ethnic, and sexual groups in any particular kind of employment would be the same as in the population as a whole. This is not, however, self-evident. There may be differences in interest, talent, education, and training in population subgroups, so that hiring by merit will not result in such percentages. For any or all of these reasons the percentage of mathematicians or engineers, for example, from a given racial, ethnic, or sexual subgroup may differ from the percentage of the population composed of members of that subgroup.

If this assumption were correct, of course, then the predicted percentages would occur within whatever span of time would be necessary for a policy of hiring by merit to take effect. But then, in order to get these percentages, it would not be necessary to hire according to percentages but only according to merit. Since the percentage argument advocates a policy that is intended to rectify policies of not hiring according to merit, it actually assumes that people should be hired only on the basis of their merit.

The percentage argument, however, often involves a different approach. It is that present hiring by merit is not adequate, because in some racial, ethnic, or sexual group X, whose members make up K percent of the total population, the number of people with the ability for a particular kind of employment is less than K percent of the total number of those with this ability. The reason for this, it is argued, is that the members of such a group X did not have educational opportunities equal to those of members of other racial, ethnic, or sexual groups. The percentage argument then is that, since members of group X did not have educational opportunities equal to those of members of other groups, they were treated unfairly. Therefore, they should not suffer the consequences of their poorer education; that is, they should not be denied employment in jobs for which they are not the best qualified. They should be hired to make up K percent of those in a particular kind of employment even though they are not the best qualified.

Let us first examine the assumption that, if everyone had the same educational opportunities, the percentage of members of particular racial, ethnic, or sexual subgroups in any particular kind of employment would have been what it is in the population as a whole—that is, the percentage of individuals in any such subgroup with interest in and talent for, say, basketball, piano, engineering, or mathematics is the same as the percentage of individuals in the total population with such interests and talents. How can this assumption be justified? No one has yet seriously proposed that all talents are evenly distributed. For example, no one would argue that the talent for playing basketball is so distributed, since clearly tall men are better basketball players than short women and tallness and maleness are not distributed in each racial, ethnic, and sexual subgroup of the population in the same way.

Whatever method could be used to find out about the distribution of interest in and talent for a particular kind of activity would require examining individuals, individual by individual. That is, the evidence of distributions of characteristics in a given population depends on the evidence about individuals of that population. Evidence of distributions derived from evidence of distributions in random samples of the population still ultimately depends on evidence about individuals, namely, the individuals in the random samples. The evidence about the interests and talents of individuals is thus stronger and more certain than the evidence about distributions of these interest and talents in the population and population subgroups to which these individuals belong, since the latter evidence is dependent on the former. It follows, then, that the policy of hiring people according to the percentage assumption is more dubious than that of hiring people according to their individual merits, since the evidence for the percentage assumption is weaker and more dubious than that about the individual merits of people.

The percentage argument, in other words,

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begs the question. Its validity depends on the assumption that people can be evaluated individually. To argue that the results of judging people individually must be wrong because these results do not conform to the hypothesized percentages is to reject the only possible basis for knowing these percentages. Thus the percentage argument refutes itself, for the only reason to accept the view that, for example, 50 percent of mathematicians should be women because 50 percent of those with the greatest interest in and talent for mathematics are women is that it has been discovered, by examining individuals, that 50 percent of those with the greatest interest in and talent for mathematics are women. It could be discovered only be examining individuals. The percentage argument thus presupposes that the most accurate way to judge individuals is to judge each individually.

b) *If the hypothesized percentages would have been:* Suppose, by hypothesis, that with proper education and training, 50 percent of the best-qualified mathematicians would have been women. The percentage argument is that 50 percent of mathematicians should *now* be women, even if they are not, due to lack of training, 50 percent of the best qualified. But the hypothesis does not imply this conclusion—what would have been is not. A person without mathematical training is not qualified to be a mathematician, even though he would have been one had he had the necessary education. To take another example: suppose John G. would have been a great pianist, drawing record audiences, if he had learned to play the piano. However, he did not study the piano, and so he is not now a great pianist; he will not draw record audiences to his attempts to play the piano, nor will "would have been" arguments persuade potential audiences differently.

In summary: The percentage argument depends on the very ability to judge individuals on their own merits whose use it rejects. It advocates hiring people without regard for their qualifications and solely because of their membership in some racial, ethnic, or sexual group X, because these individuals would have been qualified, given different education. But the argument itself depends on the assumption that there are qualifications that these individuals would have had, given different education. And the justification of the percentage assumption must ultimately depend on the ability to judge the qualifications of individuals, the kind of judgment the percentage argument rejects.

The Biased-Judgment Argument

It has been argued that evaluating individuals on the basis of merit, without regard to their racial, ethnic, or sexual characteristics, is impossible because only members of any such group X are capable of evaluating other members of group X and because present criteria of evaluation are biased in favor of members of group non-X. Therefore, members of group X must be chosen in order to hire other members of group X, and members of group X must be hired in order to compensate for the bias of present criteria for evaluating merit.

a) Who evaluates? The argument that only members of racial, ethnic, or sexual group X should evaluate other members of group X is that only they can understand members of group X, by which is meant that only they can understand the thinking of members of group X. How can the policy based on this argument be implemented and how can the argument itself be justified?

The problem of implementing the policy of having members of group X evaluate other members of group X for potential employment arises only in the case when the employer is a member of group non-X. But, in precisely this case, in order to implement the policy, members of group X would have to be chosen (whether hired or not makes no difference to the argument) by members of group non-X to do the hiring of members of group X. This, however, involves either an infinite redress or that members of group non-X choose members of group X according to some criteria of evaluation, which do not include the criterion of membership in group X. If the original argument is valid, that members of group non-X cannot evaluate members of group X, then members of group X cannot evaluate members of group non-X, and thus the policy cannot be implemented. On the other hand, if the policy can be implemented by members of group non-X choosing members of group X to implement it, then the original argument on which the policy is based is not valid, that is, it must be possible for members of group non-X to evaluate members of group X.

The validity of this argument cannot depend on being argued by a member of group X (or anyone else). That this person thinks the argument is valid is not evidence of its validity. If a person's thinking that an argument is valid makes it valid, then anyone else's thinking that the argument is not valid would make it invalid as well. For example, my belief that this argument is invalid, which I am now expressing here, would, according to this subjectivist criterion, be a sufficient refutation of the argument.

The validity of the argument thus does not depend on the argument's being believed to be valid. If the validity of the argument can be recognized by anyone, then all people have the same ability to think about and evaluate arguments. In other words, if members of both group X and group non-X are to recognize the argument as valid, members of group X must be able to evaluate the thinking of members of group non-X and members of group non-X must be able to evaluate the thinking of group X, namely, the thinking that is the argument itself. But, if this is so, then the argument refutes itself; its validity entails its own denial.

The very effort to persuade someone of the validity of the argument presupposes that it is invalid. If members of group X try to persuade members of group non-X of the validity of the argument, they are presupposing that members of group non-X can evaluate the reasoning of members of group X, that is, the argument that members of group X are offering. In the very act of using the argument, members of group X would show that they themselves do not believe it.

On the other hand, how could members of group non-X demonstrate to themselves that the argument is valid? They cannot do so by failing to evaluate the thinking of members of group X, since, in order to recognize that they have so failed, they would have to recognize the correct evaluation—that is, they would have to evaluate the thinking of members of group X correctly.

One might argue that one can indeed recognize one's own inability to evaluate the argument of another without presupposing that he has correctly evaluated it. For example, I might admit that I cannot evaluate Einstein's general theory of relativity without presupposing that I have indeed evaluated it correctly. This situation is not, however, that which is involved in the argument that members of given racial, ethnic, or sexual groups cannot evaluate the thinking of members of other racial, ethnic, or sexual groups. If I cannot evaluate the general theory of relativity, it is because my knowledge of physics is not adequate or my powers of reasoning are not powerful enough. The difficulties lie in the theory itself, the evidence presented and the reasoning used. They do not lie in the fact that I am not a German Jewish male.

On the contrary, the argument we are examining denies that knowledge of the relevant material and ability to reason are adequate to evaluate thinking. It asserts that, for example, only female mathematicians can evaluate the mathematical abilities of other female mathematicians. If male mathematicians try to evaluate the abilities of female mathematicians, according to this argument, they will only admit to their inability to do so because of an admitted lack of mathematical knowledge; they will, indeed, think that they can evaluate any mathematicians, including female ones, on the basis of their mathematical knowledge. But in order to prove to themselves that they deceive themselves in believing that they can evaluate female mathematicians, they must in some way be able to recognize the correct evaluations of female mathematicians, which is only to say that they must be able to evaluate female mathematicians correctly.

The argument, therefore, that only members of group X can evaluate other members of group X, because only they can understand the thinking of members of group X, is self-refuting. If the validity of arguments depends on their being believed to be valid, then my not believing the argument to be valid is a refutation of it. If its validity is such that everyone can and ought to recognize it, then everyone has the ability to evaluate some of the thinking of others, namely, the argument itself. The barriers to evaluating the thinking of others are not that one is unable to understand and evaluate the thinking of those different from oneself, for example, of those in racial, ethnic, or sexual subgroups other than one's own; the barriers are lack of knowledge or inadequate reasoning ability.

b) The bias of present criteria of evaluation of merit: The argument is that present criteria for evaluating merit are biased in favor of members of racial, ethnic, or sexual group non-X. Therefore, in order to correct this bias, members of group X should be hired because they are members of group X.

It is possible that present criteria for evaluating the abilities of individuals for particular jobs are unsound and racially, ethnically, or sexually biased. This must, however, be established, not merely presupposed. The percentage argument will not establish this, as previously argued. And it cannot be argued that the criteria must be biased in favor of members of group non-X because members of group non-X set them. One would first have to prove that the criteria are biased in order to argue that those who set them are biased, not vice versa.

In order to establish that the criteria are biased, then, one would have to demonstrate that according to the criteria the best-qualified people are sometimes passed over in favor of less qualified people in employment. Such a demonstration, however, would require criteria for evaluating the merits of individuals in order to establish that certain individuals are better qualified than others. This attempt to demonstrate that present criteria are biased would then actually establish what the sounder, unbiased criteria are. Far from supporting the argument that members of racial, ethnic, or sexual group X should be hired because of their membership in group X, because the present criteria for evaluating merit are biased against group X, the demonstration of such bias would establish that it is possible to evaluate individuals properly on the basis of merit, by establishing how it is possible.

One might still try to defend the biased-criteria argument by arguing that all criteria must be biased, that hiring on the basis of merit alone is intrinsically impossible. But one could not demonstrate this without demonstrating the actual bias of criteria, and this can only be done by using the yardstick of the merit criterion. And if one were to deny that there is such a thing as individual merit, then one could not argue that any criteria are biased. It could not, therefore, be argued that present criteria of merit used in employment are biased and should thus be discarded. The biased-criteria argument then is a self-refuting one; it assumes what it denies, that one should hire a person because he is the best qualified for the job, not because he is a member of any particular racial, ethnic, or sexual group.

Conclusion

The arguments here examined for employing people because of their membership in some racial, ethnic, or sexual group—the compensation argument, the percentage-quota argument, and the biased-judgment argument—all deny the very principle they assume. They assume that people should be employed because of their individual qualifications, but they deny that the criterion of individual merit should be used in employment.

But the initial principle is, I believe, the only sound one. A person should be employed for a particular job because he is the best-qualified applicant. The only criterion for this is the ability to do the job. The best-qualified person for a job is the person who can do it best. The best person for a job as a mathematician is the best mathematician; the best person for a job as a carpenter is the best carpenter; and the best person for a job as a pianist is the one who plays the piano best. ●

PART II—NEWSPAPER ARTICLES

[From the New York Times, Mar. 14, 1980]

Black Men Are Last

(By Robert W. Goldfarb)

Great Neck, N.Y.—Corporate, affirmative-action programs have been far more productive for white women than for black men. Black women—labeled "twofers" by some personnel managers because they are counted twice on Government compliance reports, once as women and ounce as minorities—are being employed and advanced less rapidly than white women but faster than black men.

The National Urban League recently reported that the nation's work force grew by nearly 5.2 million employees between 1974 and 1977. Of these 3.5 million entered private industry. Fifty-three percent of all new employees entering private industry were white women, 26 percent were white men, 5 percent were black women, 12 percent were of Hispanic background and 4 percent were Asian. At this same time, as many new black male employees left private industry as entered, so there was no net increase in their number.

Corporations, required by the Government to set specific goals for hiring and promoting both minorities and women, appear to be implementating affirmative-action programs as though given a choice of advancing either women or minorities. Irritated at having to attain any Government-imposed hiring goals, many managers are more comfortable advancing white women than black men. Many of these white male managers are contemptuous of black men, whose advancement in business and the professions they ascribe to "reverse discrimination." They characterize black men as arrogant, impatient, unwilling to conform to business standards and lacking basic job skills. They say it is difficult to find black men qualified for managerial positions since only 6 percent of the graduates of four-year colleges are black and the proportion of black students in graduate schools has been declining. Women, on the other hand, now constitute 43 percent of the work force and receive nearly half the degrees being awarded by universities and colleges. White women have also been in the corporate world far longer than black men.

White male managers devote more attention and effort to recruiting and training women and far less to advancing black men. When remined that they are required by Federal and state law to hire and promote both minorities and women, many managers reply that Government compliance officials usually are satisfied by a modest show of good faith. Recruiting and advancing a modest number of white women, they confide, is ample demonstration of good faith.

The Civil Right Act of 1964 and the legislation and executive orders that followed required corporations to increase sharply their hiring of ethnic minorities. Companies hired growing numbers of black men as urban-affairs directors, minority recruiting specialists, community-liasion coordinators and corporate social-responsibility directors. For nearly a decade these and similar positions provided employment for black college graduates. The 1974 recession gave many companies reason to reduce the size of these programs, regarded as costly luxuries. Many black employees were dismissed or assigned to more conventional jobs in which their performance was closely monitored. They rarely were given training, guidance or the informal support required in the new jobs. Black men often felt viewed as as intruders in a white world. The informal alliances and flow of ambitious white men and increasingly to white women were unavailable to them. In protest, some black managers committed career suicide by reacting in ways that hurt or ended their employment. They often did so by fulfiling the stereotypes white ascribe to blacks: They arrive late to important meetings, moved from assignment to assignment without developing enduring skills and exploded in a fury of temper at what whites perceived to be minor slights. The few black managers who did succeed found themselves in the lonely position of being the only black at the job level they had attained. Loneliness, a feeling of being endlessly judged not as a manager but as a black man, and having no confidence that they would be permitted to advance to their fullest potential all combined to damage their spirits and careers. Many white managers, impatient with black subordinates, withdrew what little support they had been providing. The failure rate of black men accelerated.

Searching for ways to attain affirmative-action goals despite their mounting frustration, some white male executives intensified their recruiting and training of white women. The same men who until recently ignored or blunted the advancement of women began to see in them an opportunity to reach hiring goals without having to deal with black men. Burning with ambition, women seized this support. As a result black men feel squeezed out in this competition for a diminishing number of opportunities for promotion, training and jobs.

NOTE: Robert W. Goldfarb, president of a consulting firm, works with companies to develop affirmative-action programs.

[From Black Enterprise, May 1982]

AN ECONOMIC DEFENSE OF AFFIRMATIVE ACTION

(By Bernard E. Anderson, a member of the Black Enterprise Board of Economists)

Is affirmative action still necessary? Many critics aruge that attitudes toward race relations have improved to a substantial degree and that discrimination is no longer a major factor in explaining employment and earnings disparities among minorities and others. According to these critics, economic growth and the expansion of jobs through unregulated, free market processes is all that is required to improve the economic status of minorities.

However, the available evidence suggests that just the reverse is true. Much of the progress achieved by minorities and women in some occupations and industries was either the direct result of or was substantially influenced by affirmative action remedies to employment discrimination.

The position of blacks and other minorities in the economy is like that of the caboose on a train. When the train speeds up, the caboose moves faster; when the train slows down, so does the caboose. No matter how fast the train goes, the caboose will never catch up with the engine unless special arrangements are made to change its position. So it its with minorities and the economy: Even during the best of times, there will be no change in the relative position of minorities unless affirmative action or other special measures are taken.

Policies designed to improve the relative position of minorities are justified by the continuing evidence of racial inequality in American economic life. In 1980, black employment was more than twice that of whites (13.2 percent vs 6.3 percent). Unemployment among black teenagers, now officially reported at close to 50 percent, has been greater than 30 percent throughout the past decade, but has not reached that level among white youths in any year. Further, the employment/population ratio—for some purposes a more instructive measure of labor market participation than the unemployment rate—has steadily declined among black youths while increasing among whites. About 25 out of every 100 black youths had jobs in 1980, compared with 50 of every 100 whites.

Comparative income data also show continuing evidence of economic disparity between blacks and others. In 1979, the average black family had only $57 for every $100 enjoyed by whites. Even in families headed by persons fortunate enough to work year round, blacks have failed to achieve parity, earning only 77 percent of the income of comparable white families.

It would be incorrect to say that the continuing presence of such economic inequality is entirely the result of overt or systemic discrimination or that affirmative action alone would improve the economic position of minorities. But there is no question that much of the income and employment disadvantage of blacks and other minorities reflects the accumulated impact of past discrimination. The continuing presence of many seemingly objective policies in the workplace have also had disproportionately unfavorable effects on the hiring, training and upgrading of minority-group workers. Affirmative action has an important role to play in correcting inequities.

In 1969, black workers, represented 6.7 percent of the nearly 600,000 employees in the Bell System, mostly black women employed as telephone operators. Only 2.4 percent of Bell's black employees were in management (compared with 12 percent of whites), 7.2 percent were skilled craftsmen (compared with 26 percent of whites), and less than one percent were in professional jobs (compared with 8 percent of whites).

In 1971, the Equal Employment Opportunity Commission (EEOC) charged AT&T and its affiliates with discrimination against minorities and women. In 1975, after prolonged litigation and negotiations, EEOC and AT&T signed a consent decree designed to correct the inequities in the company's employment practices, and to provide back pay to many minority and female employees who had not enjoyed full equal opportunity in the past. In 1979, blacks and other minorities accounted for

14.4 percent of the Bell System's managerial employees, 18.7 percent of the outside craftsmen, 19.1 percent of the inside craftsmen, and 23.3 percent of the sales workers.

The consent decree was the catalyst necessary to spur the company toward many positive changes in personnel policies that top management today lauds as beneficial to the firm. The more efficient and equitable personnel selection and assessment system adopted by AT&T and its Bell operating affiliates puts the telephone company in a much stronger position to compete with other firms in the increasingly difficult and complex information systems markets. The experience of AT&T, and other firms specifically identified as subjects for affirmative action enforcement, is instructive for understanding the potential impact of affirmative action on the occupational status of minorities. For purposes of public policy formulation, such evidence may be more useful than inconclusive studies that attempt to show the relationship between affirmative action and minority employment opportunities.

[From the Washington Post, Aug. 2, 1980]

WHO'S THE MINORITY IN THE DISTRICT?

(By Wilcomb E. Washburn)

When should affirmative action in favor of a minority cease?

Glen DeRonde, who won a reverse discrimination case in January, has asked the California State Supreme Court whether the University of California's admission preference for some racial groups will "no longer be mandated when and if Caucasians become minorities within the state of California?" DeRonde's petition raises the question of whether the definition of a minority changes when the majority becomes the minority in a particular geographical unit.

Demographers predict, for instance, that Los Angeles will soon have a Hispanic majority. Will minority preference rules be shifted to favor whites when they become a minority there—or in any city or state or in the nation at large? Or will the preference cease only when the minority proportion in designated institutions, professions or occupational levels equals or exceeds their proportion in the total population?

The District of Columbia provides a potential laboratory for consideration of these questions. D.C. affirmative action plans are presently applied in favor of blacks and Hispanics, although whites (as well as Hispanics) now constitute the minority population of the District. Although the District Council on March 26, 1979, rejected a motion to eliminate racial designations before the names of candidates for appointment to the District's boards and commissions and indicated its expectation that the D.C. Human Rights Commission would keep track of such designations for affirmative action purposes, it is still imposible to determine the exact racial composition of the D.C. government. The prevailing impression is that blacks are overrepresented even in terms of their majority status within the District.

Could black pick preference within the District be successfully challenged by members of the white minority? Will the courts rule that blacks will continue to remain the preferred minority in the District so long as they remain a minority within the Washington metropolitan region or in the nation as a whole? Or will the measure be one of proportional representation in particular levels of the bureaucracy or the professions? If affirmative action in favor of preferred minorities is reversed, does the reversal mean reversion to a color-blind system or to one in which positive preference is given to the newly defined preferred minorities? Court ruling have left undefined the temporal and spatial limitations of affirmative action.

On May 28, Iris Kern, the only fulltime white professor in the seven-member department of social welfare at the University of the District of Columbia, won a default judgment against the University in the U.S. District Court on the grounds that she had been passed ever for promotion and pay increases because she is white. Although the Kern case did not come to grips directly with the temporal and spatial aspects of affirmative action, one can expect an increasing number of court cases that will deal with these aspects.

The Supreme Court sidestepped the *DeFunis* case in the 1960s on the ground that DeFunis succeeded nevertheless in obtaining the education he had claimed was denied him because of the application of unequal standards to different races in the admissions procedure he challenged. When the Supreme Court finally ruled on the *Bakke* case in 1978 and on the *Weber* case in 1979, it set legal standards for affirmative action programs, but offered ambiguous interpretations of the moral and ethical aspects of racial preference. Affirmative action programs have not quickly solved the problems they were meant to eliminate and have in some cases exacerbated racial tensions.

Since preferential treatment in a democracy is fraught with popular emotion and political hazard, as well as with logical inconsistencies, the answer to be given by the courts in future cases will not be easy, but must be quick. Further delay in defining the temporal and geographical dimensions of racially defined programs of preference can only lead to more divisiveness and bitterness.

NOTE: The writer teaches American studies at the George Washington University and the University of Maryland

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[From the Washington Post, July 10, 1980]

JUSTICE BLIND-SIDED

(By George F. Will)

The Supreme Court has closed for the summer, so the Constitution is safe until October. But before the brethren departed, they damaged it considerably by affirming, 6 to 3, the constitutionality of the first law by which Congress created a legislative classification for entitlement to benefits based solely on race.

Speaking for the majority, Chief Justice Burger said "appropriate deference" to Congress requires acceptance of the law reserving 10 percent of certain public works funds for contracting firms controlled by members of six government-preferred minorities ("Negroes, Spanish-speaking, Orientals, Indians, Eskimos, Aleuts"). This, even if the firms are not the lowest bidders and fail to satisfy other criteria that nonminority competitors must satisfy.

Burger says the constitutional power to provide for the "general welfare" gives Congress "latitude" to allocate special rights to certain racial or ethnic groups. This, in spite of the 14th Amendment's guarantee of "equal protection of the laws" for all persons. And in spite of the constituting doctrine of all open societies, on which the 14th Amendment rests—the doctrine that rights belong to persons, not races.

Burger recognizes that discrimination on behalf of the preferred minorities will injure some competitors who are entirely innocent of wrongdoing. Astonishingly, he says, complacently and wrongly, that this is an "incidental consequence of the program, not part of its objective." But injuring some of the competitive firms is not "incidential", it is the essence of a program designed to give privileges to uncompetitive firms.

Justice Stewart, dissenting, noted that only twice before has the court found constitutional a government program imposing injury on the basis of race. That was during World War II, in the infamous Japanese-American curfew and exclusion cases. But when Stewart upholds forced busing, which involves assigning children to schools on the basis of race, he helps diminish resistance to official actions based on race.

Justice Powell sided with the majority, in spite of the fact that in his Bakke opinion he said: "It is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others." Now Powell seems to say that to be constitutional, a "race-conscious" program must at least be "temporary," so it "will not last longer than the discriminatory effects it is designed to eliminate." But Congress can renew such programs, thereby renewing its call on the court's "appropriate deference." There hardly can be criteria for determining when all ethnic groups have received recompense for all injuries inflicted by history on their ancestors.

By creating privileges based on race, the government reinforces—even teaches—the noxious habit of thinking of people as mere parts of classes. And as Justice Stevens asks in dissent, "What percentage of Oriental blood or what degree of Spanish-speaking skill is required for membership in the preferred class?" Now the government must devise its version of the Nazi laws that defined who is a Jew, Stewart says, "Our statute books will once again have to contain laws that reflect the odious practice of delineating the qualities that make one person a Negro and make another white."

This "slapdash" law (Stevens' description) is unlike, say, the Voting Rights Act. It is not designed to remove barriers to free competition. It is designed to curtail free competition. As Stevens says, "A comparable approach in the electoral contest would support a rule requiring that at least 10 percent of the candidates elected to the legislature be members of specified racial minorities."

Powell says, incongruously, "The time cannot come too soon when no governmental decision will be based upon immutable characteristics of pigmentation or origin." But by joining the majority, he said; now would be too soon.

Eighty-four years ago, in a noble dissent against a ruling that segregation was constitutional, Justice John Marshall Harlan insisted that "our Constitution is color-blind." It wasn't then; it isn't now; and because of what the court has done, it may never be. To the civil rights movement—when there was a civil rights movement; before it became just another movement maneuvering for economic redistribution—Harlan was a hero.

Burger concluded his opinion with a bromide from Justice Brandeis: "To stay experimentation in things social and economic is a grave responsibility." But the law the court has condoned just puts a different, "progressive" spin on the familiar evil of conditioning government favors on the basis of race. The chief justice bears grave responsibility for rationalizing, as Congress did not bother to do, congressional "experimentation" with racism.

[From the Washington Post, Mar. 4, 1981]

Equal Merit, Equal Opportunity

(By James Q. Wilson)

No issue better illlustrates the gap between elite and mass opinion than that of affirmative action—the requirement that, in the selection of persons for valued positions, some rule other than equal opportunity for persons of equal merit be applied. Whether called targets, goals, quotas or compensation, the principle is opposed by the great majority of Americans: Indeed, they deny it is a principle. The spokesmen for civil rights and feminist and liberal organizations defend the practice and lament the threat to it posed by President Reagan.

Jimmy Carter's Justice Department, in one of many eleventh-hour regulations adopted by the outgoing administration, signed a consent decree that, in effect, required that any examination used to select persons for the civil service would result in the hiring of minoritiles in the same proportion as those who took the test. The panel on social justice of Carter's Commission for a National Agenda for the Eighties calls for affirmative action plans "that take race into consideration" because a "colorblind remedy" would not remedy past abuses. The object is not equality of opportunity, the panel states in all candor, but an increase in the number of blacks, Hispanics, women and minorities in a particular labor force.

The faculty of arts and sciences of Harvard University has recently debated a proposal to accomplish the same thing in faculty appointments—that is, to find ways of ensuring not simply that all suitable candidtates are vigorously recruited and fairly judged but that the numbers of women and blacks in the faculty will increase.

The political cost of such measures—the rage they induce in citizens who see in such measures little more than political patronage—will, in the long run, be less than their moral cost. What is at stake, I think, is the motive force, the emotional wellsprings, of the long and still-unended struggle for human decency. The abused and oppressed descendants of American slaves did not enlist the attention or arouse the compassion of America by force of arms or superiority of numbers but by dramatizing, in ways that most Americans could no longer ignore, the elementary justice of their claims for the right to vote, to enter public accommodations, to find jobs and to buy houses. When Sen. Everett Dirksen said that civil rights was an idea whose time had come, he meant, I think, that it was an idea whose moral claim could no longer be denied.

I was taught, in school and in college, that there were no grounds for excluding a person from the enjoyment of a fundamental right because of race or religion. The Constitution was, or ought to be, colorblind. I never heard or read a plausible argument against that view; I think there is none. It has that clarity and power that, when evoked by a suitable issue or test case, will sweep all else before it. What can one say in response? Only that some race or religion is inferior, and that argument is not only wrong, it is unintelligible.

Race, religion or sex may still be taken into account in human affairs, but only with respect to those matters where men and women do not have presumptively equal claims. Where no claim of fundamental right is at stake, then the degree to which the accidents of group identity are properly considered should be decided by the purposes of the offices or resources being distributed.

In one sense, affirmative action is as old—and as unobjectionable—as the first ethnically balanced ticket for municipal office got up by the sachems of Tammany Hall. We do not object to an Irishman, an Italian, a Jew and a black being nominated for office because we know that a government does not govern simply, or even chiefly, by virtue of the competence of its governors, but rules as much by the confidence it can inspire in the diverse community over which it claims authority, and that confidence will depend in no small part on how representative of the community its chief officeholders appear to be.

Similarly, a college may decide that its purpose is not simply to find the brightest students and make them still brighter but also to have a competitive athletic program, retain the support of generous alumni and offer to students an opportunity to mingle among young persons of different background, talents and interests. Accordingly, it may admit students by a variety of criteria, including strength, speed, familial connections, race and sex.

But where the institution to which access is sought is to be judged solely, or principally, by the merit of its members and the excellence of its practices, then to admit any standard other than merit, fairly determined, is to deny the reason for the institution's existence. We do not wish to be served by a "representative" collection of brain surgeons, or naval aviators, or physicists, but by the very best such persons we can obtain, provided we are confident that no one has been unfairly excluded from consideration. Our objection to unfair exclusion is not so much that anyone has a right to be a brain surgeon or whatever, but that excluding any group from fair consideration reduces our chances of finding all of the very best surgeons.

It is possible, in short, to distinguish between circumstances where representativeness is more or less desirable as a consideration in appointment. But other difficulties remain. One involves the cost: Who is to be denied a position in order to favor another?

Those who bear the costs of affirmative action are rarely those members of the elite who most vigorously defend it; it is, rather, the (typically) less advantaged white male who does not receive the appointment or office, even though he may be personally, blameless for whatever discrimination once prevented blacks or women from receiving it. Affirmative action is often thought of as a form of restitution, but those who pay the restitution are not those responsible for the earlier evil, or even those most able to pay. Allan Bakke did not, so far as we know, oppress blacks, but Justices Brennan and Marshall were prepared to act as if he had.

The other difficulty is graver: the implied racism and sexism of the view that without special privileges women, blacks and other minorities would lose out in any fair competition. What is a "fair competition" is, of course, not easily decided; clearly, a person deprived of educational and economic advantages will be less able to compete than one who has had every such advantage. But a black or a woman of middle-class parents who graduates from a prestigious college with a good record is not disadvantaged in any subsequent competition for position or office; indeed, he or she is greatly advantaged, compared to a poor white with a high school diploma and little else. To suggest that these blacks and women will be "underrepresented" compared with the latter unless they are given privileged access to subsequent careers is to libel the former and enrage the latter.

That presidential commissions, Supreme Court justices and members of an otherwise distinguished faculty are so eager to embrace an unexamined and undifferentiated slogan without offering, or thinking it necessary to offer, reasoned arguments and useful distinctions is a sad measure of the intellectual poverty and moral bankruptcy of contemporary discussion of what was once—not so long ago—a shining crusade on behalf of great principle: equal opportunity for all persons of equal merit.

NOTE: The writer is Shattuck professor of government at Harvard University.

[From the New York Times, Jan. 10, 1982]

AN AFFIRMATIVE LOOK AT HIRING QUOTAS

(By Barbara R. Bergmann)

Is affirmative action a burden on American business? Bradford Reynolds, the head of the Justice Department's Civil Rights Division, apparently thinks so. At a press conference recently Mr. Reynolds said that he hoped to get the Supreme Court to reverse the action it took in the Weber case, in which the Court upheld the voluntary use by companies of numerical goals in advancing minority candidates.

Without a reversal in that case, in which steelworker Brian F. Weber, a white, unsuccessfully argued that a special training program for blacks discriminated against whites, there is little prospect of an end to use of compulsary hiring goals as a judicially ordered remedy for proven discrimination.

One of the reporters who heard Reynold's remarks called around to get some reaction from private attorneys who might be expected to support the Justice Department's campaign against affirmative action. He apparently found none.

An attorney who usually represents business concerns accused of race and sex discrimination told the reporter that such a move, in the unlikely event it succceeded, would be counter to corporate interests. It would seem that at least part of the American business community thinks that the setting of numerical goals for employment and promotion by race and by sex is useful and proper.

One reason for business to favor affirmative action is fairly easy to understand, since it concerns short-run pocketbook interests. As long as the antidiscrimination laws remain on the books, companies will want to position themselves so that they are less vulnerable to judgments for expensive class-action claims of discrimination.

Usually it is the upper management of a company that is most acutely aware of the possibility of such suits. It needs an effective way to instruct middle and lower management to change longstanding habits controlling the choice of people to hire, train and promote. Vaguely worded directives to hire and promote in a nondiscriminatory way seldom lead to change.

Many of today's executives have been taught in business school to "go by the numbers." They are used to making and following numerical plans in the fields of production, sales and finance. Extending this to hiring and promotion seems perfectly natural.

Quite apart from a desire to reduce vulnerability to lawsuits, at least some companies see progress against race and sex discrimination through affirmative action as not in conflict with their long-run economic interest.

The usual case made against affirmative action by its opponents assumes that companies will be forced to hire and promote unqualified people in order to meet numerical goals. The likelihood of this is reduced if the goals are set and implemented in a reasonable manner. Furthermore there are circumstances where hiring to goals can be expected to improve the average quality of a company's employees rather than the reverse.

White males now account for less than 50 percent of the United States labor force. The other 50 percent contains good candidates for many of the work groups currently monopolized by white males.

What makes it difficult for business to integrate these situations is that some of the white males currently employed may feel shamed and degraded at having to interact with a black or a woman as an equal, or at having to take orders from such a person. Behavior based on such feelings can interfere with the learning opportunities of a new employee of the "wrong" race or sex and can lower the productivity of the entire establishment. The use of legally mandated goals helps employers to deal with internal opposition more effectively.

Opponents of affirmative action emphasize that such procedures may cause unfairness to white males who are passed over despite being the best qualified. That this may occur under affirmative action cannot be doubted. On the other hand, in the absence of affirmative action, women and blacks are routinely passed over in favor of less qualified white men, as attested to by mountains of evidence presented in hundreds of Federal courtrooms.

Whether we welcome or reject affirmative action depends on a judgment about which set of circumstances will hurt our consciences and our economy the least. The Supreme Court in the Weber case has said essentially that in passing the civil rights act, we have chosen to give priority to eliminating injustices against blacks and women.

Having said this, it must be remarked that the conscience of business people has never been very tender cluded candidates of superior talents, when it has come to the rights of excluded candidates of superior talents. Favoritism and nepotism are common and accepted in American business, particularly for the best jobs.

While they may not be sticklers for exact justice, many American business people believe that the stability and prosperity of business in the long run will be improved by the improvement of employment opportunities for blacks and for women.

Taking this longer-run perspective, J. Richard Munro, the president of Time Inc., recently suggested that American business work harder on voluntary affirmative action, now that government activity has slowed down. Executives like Mr. Munro understand that exclusion of blacks from many jobs has a lot to do with the perpetuation of high crime rates, which degrade the business environment. They know that high divorce and illegitimacy rates mean that the only alternative to better jobs for women is more welfare dependency, for which business will be forced to pay a good share.

If the antidiscrimination laws were not on the books, the business community would probably not be campaigning for their enactment. But since they are there and are not likely to come off, business people can see that they are not without their advantages.

Note: Barbara R. Bergmann is a professor of economics at the University of Maryland and one of a panel of four economists appearing regularly in the Sunday Business Section.

[From the Washington Post, Sept. 16, 1981]

RACE, MERIT, AND JOBS

(By William Raspberry)

Back in 1972, a federal judge ordered the Alabama Department of Public Safety to hire one black highway patrolman for every new white trooper until the overall force was 25 percent black.

I thought the order made sense.

In 1981, the D.C. Office of Human Rights ordered the District fire department to fill 60 of its 70 vacancies with minority applicants and, after that, to give preference to minorities until the racial makeup of the department approximates the racial makeup of the city.

I don't know whether that one makes sense or not, and neither, so far as I can tell, does human rights director Anita Shelton, who issued the order.

In the Alabama case, the problem was clear-cut racial discrimination. There were some 600 state troopers, and all of them were white. A federal judge found evidence of overt discrimination and was upheld on appeal.

There has been no similar finding of discrimination against minorities by the local fire department. The principal evidence—so far as I can tell, the only evidence—of bias is the fact that in a city whose population is some 70 percent black, 63 percent of the firefighters are white.

And on the basis of that evidence, Shelton ordered the department to fill 60 of its 70 vacancies with minority applicants, even though most of those who made the top scores on the entrance exam were white.

She has now been ordered by the city administrator's office to hold public hearings to determine whether the skewed racial makeup of the department is the result of racial discrimination. It's something that might have occurred to Shelton without prodding from Veronica Pace, the aide who issued the order.

While there are superficial similarities between the 1972 situation in Alabama and the 1981 situation in the District, there are also important differences. All the relevant officials involved in the Alabama case were white. White people ran the state and were quite obviously determined to run it for the benefit of white people.

In the District, the key officials—the mayor, the city administrator, the fire chief—are black. It takes a good deal of imagining to suppose that these officials are guilty of discriminating in favor of white firefighter applicants.

Indeed, Shelton has not made such a charge. Her contention is that the discriminatory instrument is the entrance exam, on which white applicants tend to score higher than blacks. But for this fact to translate into discrimination, there ought to be some showing—in public hearings or otherwise—that the test is biased in favor of whites in ways that have nothing to do with competency in firefighting or in training for the job.

It would have made more sense if Shelton had ordered the establishment of a cutoff score for success on the entrance exam, with selections to be made randomly from those who passed the exam, as Mayor Barry did in the case of the police department.

The unspoken issue is whether jobs and other privileges are to be awarded on the basis of merit, however determined, or on the basis of racial proportion. A case can be made either way.

You can establish criteria and make appointments based on how well applicants meet those criteria, without regard to race or other considerations. Or you can make the appointments reflect the racial makeup of the city, without regard to test scores or other measures of merit. You can even combine the two, ordering in effect, the establishment of two lists, one white, one black, with 30 percent of the appointments to be made from the top of the white list, 70 percent from the highest-scoring blacks. The same choices hold for promotions to supervisory ranks. One of the two assistant chief positions could be reserved for blacks; two of the five deputy chiefs would be white. The chief would automatically be black, since more than half the population is black.

My suspicion is that those who support Anita Shelton's order would want no part of such a two-track personnel system. If the five best-qualified applicants for the deputy jobs were black, they would insist that the five blacks be appointed.

In other words: merit, where merit works to the advantage of blacks; proportional appointment where merit favors whites.

Isn't it about time we opted for simple fairness? It's legitimate to debate the qualities (intelligence, reliability, physical condition and so on) we want in firefighters; it's legitimate to argue about how best to measure these qualities.

What strikes me as illegitimate, fundamentally unfair and destructive of popular support for affirmative action is to insist on bending the rules and requirements until they produce some arbitrary racial proportion.

[From the Washington Post, Oct. 5, 1981]

A Bean Ball Aimed at Affirmative Action

(By William Raspberry)

It was a beautiful windup.

"If a person is denied employment because of race, national origin or sex," the assistant attorney general for civil rights said, "the consequences may well be so serious as to make other civil rights largely academic. For example, access to equality of housing opportunity has little practical significance if an individual is discriminated against in the job market and cannot earn a wage to purchase decent housing. Similarly, a diploma becomes less valuable if it fails to open doors to positions for which the person was trained."

Then came the delivery: a sweeping curve so wide of the plate as to constitute a wild pitch. Or a bean ball. William Bradford Reynolds, the administration official charged with civil rights enforcement, called for an end to affirmative action as generally understood.

"We no longer will insist upon, or in any respect support, the use of quotas or any other numerical statistical formulae designed to provide to non-victims of discrimination preferential treatment based on race, sex, national origin or religion."

It was a definition calculated to cut the moral ground from under affirmative action. After all, who (except white men, for whom it is a matter of routine) can countenance preferential treatment for "non-victims of discrimination"?

The remarkable thing is that he seems to understand the problem that led to such concepts as "goals and timetables" for correcting racially skewed hiring patterns.

"Affirmative action," as originally promulgated by President Lyndon Johnson, involved expanded recruitment of minority applicants. It quickly became apparent, however, that employers who wished to continue to discriminate could do so, even while casting a wider recruitment net. The question arose as to what might properly be done if such an employer met the Johnson requirement by *interviewing* impressive numbers of minorities without significantly changing his *hiring* patterns.

The answer: insist on changed results—or at the very least an explanation of why the results had't changed.

Reynolds, naturally, describes it differently. Some, he said, "were impatient with the progress of minorities and began to urge use of new hiring requirements designed to achieve immediate numerical equality among the races in the place of work."

He would handle the recalcitrant employer by supporting suits by applicants who could show they had been discriminated against in the personnel office. Lots of luck. To begin with, the person who is rejected by a large company usually cannot know who got "his" job, let alone whether his qualifications were equal or better. Under the present rules, the rejected applicant could point to the dearth of minorities or females on the employer's work force as evidence of discrimination. If the complaint were upheld, the employer could be required to do something about the makeup of his staff.

Not under the Reynolds rule. To the extent that "doing something" about evident discrimination involved a requirement to hire members of a discriminated-against group—without regard to whether the individuals hired had themselves been discriminated against by the employer—it would amount to preferential treatment at the expense of white potential employees; reverse discrimination.

Where an applicant is able to prove that he has been discriminated against, Reynolds would require that he be hired and—another big windup—"seek injunctive relief directing the employer to make future employment decisions on a nondiscriminatory, race-neutral and sex-neutral basis." Then:

"To ensure that the injuction is followed, we will require as part of the remedy that the employer make special efforts to reach minority or female workers through comprehensive use of employment recruitment techniques, such as media advertising and visiting high schools and college campuses * * * (and) regularly file records detailing its recruitment efforts and revealing the number of minority and female applicants being attracted." He would even seek, "where appropriate," percentage recruitment goals.

And again the wide-breaking pitch: Reynolds is talking recruitment, not hiring. This whole elaborate scheme of injunctions and follow-up and record-filing deals only with getting minority applicants.

Victims of discrimination could tell him that it doesn't help a lot to require a biased employer to take your application. It's getting the job that counts.

[From the Washington Star, July 22, 1980]

THE INEQUALITY DOCTRINE

(By James J. Kilpatrick)

If nominations are in order for the worst Supreme Court decision of the term, let me porpose *Fullilove vs. Klutznick,* decided on July 2. This was the case in which the court held that when it comes to equal access to federal contracts, some are more equal than others.

One of the oldest and most cherished doctrines of our constitutional law is that constitutional rights are individual rights. Another doctrine, not so old but just as precious, is that the Constitution is color-blind. The Fifth Amendment says that "no person" shall be treated unjustly, and the Fourteenth Amendment prohibits discrimination—implicity, racial discrimination—against "any person."

But with its decision in *Fullilove,* a majority of the court cast these old doctrines to the four winds. The effect is to rule that some persons may be treated unjustly, that some persons may be excluded from federal programs solely because of the color of their skins.

We are talking, of course, of white persons.

These are the facts: Through the Public Works Employment Act of 1977, Congress appropriated $4 billion for projects across the country. The law contained this express provision: "Except to the extent that the Secretary of Commerce determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 percentum of the amount of each grant shall be expressed for minority business enterprises."

The act went on to define acceptable minority group members as "Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts."

The effect of this racially discriminatory provision was absolutely to bar non-minority contractors from even bidding upon $400 million in federal contracts. The provision precisely echoes the anti-Catholic notices that once were posted in parts of New England: No Irish need apply. The law is a racist law.

But, ah, said the court, the provision is benignly racist. It is remedially racist. It is temporarily and experimentally racist. Nothing in the Constitution prohibits Congress from enacting racially discriminatory laws if the laws are intended to assist minorities who have been socially or economically disadvantaged in the past.

And, besides, $400 million really isn't much. Barring non-minority contractors from this paltry sum is only "an incidental consequence" of the program. The burden imposed upon the barred contractors is "relatively light." And after all, the 1977 appropriation is limited in its scope.

Incredibly, these specious contentions were accepted by such ordinarily sound justices as Burger and Powell. Three members of the court—Stewart, Rehnquist and Stevens—emphatically dissented. Stevens said bluntly that the $400 million set-aside "creates monopoly privileges for a class of investors defined solely by racial characteristics." And he warned that the court was creating a precedent for racial quotes that will come back to haunt the law.

Stewart had the last word: "The equal protection standard of the Constitution has one clear and central meaning—it absolutely prohibits invidious discrimination by government * * * Racial discrimination is by definition invidious discrimination. The rule cannot be any different when the persons injured by a racially biased law are not members of a racial minority. The guarantee of equal protection is universal in its application."

In Stewart's view, the majority had abandoned a long line of decisions attempting to get away from racial classification. Now, the majority had placed and imprimatur "on the creation once again by government of privileges based on birth." Statutes will have to be drawn to define such terms as "Nergo" and "Spanish-speaking." The result will be to foster notions of "racial entitlement"—a system of rewards and apportionments geared to racial criteria.

Thirteen times in his opinion for the court, Burger remarked upon the "limited" or "narrow" scope of the 1977 act. But in upholding this unjust and evil law, he opened broad doors to a return of discrimination by race. Sound law would slam them shut.

[From the Wall Street Journal, Aug. 5, 1981]

SPEAKING UP ON AFFIRMATIVE ACTION

(By Walter Berns)

Not so long ago, in a seminar room at the Federal Executive Institute in Charlottesville, Va., (a sort of "think tank" for high-level civil servants), a number of federal government career executives, mostly strangers to one another, were chatting informally about their management problems. At a certain point, one of them blurted out, no doubt inadvertently, that in his experience the greatest obstacle to intelligent and efficient management was the government's own affirmative action program. At which point the conversation came to an abrupt end, just as if he had said. "Well, my broker is E. F. Hutton, and E. F. Hutton says * * *"

I have never had occasion to learn what it is that E. F. Hutton has to say, nor was I present in Charlottesville on the reported occasion—the episode is recounted in a recent issue of the Washington Monthly—but I have no reason to doubt its authenticity; it has the ring of truth about it.

Every federal executive knows, or ought to know, that the equal employment opportunity program has been corrupted beyond recognition, but it is the rate executive who is willing or, as we shall see, is permitted, to talk about this. I mean talk about it publicly; there are many who are willing to say much if they can say it privately or, better yet, anonymously.

I learned this immediately after publishing my first article on this subject in these pages ("The Carter Agreement That Creates Racial Quotas," Feb. 5, 1981). That piece, and a subsequent article in the May issue of Commentary ("Let Me Call You Quotas, Sweetheart") brought me a flood of letters and phone callls from federal officials (Most of them anonymous) assuring me that the situation was even worse than I had depicted.

I had written critically of the consent decree "negotiated" by the Justice Department on behalf of the Office of Personnel Management, according to which the OPM was required to phase out its practice of hiring by competitive examination and to replace it with a system of hiring by racial quotas. In the course of reciting the details of this devious business, (I called it a sweetheart deal, coming out of a sweetheart suit, because the Justice Department, asking nothing in return, actually gave the plaintiffs more than they publicly dared to ask for) I pointed out that the Justice Department had signed the agreement without informing the agencies that would be most affected by it, and had signed it over the objections of the OPM, the agency principally concerned with Executive Branch hiring.

THE NAME OF THE GAME

The mail brought me a mountain of materials—in-house journals, memoranda and the like—demonstrating that the name of the game now being played in many if not most major federal agencies is not equal employment opportunity, but unequal employment opportunity, otherwise known as affirmative action.

Almost every one of these agencies has its own Office of Civil Rights, staffed, as these ancillary operations usually are, by misfits and discards from offices where real work has to be done, and they stand ready and eager to hear complaints of discriminatory treatment (on the basis of race, sex, national origin and even age.)

Of discrimination there is, I am assured, very little; but of complaints there is a growing avalanche. Some employes apparently do little but file complaints—eight in six months is the individual record in one agency, and 30 in just over a year in another—and superviors can do nothing about it (except, of course, to recommend the transfer of the complainer to the agency's Office of Civil Rights).

To threaten to discharge someone because he spends his time filing complaints is itself a ground for formal complaint. The point has been reached where time spent filing and otherwise working on complaints is considered time spent on the job, the job for which one is being paid, and to be asked to forgo the former in favor of the latter justifies the filing of still another complaint.

It takes a lot of time to pursue a complaint. If the complainant is not satisfied with the judgment rendered within his own agency, he is entitled to a hearing before an examiner in the Equal Employment Opportunity Commission, the agency that became notorious under the recently retired Eleanor Holmes Norton. After that, to skip over a few of the stages in this almost infinite process, he can always go to court.

Many do and, in one way or another, they all win because the accused supervisor can only lose. For even if the supervisor manages to escape dismissal or reprimand, in the climate now prevailing he cannot escape the suspicion of deserving dismissal or reprimand. Besides, he can be made the object of a personal damage suit, a prospect made much more likely by a recent Supreme Court decison. Having personally to meet the costs of defending such actions, to say nothing of the damages if the plaintiffs prevail, is enough to persuade most federal supervisors to tread carefully and keep their mouths shut.

They will want to avoid the fate of—let us call him—Mr. Jones, who, after reviewing the resumes of many applicants and interviewing some of them, offered a position to—let us call her—Ms. Smith, who, after being "cleared," as they say (for this was a sensitive agency), came back to Mr. Jones and informed him that she was expecting a child and could work only on a part-time basis, at which point Mr. Jones made the mistake of saying that he was sorry but it was a full-time position.

What happened after this can be summed up as follows: (1) she sued him and the agency; (2) the agency, ever eager to avoid the charge of being soft on sex discrimination (and, besides, it was the taxpayers' money), settled with *her* and joined in the suit against *him;* (3) he was formally reprimanded, which, being made a part of his official record, will preclude his ever again being promoted; and (4) he was left to pay some $1,800 in legal expenses out of his own pocket.

The mail also brought me copies of what might be called Eleanor Holmes Norton's legacy to the federal civil service: a test to end all tests by discrediting testing.

When she was still "chair" of the EEOC, Eleanor Norton said that "tests do not tell us very much about who is qualified to do the job," and while this was not true of the former test, the one scrapped by the Justice Department as part of that sweetheart deal, it is emphatically true of the test that replaced it.

The old one, the Professional and Administrative Career Examination (the PACE), was a real test, one that most applicants failed: white as well as black and Hispanic, male as well as female. It is difficult to imagine anyone failing the new one.

On one form, applicants are asked to give their names, addresses and Social Security numbers; on another "supplemental form," to be completed at home and returned "in the enclosed envelope within 15 days," they are asked merely to describe what they "consider to be [their] major accomplishments."(Those without accomplishment or the ability to compose a narrative describing them are free to rely on their friends for assistance, or perhaps some friendly commercial resume-writing service.) One would like to think there is someone in the new administration with the courage to blow the whistle on this business.

LEAVE IT TO HILLSDALE

Unfortunately (and here I am no longer relying on my mail), federal executives are not the only ones to hold their public tongues on affirmative action. So do university presidents—the major universities appoint "vice presidents for compliance" and leave it to little Hillsdale College to take the government to court—and, most surprisingly, so do the executives of the major private corporations.

If they think what is going on within the federal workforce won't eventually affect them, or, if it has already begun to affect them, that they have seen the worst of it, or, even, that the Reagan administration will be able to put an end to it, the should wake up.

The administration is not going to be able to defeat the powerful affirmative action lobby outside as well as inside the government—I'm thinking primarily of the EEOC, the Civil Rights Division in Justice, and the Labor Department's Office of Federal Contract Compliance Programs—unless it acquires more vocal public support than it now has.

And that support will not be forthcoming so long as the persons who ought to be leaders of that public can be cowed into silence or gulled into thinking that the equal employment opportunity law is being used only, or nowadays even primarily, to eliminate discrimination.

That was Congress's intention when it enacted Title VII; indeed, Title VII *forbids* what has come to be called affirmative action or reverse discrimination, to say nothing of quotas, but the government now uses it to promote affirmative action as well as quotas.

It would be interesting to know how many private corporation executives—the CEOs, not personnel managers—even know of the existence of the Uniform Guidelines on Employee Selection Procedures. They ought to know about them; these guidelines were adopted in 1978 and are avowedly designed require affirmative action hiring on the part of private and public employers alike.

If the Justice Department has its way—which is to say, if that consent decree is given final approval by the federal judge with jurisdiction in the case—the guidelines will be used to impose a quota hiring system, on the federal government immediately and on private employers eventually. Fortunately, it is formally within the power of the new administration to modify or even abolish those guidelines, but to do this it will need more support than it seems to be getting.

NOTE: Mr. Berns is a resident scholar at the American Enterprise Institute.

[From the Wall Street Journal, Apr. 27, 1982]

TEACHERS WHO LOST JOBS BECAUSE OF RACE

(By Walter Berns)

Last year, I introduced an article on this page with the statement: "Seventeen years ago Congress set out to eliminate discrimination in the workplace. To accomplish this, it enacted the Civil Rights Act of 1964, Title VII of which declares it to be unlawful for an employer 'to fail or refuse to hire or to discharge any individual * * * because of such individual's race, color, religion, sex, or national origin.' " ("The Carter Agreement That Creates Racial Quotas," Feb. 5, 1981.) Presumably, hiring and firing were now to be done on a nondiscriminatory basis.

The occasion for the article was a consent decree, approved a month earlier by a federal judge, according to which the government agreed to scrap an aptitude test used to screen applicants for civil service jobs. The test was said to be discriminatory because too few blacks and Hispanics managed to pass it, and very few with scores high enough to insure their being employed. In place of the test, the government agreed to inaugurate what in effect is a racial quota system. So much for hiring on a nondiscriminatory basis. What about firings?

This past February, even as the press was excoriating the Reagan administration for failing to move swiftly on the affirmative-action front, the U.S. Court of Appeals in Boston affirmed an order discharging over 600 of Boston's public school teachers solely because of their race.

They were white; or more precisely, they were not black. They were also tenured professionals with an average of 10 years seniority and working under a contract—part of a valid collective bargaining agreement—specifying that, in the event reductions in force became necessary, they would be discharged in reverse order of seniority. Except insofar as it honored this seniority principle in the selection of the whites to be laid off, the Boston school committee violated this contract. No black teachers, however junior, were laid off; indeed, during this same period, 15 blacks were newly hired. So much for discharging on a nondiscriminatory basis.

HIRING ON A ONE-FOR-ONE BASIS

This mass layoff of teachers is the latest episode in the Boston public school crisis that began, or, at least, that came to the attention of a wider-than-Boston public, in 1974 when Judge W. Arthur Garrity of the U.S. District Court ruled that Boston was maintaining a dual school system, one for whites and one for blacks. The following year, having determined there was racial discrimination not only in pupil assignment but in faculty and staff hiring and assignment, Judge Garrity ordered the city to hire teachers on a one-for-one basis until the proportion of black teachers reached 20 percent (thus approximating the proportion of blacks in the city) and to pursue a policy of affirmative recruitment of black teachers until that figure reached 25 percent. By early 1981, the proportion of black teachers had reached 19.09 percent.

Meanwhile, and thanks in large part to Judge Garrity's desegregation orders, the proportion of white students in Boston's public schools, 61 percent in 1971-72, had fallen to approximately 30 percent. And public school enrollment itself had experienced a steady and severe decline.

The schools also faced a fiscal crisis, brought on in part by the taxpayers' revolt that culminated in the passage of Proposition 2½. The five-person school committee (now three whites and two blacks) faced the prospect of having to reduce the number of teachers. It also had to decide whether to respect the contract with the Boston Teachers Union or obey the court's order to reach—and, presumably, maintain—that 20 percent quota of black teachers. It decided to obey the court order, and, to the surprise of no one, Judge Garrity approved this decision. (Untypically, but graciously, he permitted the school committee temporarily to suspend its efforts to recruit black teachers until their proportion reached 25 percent.) It was Judge Garrity's approval of this layoff plan that the Court of Appeals affirmed last Feb. 17. So it came about that, the contract notwithstanding, teachers were discharged on a racial basis.

To say the least, that contract did not figure prominently in Judge Campbell's opinion for the Court of Appeals; he disposed of it in a brief footnote. The contract, he said, cannot "bar a federal court from granting effective relief for constitutional violations." And that was that. Of course, neither the discharged teachers nor the union had been responsible for any constitutional violations; the Constitution had been violated by the Boston school committee when it maintained the dual school system. Then, too, the black teachers who benefited from the layoff plan had never been victims of hiring discrimination; if anything, having been hired under the quota system, many of them were the beneficiaries of reverse discrimination. By what right should they, in the face of a nondiscriminatory contact, be preferred at the expense of teachers who had done no wrong to them or to anyone else?

The union asked this question in the appeals court and was told that it did not understand the nature of the case. The Court of Appeals said this was not a case pitting white teacher against black teacher; it was a case brought by black school children against the school board. Judge Garrity's original order requiring the school board to hire black teachers—now interpreted to forbid their being fired—was issued not to protect them, but, rather, to protect the black children. The hiring and firing orders were "designed to make the children whole, to vindicate their rights, and that is indeed their effect." It was not a question of preferring black teachers over white teachers who, admittedly, had done no wrong; it was a question of observing a contract or of benefiting the children—vindicating their rights and making them "whole"—and a labor contract could not stand in the way of action that benefits children who had been deprived of constitutional rights.

It seems important to know whether the children have been benefited by Judge Garrity's orders. The children were to be made "whole" through their attendance at nonsegregated schools—an idea one can readily accept—and by being taught by an integrated faculty, a faculty at least 20 percent black. Such a faculty, said the Court of Appeals, "provides black students with role models." This idea may have some validity, but when the Boston school committee used it back in 1974 to defend its assignment of black teachers to mostly black schools, Judge Garrity rejected it. "The record," he said, "is barren of evidence by supporting the argument." There may now be such evidence, but if so, the Court of Appeals didn't bother to point to it. Race-conscious remedies have apparently become so much a part of our law that evidence of their efficacy is no longer required.

TEACHERS' UNION IS APPEALING

By upholding this remedy, the First Circuit federal courts have created still one more racially based entitlement. Just as the consent decree created a racially based entitlement to federal jobs, and the amended Voting Rights Act, soon to be enacted by Congress, will create a racially based entitlement to representation in proportion to population, so we now have a racially based entitlement to job security, one that supersedes a job-security entitlement negotiated by a union on behalf of its members of all races.

No longer could Martin Luther King say that "Negroes are almost entirely a working people [whose] needs are identical with labor's needs." These court orders pit black worker against white worker in a matter that is vital to their lives. And by abrogating the principle of seniority, they strike at the heart of trade unionism, which is why the teachers' union is appealing the case to the Supreme Court.

It bears repeating, however, that the case being appealed is, formally at least, a school segregation case and not an employment discrimination case, which probably explains why Title VII of the 1964 Civil Rights Act does not figure in it. If the Boston Teachers Union were also to file a Title VII action against the Boston school committee and on behalf of the white teachers, who are the aggrieved parties here, the discrimination issue could be squarely faced. If the case were to reach the Supreme Court, the union might even win it. There is, after all, a section of Title VII that permits employers to apply different "conditions of employment pursuant to a bona fide seniority or merit system."

A few weeks ago, in a case involving this proviison, the Supreme Court upheld a seniority system against the charge that, while racially neutral in its terms, it had a discriminatory impact. That fact, the Court ruled 5-4, is not alone sufficient to invalidate the system. So, as I said, the union might yet win on this issue. Statutory language ought to carry some weight with our judges.

NOTE: Mr. Berns is a resident scholar at the American Enterprise Institute.

[From the Washington Post, May 4, 1982]

OUT OF THE AFFIRMATIVE ACTION QUAGMIRE

(By Diane Ravitch)

At present, it seems that there is nothing new to be added to the onging controversy about affirmative action. So much has been written by now that the issue itself seems to have grown stale, mired in tired rhetoric and unthinking assertion.

On one side are the advocates of women, blacks, Hispanics, gays the handicapped, veterans and others who have or seek protected status, and on the other are those who find special treatment of any kind objectionable. The former insist that their rights will be trampled if affirmative action ends, while their critics complain that preferences based on such criteria as race, sex and national origin turn the meaning and purpose of the Civil Rights Act upside down. By now, we have many times heard the arguments from both sides, and there seems to be no way out of the dilemma, other than through the marshalling of political power to impose the views of one side on the other.

Yet, the quagmire that this aspect of social policy is stuck in may be an artifact of the language of the Civil Rights Act. The deadlock, I suggest, results from the manner in which civil rights protections are written, not from any lack of clarity about their purpose. Anyone who has read the testimony before Congress in 1963 and '64, and the speeches of the sponsors of the Civil Rights Act, knows that the intent of Congress was to end invidious discrimination, whatever is source.

In passing the Civil Rights Act of 1964, Congress specified that certain kinds of discrimination would henceforth be illegal. In the years since then, groups that wish to have the special protection of the law have clamored to be added to the official list of protected minorities. In practice, this has meant competition for preferences, even for quotas, in hiring and in admission to competitive schools.

So long as we stick to the original practice of listing those groups that may not be discriminated against, those who are outside the mantle of civil rights protection will continue to seek protected status. The possibilities for the future were suggested in a report of the United States Commission on Civil Rights last year, which held out hope that white European ethnic groups might eventually receive the same federal protection now extended to blacks, Hispanics, women, American Indians and Asian-Americans. Despite the efforts of the present administration to undo affirmative action, there is already a substantial body of judicial opinion directing the allocation of jobs and status by race, sex, ethnicity and other such criteria.

There is a sensible and relatively painless way out of this deadlock. In accordance with our civil rights laws, every institution should adopt a straightforward declaration of nondiscrimination without naming the specific groups that will not be discriminated against. Every university, government agency, private employer and public institution might adopt as its policy the following statement: "We discriminate only in preferring those with the professional competence to perform the job for which they are hired. On no other grounds do we discriminate."

Each institution should clearly state the grounds on which it does discriminate. For exmple, a women's college might say in its catalogue, "In the selection of students, we admit only women, because we are a college historically committed to the higher education of women; furthermore, we prefer to admit students who have demonstrated the academic capacity to benefit by the kind of education that we offer. On no other grounds do we discriminate."

Would it not be eminently reasonable to reverse the customary language in this manner, so that each institution acknowledges the grounds on which it does discriminate and foreswears every other form of discrimination? This would remove no present rights: if a woman or black or gay or Hispanic or handicapped person failed to gain a job or promotion for which he or she was competent, then the courts would still be available for redress. Indeed, the protection against discrimination would be extended even more fully to cover not just those on a politically determined list of protected minorities, but also people who are discriminated against because of their height, weight, age, facial characteristics, or any other quality other than their competence to do the job.

The present semantic stalemate has become the province of vested interest groups, who have no interest in changing the rhetoric of preferences and quotas and affirmative action. Yet, in that direction, unless we change course, lies a society in which all jobs, promotions and admissions to competitive institutions will be allocated on the grounds of race sex religion and national origin, rather than without regard to such factors. Fresh thinking by Congress is needed now to restore the original equalitarian goals of the Civil Rights Act.

NOTE: The writer is an associate professor of education and history at Teachers College, Columbia University.

[From the Wall Street Journal, Nov. 28, 1980]

CHALLENGE TO AFFIRMATIVE ACTION

(By James F. Blumstein)

Everybody complains about the peasoup fog of the government's affirmative action requirements, but until recently nobody has done much about it.

Under the program federal regulations threaten to cut off or cut out government contracts for companies that don't actively strive to have a work force with racial balance that precisely mirrors the racial composition of the relevant labor pool. While there have been a few challenges to the government's procrustean enforcement of the program, only Firestone Tire & Rubber Co. has recently challenged the validity of the entire program itself. A hearing in the case has been set for Monday in U.S. District Court in Beaumont, Texas.

It is difficult to overestimate the potential importance of the core separation of powers issues raised in the Firestone litigation.

Typically, attention has focused on the details of conforming to the program. A government contractor must determine the racial composition of the relevant labor pool and compare that ratio to the racial balance of its own work force. If there is a difference, the employer must declare "underutilization" and take "affirmative action" to "overcome" that imbalance. No finding of racial discrimination is necessary.

FINE POINTS

Nice technical questions arise, such as how to define the appropriate labor pool, or how to define various job categories. In the Firestone situation, the technical issue is how to determine whether there is "underutilization" of minorities within the employer's work force. The government's position is that an employer must declare underutilization and adopt an affirmative action plan whenever there is any difference at all between the percentage of women or minorities in the available labor pool and the percentage of women or minorities in the employer's labor force. Firestone urges a more flexible approach than the government's absolute parity concept.

Although these technical issues are significant, emphasis on the details of implementation, has shoved into the background what could well be the Achilles heel of the entire affirmative action program—namely, its origin.

The entire bureaucratic enforcement structure rests not on legislation by Congress, but on an Executive Order issued unilaterally by President Johnson in 1965 after Congress, in passing the 1964 Civil Rights Act, refused to permit use of the federal funds cutoff technique to combat discriminatory employment practices.

Each President has the constitutional duty to determine the proper balance of power between the legislative and executive branches Since the affirmative action program is completely a product of executive action, the new administration is in a position to annul the program with a stroke of the executive pen. Then it would be up to Congress to take the initiative, if it chose, to establish such affirmative action policies.

Title VI of the 1964 Civil Rights Act bars race discrimination in all federally funded programs; federal agencies are authorized to cut off the flow of federal funds to noncomplying recipients. However, Title VI has several limitations that undermine the validity of the Executive Order program.

First, funds can be withdrawn only from specific programs guilty of non-compliance. In the Firestone case, the government's charge is that Firestone mistakenly refused to declare underutilization at a single plant. The debarment from Federal contracts was for all Firestone's contract work with the entire federal government.

Second, Title VI is explicitly inapplicable to "any employment practice of any employer." Employment discrimination under the statute is exclusively covered under Title VII. Nothing in Title VII authorizes the use of the funds cutoff remedy.

The numerical orientation of the Executive Order program may also conflict with Title VII, which mandates non-discrimination, not affirmative action. In the "Weber" case last year, the Supreme Court upheld an agreement between Kaiser Aluminum & Chemical Corp. and the United Steelworkers that called for an explicitly race-conscious affirmative action plan to eliminate racial imbalances in certain portions of the work force. The court held that private, voluntary affirmative action programs were legal under Title VII; the government could not require affirmative action, although the statute permits it.

The mandatory provisions of the Executive Order program are hardly voluntary, since the government requires its contractors to overcome underutilization (i.e., racial imbalance). The Weber case, by drawing the require/permit distinction, suggests that mandatory affirmative action imposed by government is inconsistent with Title VII.

Not only does the Executive Order program seem to conflict with the 1964 Civil Rights Act, it is also questionable whether there is an adequate source of either constitutional or statutory authority for the program. Under the Constitution, Congress makes the laws and the President enforces them. As Justice Black noted in the 1952 steel seizure case, a presidential order must "direct that a congressional policy be executed in a manner prescribed by Congress"; it cannot direct "that a presidential policy be executed in a manner prescribed by the President."

No explicit constitutional provision authorizes presidential action of the type taken in the affirmative action Executive Order. Enforcement of a nondiscrimination rule would be compatible with the constitutional prohibition against governmental complicity with private racial discrimination. The Executive Order, however, goes considerably beyond enforcement of a norm against purposeful discrimination.

The pending Firestone case is a good example. Firestone was found in violation of the Executive Order not because of any discriminatory conduct on its part but because it disagrees with the enforcement agency about how to measure whether there is "underutilization" of certain categories of workers.

At least since 1976, the Supreme Court has ruled that no constitutional claim of racial discrimination can be established without proof of discriminatory intent. No such intent was alleged or proved in the Firestone situation. Because the Executive Order program does not require a finding of discriminatory intent or purpose, it cannot be designed to enforce a constitutional mandate.

If no convincing constitutional basis for justifying the Executive Order exists, a statutory source of authority must be identified. On the basis of the statutory procurement power, the District of Columbia Court of Appeals justified President Carter's wage and price control program under which federal contractors were required to certify their compliance with the voluntary wage and price guidelines. In upholding the President's order, the court said that any Executive Order based on procurement powers must accord with the values of "economy" and "efficiency" regarding government contracts. Since the objective of the program was to contain procurement costs, the majority held there was a "sufficiently close nexus" between the criteria of efficiency and economy and the wage and price control program.

In upholding the Philadelphia Plan of affirmative action hiring in 1971, the Third Circuit Court of Appeals found that the plan was not mainly designed to achieve equal rights but rather to increase the labor pool available for government contract work. As the program has evolved since 1971, however, it is questionable whether the Third Circuit's characterization is still accurate, especially in light of the Firestone litigation.

HIGH COURT DUBIOUS

It is very dubious that the affirmative action program is primarily designed or enforced to achieve economy or efficiency in governmental contract procurement. Indeed, in a different context the Supreme Court in 1979 held that the Executive Order program is not "authorized by law" and expressed doubt about the statutory source of authority for the program.

It thus seems very possible that the affirmative action Executive Order program lacks a source of either constitutional or statutory authority, and in addition seems to conflict with the 1964 Civil Rights Act. Because there is no allegation of discrimination, the Firestone case provides an excellent vehicle for addressing the basic issues of executive authority.

It would be disappointing if the court should decline to deal directly with the fundamental separation of powers issues in the Firestone litigation. Regardless of how the court rules—whether or not it ducks the core issues and relies on a technical implementation matter—the new administration has an obligation to reconsider the propriety of executive action in an area in which the exercise of executive authority rests on such a shaky foundation.

NOTE: Mr. Blumstein is a professor of law at Vanderbilt University School of Law.

[From the Boston Herald American, June 29, 1980]

AFFIRMATIVE ACTION: ARE THE BENEFICIARIES REALLY THE VICTIMS?

(By Midge Decter)

Despite the fact that the policy known euphemistically as "affirmative action" is held in disfavor by an overriding majority of the American people, it seems safe to say that racial and sexual quotas are solidly established in our midst and will remain so for the foreseeable future. During that time, it is unlikely that any policy will have done more than affirmative action to unsettle the series of delicate balances—between democracy and republic, individuals and pluralities, private rights and public necessities—it was once the unique political talent of this society to have struck.

Much has already been observed about the harmful impact of quotas on such institutions as the schools and universities, the political parties, the agencies of government, and the economy. Moreover, that quotas are themselves indisputably unjust has been frequently and forcefully pointed out. One issue, however, has so far not been paid the attention it deserves. That is the question of the impact of quotas on those who are their intended beneficiaries. How does preferential treatment affect those who are, in actuality or even only potentially, its recipients? Beyond this, how does it affect the feelings of others toward them? And finally, how does it affect the attitude of everyone toward the society he is living in?

The two main groups at whose behest quotas have been instituted are, of course, blacks and women. Their linkage under the common heading of disadvantaged minorities is, literally, an incongruous one. For historical reasons that remain to be properly explicated, however, the "causes" of women and blacks came to be treated as one. In examining the issue of public attitude, we are consequently bound to find the groups, with certain inevitable variations, in an ever more similar condition.

It would be impossible to test an idea about that condition with any degree of scientific authority, but a good deal of so-called soft evidence is all around us. And what this evidence points to is that recipients of preferential treatment tend to suffer from a serious decline in self-respect. The advantages gained appear to be bringing little sense of private or public satisfaction, but only more strident assertions of grievances yet to be addressed. For an outsider to remark upon any improvement is for him to call down upon his head heated accusations of heartlessness and bigotry. The tone is not of people impatient for more but rather of people who have discovered that their sought-for special privileges, being unearned and therefore unmerited, are doing them no good.

It is an open secret in this country, alluded to only in whispers but commonly recognized alld the same, that students admitted to colleges and professional schools by virtue of helping to fulfill a racial or sexual quota tend quickly to feel defeated there. Even the qualified, insofar as they know themselves to have won a competition through the added benefits of a special allowance, sooner or later undego crises of self-doubt.

How could all this be otherwise? At the heart of affirmative action, no matter how the policy is defined, lies the simple proposition that the individuals being hired or admitted or promoted would not in their own individual right be so. No matter how passionately affirmative action is sought and defended by its client groups, this underlying proposition is one that must breed painful resentment.

But if these are the inevitable consequences for the beneficiaries, what can we imagine about the emotions of the people among whom they work and live? In the daylight world, Americans have undergone a massive diminution of racial prejudices. In the dark night of the soul, however, affirmative action itself is creating a new wave of racism and sexism. The new wave differs from the earlier sort in that it is not based on fear, hatred, or guilt but on contempt. Whatever people *think* about the justice or unjustice of making special allowances, what they *feel* is that the objects of these allowances are somehow inferior.

Before long, the irony will have escaped no one: by means of a policy intended to short-cut past discriminatory practice, the American populace will have become subject to a kind of prejudice which, if more subtle, is also by the same token infinitely more difficult to overcome. This prejudice, moreover, is no unforeseen accident. Affirmative action is in its very inception based on a racist (or sexist) idea, which is that blacks (or women), given the removal of all barriers to opportunity, could not every fairly compete.

Affirmative action is not simply a legal or administrative arrangement; it is a frame of mind—a frame of mind best characterized by the term "double standard." A lowering of standards follows naturally and seeps into the whole fabric of the culture.

The assault on the old idea that in America equality means equal opportunity has an impact on attitudes far wider than merely those toward race and sex. The message being hammered home is, to put it bluntly, that society is a racket. There are no such things as standards of performance. There is no such thing as achievement. Above all, there is no such thing as justice. To live in accordance with the belief that standards of achievement or justice have a reality, that they matter, is to be a sucker.

A society cannot long remain vigorous and productive when so massive a cynicism about its principal beliefs is permitted to spread through the underground consciousness.

NOTE: Midge Decter, Senior Editor of Basic Books, Inc., is the author of "Liberal Parents, Radical Children" and several other works. This article is excerpted from the current issue of "Policy Review," the quarterly journal of the American Heritage Foundation in Washington.

[From the Wall Street Journal, Apr. 17, 1981]

TOWARD A NEW POLICY ON EQUALITY

(By Terry Eastland)

Consider the following proposition: What keeps blacks and minorities from achieving equality is racism, and the way to eliminate racism is through the adoption of affirmative action "goals," or quotas.

The foregoing is not merely the belief of liberals and civil rights leaders. It also fairly describes the government's implicit policy on equality, a policy developed since passage of the Civil Rights Act of 1964. Whether the branch of government involved has been the Executive, the Legislative or the Judicial, each has understood racism as the fundamental problem for America's minorities, and each branch, in its own way, has taught the American public to believe that affirmative action will eradicate racism and bring about equality.

President Reagan has taken issue with affirmative action of this kind, and it seems clear that he will take steps that will put at least his own Executive Branch out of the quota business.

The administration is trying to modify the Carter-initiated consent decree under which blacks and Hispanics effectively would be guaranteed federal jobs in proportion to the number of each group being tested for the jobs. And if Mr. Reagan follows the recently announced recommendation of the transition team studying the Equal Employment Opportunity Commission, that agency will change. No longer will it pressure employers to adopt numerical quota schemes simply because their work forces do not divide out into what the EEOC deems should be the appropriate percentages for blacks and other minorities.

COUNTING BY RACE

Elsewhere within the Executive Branch—noticeably at the Office of Civil Rights within HHS and the Office of Federal Contract Compliance within the Labor Department—counting by race has been standard procedure, and President Reagan can be expected to try to end the practice in these departments, too.

From the point of view of fundamental principle, efforts in this direction are welcome. Affirmative action "goals" call attention to race and ethnicity. In the consideration of an individual's qualifications for a job, they make important, if not decisive, the very qualities that the Civil Rights Act said should not matter at all. Indeed, they violate the very principle of non-discrimination which that legislation was widely understood to have embodied. It is President Reagan's clear opportunity to bring government practice into line with this noble principle.

Yet this is not Mr. Reagan's only opportunity. Or, to put it another way, it is only part of the opportunity. The full opportunity lies in changing nothing less than government policy on ethnicity and equality.

The beginning of wisdom towards a new policy lies in grasping what several students of race and ethnicity, most notably Thomas Sowell, have recently demonstrated: that racism or ethnic prejudice cannot fully or even primarily explain the current position of every racial and ethnic group in American society; that the explanation is much more complex, including such non-moral factors as age, locational preference and cultural habit; and that the degree to which each factor is explanatory varies among ethnic groups and even within the groups, when various subgroups exist.

Because it is simplistic to say that racism explains the position of minorities in American life, affirmative action "goals" are a simplistic response to the issue of minority advancement. Interestingly there is a growing body of evidence which shows that "goals" have not appreciably advanced ethnic minorities in terms of either incomes or occupations. Even if new evidence should contradict this, the fact still would remain that "goals" have not been much help to non-middle class racial and ethnic minorities.

The underclasses (particularly among blacks) have been untouched. Their problems of low aspiration, poor work habits, illiteracy and family instability, among others, may have been rooted originally in racial and ethnic discrimination against them. But now these problems have a life of their own, self-perpetuating, which the elimination of racism through "goals" cannot hope to cure.

These, in brief, are the pertinent facts regarding America's racial and ethnic minorities. But so far they have not informed government policy. President Reagan's opportunity is this: to bring together those who not only appreciate the non-discrimination principle of the civil rights legislation but also grasp the complex factors that explain an ethnic minority standing in American society.

Out of this meeting of minds—it could, perhaps, take the form of a presidential commission—could come concrete proposals. Here could develop the new policy on equality.

President Reagan's role is critical. Carl Gershman, writing in regard to the problem of the underclass, notes that "to date [it] has not been seriously discussed," nor have solutions been proposed. Thomas Sowell, while he has a most sophisticated understanding of ethnicity and equality, has yet to advance many solutions. The new organization he is founding—Black Alternatives Association Inc.—apparently will address this need. What Mr. Reagan could do is to speed the process of formulating a new policy by giving it the dignity of presidential concern.

What solutions might a Reagan commission propose? Doubtless it would emphasize the general need for an expanding economy, and probably it would endorse the idea of "enterprise zones" in decayed rural and urban areas. In addition, such a commission usefully might consider several promising yet unpublicized examples of how government can and does work.

One is in California, where the National Guard there has had spectacular success in creating genuine job opportunities for the hard-core unemployed in Oakland. The "Oakland Guard Plan," as it originally was called when started four years ago gives unskilled individuals training in a particular trade, and helps place them in jobs. In return they are obligated to serve six years of guard duty. The California National Guard is expanding the program now called "Impact," beyond Oakland to other cities, including Los Angeles.

HOW TO FIND JOBS

Another program is the one run by the A. Philip Randolph Educational Fund of New York City over the past three years. Its Youth Employment Program teaches young people (16 to 21) without skills and out of school how to find jobs, and then hold them. A sizable number of those enrolled in the program have found, and remain in, solid jobs. Currently the program benefits nine cities, among them Baltimore, Raleigh-Durham, New Haven, Kansas City and Los Angeles.

Both of these programs are open to anyone, regardless of race (and in compliance, with the Civil Rights Act of 1964), and both, not surprisingly, attract a majority of minority individuals, almost all of them from the working class or the underclass. Both programs rely on federal money, but the costs are much lower than in most federally funded jobs programs. This is so because the jobs acquired are in the private sector—yet another reason the programs should be particularly instructive to the Reagan administration.

Liberals and civil rights leaders have worried that President Reagan might "turn back the clock." But the clock is stuck, and Mr. Reagan's task is clearly that of getting it unstuck. It is time, 17 years after the Civil Rights Act was enacted, that we developed a policy on ethnicity and equality that is both compatible with fundamental principle, and attentive to the facts of life.

NOTE: Mr. Eastland is co-author of "Counting by Race, Equality from the Founding Fathers to Bakke and Weber" (Basic Books).

[From the San Francisco Chronicle, May 21, 1981]

GALLUP POLL: PREFERENTIAL JOB HIRING OPPOSED

(By George Gallup)

PRINCETON, N.J.—Ability, and not preferential treatment, should be the basic criterion for placement in jobs and colleges, according to a large majority of Americans—including people of all races and both sexes.

Preferential treatment for women and minorities to compensate for past discrimination was favored by 10 percent of the public poll, while ability, as determined by test scores, was the choice of 83 percent.

The principle of affirmative action—called by its critics "reverse discrimination"—gained new currency this month when Republican Senator Orrin Hatch of Utah opened subcommittee hearings on a constitutional amendment that would forbid the federal government from making distinctions for race, color or national origin.

Among women and non-whites, the groups most directly affected by "affirmative action," the results were conclusive. Women chose ability over reparative preference, 82 percent to 11 percent. Among non-whites there was more support for preferential treatment; nonetheless, non-whites voted for ability over special treatment, 57 percent to 29 percent.

While the concept of preferential treatment to compensate for past discrimination is unacceptable to most people, when the issue is narrowed to whether qualified blacks should receive preference over equally qualified whites, black opinion divides much more evenly. According to a recent Newsweek Poll conducted by the Gallup Organization Inc., 45 percent of blacks believe members of their race should receive preference under these circumstances, while 47 percent believed they should not.

Rarely is public opinion, particularly on such a controversial subject, as united as it is over this question. Attitudes are similar from region to region, among all age groups and by education. Democrats are only slightly more disposed to preferential treatment than are Republicans and independents. All groups back objective data, such as test scores, as the main qualifications for jobs and college entrance.

Opponents of affirmative action programs maintain that ability alone should determine who is hired or admitted to colleges and professional schools, thereby ensuring the highest standards. They say those who are innocent of past discrimination should not be made to pay now, and that affirmative action programs ultimately will dilute the market value of other, competent people who achieved their status on the basis of objective criteria.

Opponents also argue that preferential treatment puts a "badge of inferiority" or stigma on minority professionals, saying, in effect, that a black lawyer or doctor is less qualified than a white one.

Proponents of affirmative action counter that without it blacks and women will never participate fully in American society.

Aside from the issue of compensation for past discrimination, supporters maintain that without quotas many institutions and professions will not be representative of the publics they serve.

Backers of affirmative action also reason that tests are often discriminatory because of the inferior education that minority group members have received. They also point out that de facto "affirmative action" already exists for such groups as athletes, alumni sons and daughters and, in the case of employment, for those who are fortunate enough to count among their friends a labor union business agent.

Here is the question asked to determine attitudes toward affirmative action in hiring and education:

"Some people say that to make up for past discrimination, women and members of minority groups should be given preferential treatment in getting jobs and places in college. Others say that ability, as determined by test scores, should be the main consideration. Which point of view comes closest to how you feel on this subject?"

Following is the trend:

AFFIRMATIVE ACTION

[In percent]

	Preferential treatment	Ability	No opinion
Latest (December: 1980)	10	83	7
1977:			
(October)	11	81	8
(May)	10	83	7

Here are the latest results by population groups:

AFFIRMATIVE ACTION

[In percent]

	Preferential treatment	Ability	No opinion
National	10	83	7
Men	9	85	6
Women	11	82	7
Whites	7	87	6
Non-whites	29	57	14
Under 30 years	11	81	8
30 to 49 years	11	83	6
50 and older	8	86	6
College education	10	86	4
High school	9	84	7
Grade school	13	76	11
Republicans	6	92	2
Democrats	14	78	8
Independents	8	86	6
East	10	84	6
Midwest	8	85	7
South	11	79	10
West	10	87	3

[From the New York Review of Books, Dec. 20, 1979]

How To Read the Civil Rights Act

(By Ronald Dworkin)

I

When *Steelworkers* v. *Weber* began its way through the federal courts in 1976, it was widely thought that the case would proive an even more important challenge to affirmative action programs than the famous *Bakke* case. *Bakke* tested affirmative action programs in universities and professional schools. But *Weber* tested the legality of programs giving blacks advantages in training programs for industry, programs that would benefit more blacks directly and might be expected to have an earlier impact on economic racial inequality.

Blacks were seriously underrepresented in the work force of the Kaiser Aluminum Company's plant in Gramercy, Louisiana, where Brian Weber, a white laborer, was employed. Blacks held hardly any of the plant's craft or skilled jobs. Kaiser agreed with its union to establish a training program for craft jobs, to which current employees would be admitted in order of seniority, that is, in the order in which they had entered the plant—except that one black employee would be admitted for each white employee until the number of blacks in skilled jobs formed the same proportion of all skilled workers as blacks formed of the labor force in the Gramercy area.

Weber applied for the program but was insufficiently senior to obtain a "white" place, though he was more senior than applicants who received "black" places. He sued Kaiser, arguing that the program used a racial quota system and so was illegal under the Civil Rights Act of 1964, which provides in Section 703(a) of Title VII that it is unlawful for an employer:

(1) to fail or refuse to hire or discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or,

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Five justices—Justices Brennan, Marshall, White, Stewart, and Blackmun—held that Weber was wrong, and that this statute did not outlaw the Kaiser plan. They said that Congress did not intend to outlaw affirmative action plans of this sort, and that if a court interpreted the statute as Weber wished the statute's "purpose" would be frustrated. Chief Justice Burger and Justice Rehnquist dissented. The two other justices—Justices Powell and Stevens—took not part in the case.

In the *Bakke* case Justice Powell had held that the admissions program of the Davis medical school was unconstitutional because it set aside a fixed number of places for minority applicants. The Kaiser training plan also set aside a fixed number of places for minority applicants. The Kaiser training plan also set aside a fixed number of places for blacks, but it could not be said to be unconstitutional. The Equal Protection Clause of the Constitution requires states (and therefore state university professional schools) to treat people as equals, but imposes no such requirement on private institutions, unless "state action" is involved in what these private institutions do. The Court assumed that the voluntary decision of Kaiser did not constitute state action, and that the case therefore did not present any constitutional issue. The question raised in *Weber,* therefore, was only the question whether the Kaiser plan was made illegal by the Civil Rights Act.

That might seem a less important question than the question whether the plan is constitutional. If Congress disapproves a court decision interpreting a congressional statute, it can always reverse the decision by changing the statute. It cannot reverse a decision that interprets the Constitution. In the present circumstances, however, a Supreme Court decision on the statutory legality of affirmative action programs is, as a practical matter, almost as irreversible as a decision on their constitutional validity. It seem unlikely that Congress would now pass legislation either explicitly condoning or explicitly forbidding affirmative action in employment, at least so long as that issue remains politically as volatile as it is now. So the Court's decision about the legal consequences of what Congress has already done is likely to remain in force for some time, whatever that decision is.

Weber was not a simple case to decide. The Civil Rights Act is explicit, in Section 703(j), that the government may not *order* private institutions to adopt affirmative action plans. But Kaiser's program was not ordered by the Justice Department or any other government agency; it was agreed between the company and the union. The case would have been easier if Kaiser had admitted that it had discriminated against blacks in the past. If it had said that its previous hiring policies had been in some way discriminatory, so as to violate Title VII, and if that had been proved, then its affirmative action program would have been justified as a self-imposed remedy of the sort that a court might have ordered. The trial judge said that it was "arguable" that Kaiser had violated Title VII in the past. But Kaiser certainly did not concede that it had—that admission would have opened it to a large number of private suits by blacks. And no other private party to the suit had any interest in even raising the issue.

Burger and Rehnquist thought that the language of 703(a) of Title VII was so precise and unambiguous that there was no need for the Court to do more than to read the statute. Burger said that if he had been in Congress in 1964 he would have voted against outlawing plans like Kaiser's, but he thought there could be no doubt that the words of the section quoted above did just that. That view of the statute is unpersuasive. Against the background of centuries of malign racial discrimination, phrases like "discriminate against someone because of race or "deprive someone of an opportunity because of race" may be used in a neutral (or, as Brennan put it in his opinion, in a "literal") sense so that *any* racial classification whatsoever is included. Or they may be used (and I think typically are used) in an evaluative way, to mark off racial classifications that are invidious, because they reflect a desire to put one race at a disadvantage against another, or arbitrary, because they serve no legitimate purpose, or reflect favoritism, because they treat members of one race with more concern than members of another. In the former sense, choosing a black actor over a white one to play Othello or instituting an affirmative action plan to help establish genuine racial equality both count as discrimination against whites and deprive whites of opportunities because of race. But in the latter, evaluative, sense neither does. It is a difficult question which sense to assign to Title VII.

Of course, in either sense, the provisions of Title VII would apply to racial discrimination against whites as well as against blacks. In an earlier case, *McDonald* v. *Santa Fe Transportation Co.*, the Supreme Court held that it was illegal for a truck company arbitrarily to fire a white employe when black employees guilty of the same offense were retained. That was as explicit a case of favoritism—as unrelated to any legitimate established program of affirmative action—as the reverse would have been. But in that case the Court explicitly and carefully left open the question of whether the statute outlawed affirmative action programs "which do not involve discrimination against any race, white or black, but are rather designed to compensate for the past racial discrimination."

Weber required the Court to decide the question it had left open in *McDonald*. If it were clear that "discriminate * * * because of * * * race" was used in the neutral sense, it would have made no sense for the Court to leave open the question of whether it applied to affirmative action. The majority in *Weber* was right, both as a matter of ordinary language and precedent: the question of how Title VII should be interpreted cannot be answered simply by staring at the words Congress used.

This is obviously a question of cardinal importance. The majority and dissenting opinions describe two very different conceptions of the Civil Rights Act, and it is important to decide which version is part of the law of the United States. According to Brennan, who wrote for the majority, the act represents a decision by Congress to advance racial equality in education, employment, and other areas, and to end an economic era in which those blacks not wholly unemployed are largely restricted to lower paying and less interesting jobs. It would therefore be inconsistent with the underlying policy of the act to construe it to forbid voluntary industrial plans aimed at these goals.

Rehnquist disagrees, savagely. He said that the majority acted like the tyranny of Orwell's 1984, reaching the conclusion it wanted in an intellectually dishonest way in spite of what Rehnquist considered devastating and conclusive arguments to the contrary. According to Rehnquist, the act embodies a conception of equality that prohibits any distinctions based on race whatsoever, so that the decision of the majority, far from promoting the policy of the act, "introduces into Title VII a tolerance for the very evil that the law was intended to eradicate * * *." If Rehnquist is right, then the *Weber* decision, though much celebrated by civil rights groups now, may well be limited sharply or even overruled by related cases in the future.

II

The two opinions—majority and dissenting—take competing positions on the question of what procedures the Court should use to interpret an act of Congress, and we cannot understand or evaluate these opinions without discussing that jurisprudential question. It is necessary, first, to distinguish between a statute, which is a canonical set of sentences enacted by Congress, and the legislation created by that statute, that is, the set of legal rights, duties, powers, permissions, or prohibitions the statute brings into existence or confirms. In the United States (as in every mature legal system) there are strict and precise rules, agreed on by everyone, that determine what counts as the statute. It is the set of sentences before Congress when it votes, as certified by a clerk, and thereafter signed by the president. But it is highly controversial what principles fix the legislation that a particular statute creates. When two conditions are met—when the words in the statute unambiguously require a certain decision about legal rights and duties, and when that decision is sensibly related to some widely supported political aim—then it is uncontroversial that the legislation includes that decision, and judges are bound to enforce it, whether they themselves approve it or not, unless they believe it unconstitutional.

When either of these conditions fails—when, for example, the words used might be used to express either of two decisions—then an argument must be provided establishing which decision, if either, does form part of the legislation. Any such argument will assume what might be called a theory of legislation, that is, a theory of how to determine which legal rights and duties Congress has established when it enacts a particular set of sentences.

There is no agreement about theories of legislation among American judges, or indeed among judges of any developed legal system. On the contrary, the concept of legislation figures in jurisprudence as what philosophers call a "contested" concept. Theories of legislation are not themselves set out in statutes or even fixed by judicial precedent; each judge must himself apply a theory whose authority, for him as for others, lies in its persuasive force.

Rehnquist's dissenting opinion has the virtue of setting out his own theory of legislation in a reasonably clear way. "Our task in this case, like any other case involving the construction of a statute," he said, "is to give effect to the intent of Congress. To divine that intent, we traditionally look first to the words of the statute and, if they are unclear, then to the statute's legislative history." (Lawyers use the phrase "legislative history" to refer to the records of congressional consideration of a bill that ultimately becomes a statute, including committee reports and debates on the floor.) Rehnquist believes that, on this theory of legislation, which takes legislation to be fixed only by what he calls the "intent" of the legislature, plans like the Kaiser plan are plainly outlawed. His contempt for the majority opinion shows that he thinks that this theory of legislation is not simply the best theory, but the only conceivable theory, so that the majority was not only wrong but intellectually dishonest in applying, as it did, a different theory.

It is true that Rehnquist's intent-of-Congress theory is a popular one. It has two apparent and related advantages. First, it seems to enforce the general principles of democracy: since the legislature is entrusted with making law, the legislature should be taken to have done what it intended to do, at least if the words it used are capable of bearing that interpretation. Second, it seems to make the Court's decision a politically neutral decision: the Court is supposed to answer a historical question—what did the legislature intend the statute to do—rather than to make its own political judgment. In fact, however, both appeals are in large part illusory, and the theory of legislative intent turns out to be, on examination, much less useful than it seems.

The theory seems useful only because it exploits an ambiguity in the idea of a legislative intention. There are in fact two different concepts described by that phrase, though legal scholarship and practice has not sufficiently attended to the difference. The first is the idea of an institutionalized intention, a policy or principle, or some set of these, that is in some way enacted so that it becomes part of the legislation by express legislative decision. Statutes sometimes contain explicit declarations of purpose, set out in what are called "preambles," though this was once more common in the United States than it is now. If the Civil Rights Act had contained a preamble, reciting that its intention was to ensure that no person gained any advantage by any racial classification whatsoever, that understanding would thereby have been made part of the legislation and the rules described by the rest of the statute would have been properly interpreted only in that light.

Though preambles are now rare, convention has established other methods through which purposes are enacted as part of statutes. The most commonly used, I think is the method of committee report: if the appropriate committee of Congress has considered a bill, and published an extended report recommending it, then convention now treats any understanding of what that bill will accomplish that is set out in that report as if the understanding were attached to the statute. If the bill is enacted, that statement is understood to be enacted as well, as an institutionalized account of its purpose.

It is, of course only through conventions that this association of a committee report with a statute is achieved, and it is only through that convention that the association is justified. Since members of Congress understand the convention, and have the committee report before them as a part of the institutional material on which they vote, it is fair to take any statement in the report as part of what they vote to enact, unless, of course, as sometimes happens, the statute is deliberately amended in order to override some statement of the report.

Preambles and committee reports do not exhaust the mechanisms of institutionalized intention. Such intentions may also be created by statements of congressmen on the floor in debate over the bill, though the details of this convention cannot be stated so crisply. If a prominent spokesman for a bill proposes a general understanding about what the bill will do, and if this is accepted by other congressmen as a kind of official clarification or informal amendment, then this statement will have that force, and it is now common for courts to attend to such statements. But the qualification—that the statement must be accepted as understood to form part of the statute—is essential. If even a leading spokesman's statement of what the bill will do is contradicted by other legislators, then that statement becomes simply a report of his own belief, different from theirs, of how the statute should or will be interpreted by agencies and courts, not an institutionalized intention at all.

This first concept of legislative intention—the concept of institutionalized intention—is in no sense a psychological concept. A preamble, or an explicit statement in a committee report, or an uncontradicted proposed understanding is taken to be part of what is enacted, not because of any assumption about the hopes or motives or beliefs or other mental state of any particular congressman, but because the convention that attaches the statement to the statute is now part of the institution of legislation in the United States. The convention has the same logical standing (though of course it is neither so explicit nor so secure) as the fixed constitutional rules that provide for the form in which a statute must be enacted.

The concept of institutionalized intention must therefore be sharply distinguished from the second concept of legislative intent, which I shall call the concept of collective understanding, and which is distinctly a psychological concept. This second concept takes a legislative intention to be some combination—which combination is a matter of dispute—of the beliefs of particular congressmen who draft, advocate, oppose, lobby for or against, and vote to pass or reject a particular statute. Of course the senators or representatives who are in this way part of the legislative process, and their staffs, and other government agencies or personnel, do act on the basis of some beliefs about what legislation the statute will in fact enact. A congressman may have voted for the Civil Rights Act, for example, precisely because he thought that it would prohibit affirmative action programs of a certain type; another may have voted for it only because he thought it would not. This psychological concept of legislative intention supposes that some combination or function of these individual beliefs constitutes the collective understanding of the institution as a whole, so that, it, for example, that combination existed in favor of the understanding that affirmative action was outlawed, then this was the intention of the legislature itself.

Of course, the concept of legislative intention is useless unless the combination of individual understandings necessary to constitute the collective intention is at least roughly specified. Lawyers who seem to rely on this concept of legislative intention are rarely explicit on this matter and assume that the necessary combination can be formed in different ways. If the theory of legislative intent is to remain faithful to democratic principles, however, a minimum requirement must be met: a sufficient number of those who voted for a statute must have an understanding in common, so that that number alone could have passed the statute even if everyone else—all those who did not share that understanding—had voted against.

The idea of a collective legislative understanding is therefore of limited use. Some of its limitations have been noticed often in the extensive legal literature on statutory interpretation. Lawyers know, for example, that it is very difficult for a court to discover, years after the event, what understanding any particular legislator had, and therefore difficult to know what the composite understanding was. This is an epistemological difficulty that Rehnquist himself concedes, because he acknowledges that in some cases it may be difficult to say what the legislature's intention was, though he thinks that this is not so in the case of the Civil Rights Act.

There are other, less familiar, difficulties with the idea. Let us assume, for a moment, that every congressman who voted on the Civil Rights Act had some belief about whether that statute would ban affirmative action. Suppose that of one hundred Senators sixty voted for the act but only forty-nine of these believed it would outlaw plans like Kaiser's. In that case, there could be no collective understanding either way, even if all those who voted against the act also had the same belief, making a total of eighty-nine who held it. And in fact the assumption we have made is almost always unjustified. It is wrong to assume that every legislator who votes on a bill has an understanding one way or the other about every consequence that bill might have. It seems quite likely, for example, that some of the Senators and Representatives who voted on the Civil Rights Act gave no attention at all to the problem of whether the act would forbid voluntary programs like Kaiser's. It seems equally likely that many of those who did consider this were genuinely uncertain whether the act would, and either had no motive for attempting to clarify the matter or a strong motive for not doing so. If a significant number of congressmen had no firm understanding either way, or if the majority that passed the statute was divided in its opinion, then once again the collective understanding is not simply difficult to discover. It does not exist.

Even when a sufficient number of congressmen do share a belief about what a statute will do, moreover, that agreement might not constitute a collective understanding of the sort that a court should enforce. For we must be careful to distinguish among different sorts of belief a congressman might have about a vague or uncertain provision in a statute on which he must vote. He might assume that the language of the provision itself does determine some controversial issue, or that some preamble or unchallenged statement constitutes an institutionalized intention one way or the other. If the text is genuinely unclear, however, and if there has been no statement forming an institutionalized intention, he is more likely to think that the text of the statute leaves the issue open as an issue of interpretation for the courts to decide.

In that case any belief he might hold or express about the consequences of the statute would be a matter of predicting the decision the courts will reach. The decision he predicts might be the decision he prefers, and would have enacted explicitly if he had been able to do so. It might, that is, represent his hopes. If so, and if, a sufficient number of other congressmen express the same hope that would represent the will of congress. But a congressman's prediction might represent not his hopes but simply his expectations or even his fears. In that case it would be a grave confusion to suppose that if a court fulfills his prediction it enforces his will. If the idea of a collective understanding is to play any useful role in a theory of legislation, it must be defined so that only evidence of the legislators' hopes, not of their bare predictions however confidently these are made, count as evidence of a collective understanding.[1] But that makes is less likely still that a collective understanding will exist either way in any particular case, and more likely that a court's "discovery" of such an understanding would be only an invention.

Nothing illustrates the need for these distinctions better, in fact, than the congressional debates of 1964 leading to the Civil Rights Act. Opponents repeatedly argued that Title VII would allow federal agencies to impose racial quotas on private industry. They detested such interference, and they hoped to enlist the aid of others who also did. In the event, the statute was amended, by adding section 703(j) to Title VII, which expressly declared that nothing in the act should be construed to allow such imposed quotas. But if the act had not been amended, it would have been perverse to cite these statements of opponents to prove that the statute did accomplish what they feared. It would have been equally perverse to cite those proponents of the bill who argued that the statute did *not* allow compulsory quotas as evidence of any congressional will that such quotas be prohibited. Several of the act's sponsors thought that it would be interpreted to prohibit such imposed quotas even before the amendment—that is certainly what they said—but it was not necessarily what even they wanted. Many backbenchers who favored the bill even before the amendment might have done so fearing that these leaders were right, but hoping that they were wrong, and that the act would be interpreted to license exactly the sort of government-supervised integration of industry that they wanted.

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[1] Legislators must use theories of legislation themselves in forming beliefs or making predictions about the consequences of inexplicit statutes. But a legislator cannot use, as part of his theory of legislation, the psychological concept of legislative intent that makes his own opinion, along with the opinion of others, decisive of the content of legislation. For neither he nor they could *have* such opinions unless they had already applied a *different* theory of legislation: no group can apply the theory that the content of legislation is what that group thinks it is. Unless the concept of collective understanding is carefully limited to the hopes rather than simply the beliefs of legislators, the concept becomes incoherent. It supplies a test of the content of legislation that supposes that those whose opinions this test uses have themselves used a different test of the same thing.

III

We must now examine Rehnquist's argument to see which of the two concepts of legislative intent we have distinguished he himself had in mind. He builds his argument around the debate I have already described: between opponents of the Civil Rights Act in the 1964 congressional debates who said that as drafted the act would authorize federal agencies to dictate that private industries hire according to racial quotas, and proponents who replied that it would not. Several of these proponents went further, and declared that the bill would not permit *any* employment decisions, even voluntary decisions, to be taken on the basis of race. Senator Humphrey, for example, argued that Title VII "says that race, religion, and national origin are not to be used as the basis for hiring and firing. Title VII is designed to encourage hiring on the basis of ability and qualifications, not race or religion."

Senators Joe Clark and Clifford Case, who were designated the bipartisan "captain" of the bill, submitted what they called an "interpretative memorandum" addressed to the problem of imposed quotas, which said "There is no requirement in Title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance . . . would involve a violation of Title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race. * * * He would not be obliged—or indeed permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier."

None of these statements satisfied opponents who feared government orders making racial quotas or racial balance mandatory. In the end it was necessary to introduce an amendment explicitly prohibiting such orders. This was section 703(j), which said that nothing in Title VII "shall be interpreted to require any employer * * * to grant preferential treatment to any individual or to any group" in order to reduce racial imbalance in the work force. Mr. Justice Brennan, writing for the majority in *Weber*, emphasized that this new provision said only that affirmative action was not required, not that voluntary affirmative action was prohibited. But Rehnquist emphasized instead the previous history, and the many congressional statements he had discovered arguing that the new provision was not necessary, because the act, by itself, without the new provision, barred any form of race-conscious employment or promotion program.

What does Rehnquist take these statements to show? Did they constitute an institutionalized intention, so that the statute should be construed as if these statements were formally a part of it, like an oral preamble? That is extremely implausible. There is no legislative convention that automatically turns the statements even of key leaders, even of "bipartisan captains," into preambles. If there were such a convention, if would not have been appropriate for opponents of the bill to voice fears after the reassuring statements had been made. On the contrary, it would have been preposterous. Nor would it have been necessary to add section 703(j). That would have been redundant, merely repeating what Senators Humphrey, Clark, Case, and others had already added to the bill.

The fact that Congress added 703(j) shows that congressmen do not acknowledge a convention that turns the statements of important senators into amendments. Of course these statements might have been offered and taken by everyone to constitute an institutionalized intention. But plainly they were not. The leaders Rehnquist quoted offered their own opinions about the effect of the bill simply as their opinions, which continued to be contested by others, so that it was necessary to resolve the matter by formal amendment. A backbench senator or representative voting for the Civil Rights Act need not have supposed that he was bound by what Humphrey or the Clark-Case memorandum said the Civil Rights act would do, and it is unfair—and contrary to democracy—to insist that he was.

Does Rehnquist think, on the contrary, that the statements of the leaders he quoted are evidence of some shared psychological state, some collective understanding of the legislators as a whole? If so, then the evidence is very thin indeed. Rehnquist is able to cite the remarks of only a relatively few congressmen, whom he interprets as holding the opinion that the act would forbid affirmative action plans like the Kaiser plan. He cites several who thought that until the act was amended it would have authorized mandatory government racial quotas based on percentages of blacks in the labor force, and who must therefore have held the contrary opinion on affirmative action plans, that is, that the act would permit industry to do voluntarily what the government could order it to do.

Nothing suggests that most of the legislators—or enough of those who voted for the act to pass it unaided—accepted either of these two opinions, or if so which, or indeed that they had any opinion at all. But even if we assume that they did, and that they agreed with Rehnquist's interpretation, it hardly follows that that was their will. Many might seriously have regretted that they must enact a statute that would block affirmative action (assuming they thought that they were doing so) in order to prevent outright racial discrimination in employment. They would have been pleased to be persuaded that their judgment of how the act would be interpreted was wrong.

Indeed the only remarks in either house that said directly that it would be illegal under the act for a black employer to prefer black employees so as to improve the economic condition of blacks stated that this was a matter of great regret. (This was a staged dialogue between Senators Curtis and Cotton, opponents of the bill, whose sympathy for the black employer might have been diplomatic.) If Rehnquist means to use the psychological concept of a composite intention, then, his use displays everyone in the long catalogue of flaws in that misunderstood concept. It is not simply that we need more evidence to discover what the collective understanding was. Rather the evidence we have suggests that there was none to discover.

So Rehnquist's argument fails whether we take it to rely on the institutional or the psychological concept of legislative intent. Its appeal to him might have come from a failure to distinguish these two concepts, so that he could take arguments for the psychological branch as arguments for the warrant of the institutional branch. He should not have taken this occasion so violently to tax his colleagues with using slipshod arguments to cover a purely political judgment, for his own arguments were much weaker than he thought.

IV

We must ask, however, whether the majority had better arguments then Rehnquist had. For his charge that their decision was based on purely personal political convictions is not answered simply by showing that his own arguments are poor. The opinion for the majority was written by Mr. Justice Brennan. It contains two different arguments, one of them explicit, and one that must be reconstructed from independent remarks. The explicit arguments is the mirror image of Rehnquist's opposing argument and suffers from the same defects. It uses general remarks about the purpose of the Civil Rights Act, together with the fact of section 703(j), to establish a legislative intention to exempt affirmative action from Title VII. Brennan is not explicit whether this is an institutionalized intention or a collective understanding.

If Congress did not intend to permit voluntary affirmative programs, he argues, it would have stated in 703(j) that such programs were neither required nor permitted; but it said simply that they were not required. "The natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative action." That inference is not natural but fallacious. The argument shows that Congress did not choose to outlaw affirmative action, but it does not follow that Congress chose not to do so. Personifying the Congress encourages the mistake (Brennan's opinion is full of phrases like "Congress's primary concern * * *," Congress feared * * *," etc.). But it is not true even in the case of an individual that he either chooses to permit something or chooses not to permit it. He may have chosen neither.

Brennan's second argument is much more successful. If made more explicit, it would take something like the following form.

(1) We can identify an uncontroversial political policy that fully supports the main provisions of Title VII of the Civil Rights Act. This is the policy of ameliorating the economic inferiority of blacks and other minorities. Many members of both houses expressly endorsed that policy, and no one contested it.

(2) That policy will be advanced by permitting plans like Kaiser's. It would be sharply arrested by making such plans illegal.

(3) Section 703(j) is supported by a different, and to some degree competing political principle, which is that it is wrong for the government to intervene in private hiring and personnel policy simply to secure a racial balance. Even though such intervention would advance the main policy of achieving greater economic racial equality, it is wrong because it abrogates what Brennan calls "traditional management prerogatives." Though this principle is not uncontroversial there is no dissent from it in the legislative history, either.

(4) A rule forbidding voluntary affirmative action would certainly constitute an intervention in traditional management decisions, therefore violating the principle supporting section 703(j), and it would be, moreover, not an intervention advancing the core policy of economic equality but one impeding that policy, and so condemned by that principle a fortiori. For all these reasons, the statute should not be construed to forbid the Kaiser plan.

Is this a good argument? It does not in any way personify Congress, or presuppose a congressional intention, in either sense, to exempt private and voluntary rate-conscious employment plans from the act. So it does not suffer from the mistakes of Brennan's first argument, or of Rehnquist's opinion. It rests instead on a different theory of legislation, which we might call the coherence theory. This supposes that a statute should be interpreted to advance the policies or principles that furnish the best political justification for the statute.

It may, of course, be controversial which principles or policies supply the best justification or a particular statute, or for some particular provision or limitation of that statute. Nor is it possible to state any mechanical formula for determining the answer to that question. A proposed justification cannot be accepted, of course, unless it is consistent with the provisions of the statute and finds substantial support in the political climate of the time. The justification Brennan provided for Title VII of the Civil Rights Act—the policy of promoting economic inequality between the races, subject to the principle that private employers should not be forced to maintain a racial balance—meets that test of consistency. The main provisions of Title VII, which forbid traditional discrimination against blacks, could be expected to reduce economic inequality, and though the various speeches Brennan cited, which include a statement by President Kennedy as well as statements by various senators, do not establish that all the congressmen had this justification in mind, they do establish that the justification had wide currency and political appeal.

But though Brennan's proposed justification does meet this test of consistency, other, different justifications might meet the test as well. It is, in fact, easy to construct a different justification according to which the coherence theory of legislation would support not the decision of the majority in favor of affirmative action but Rehnquist's opinion condemning it. We might say that Title VII is justified, not by a policy of promoting economic equality, but by the principle that any use of race-conscious criteria in hiring or promoting employees is unfair. That principle also fits the central provisions of the statute, and it is also supported by a substantial section of political opinion. But if that principle is taken to be the justification of Title VII, rather than the policy of promoting racial equality, then it is a decision for Weber, rather than a decision in favor of the Kaiser plan, that is most consistent with the statute so justified.

How is a court to choose between two justifications for a statute, each of which fits the statute and finds a basis in political opinion? Of course, if one of these justifications has been attached to the statute as an institutionalized intention, through some legislative convention of the sort described earlier, then the court must apply that justification even though it prefers another. If the legislative history shows that while one justification had great support among a number of legislators, the other went unnoticed or was rejected by all who noticed it, then that might well be some evidence that the second does not, after all, reflect any widespread political opinion. But in most hard cases testing whether a statute applies in controversial circumstances, when there are two justifications available that point in opposite directions, both justifications will fit well enough both the text of the statute and the political climate of the day, and neither will be attached to the statute by convention.

Weber was such a case. In these cases I see no procedure for decision—no theory of legislation—other than this: one justification for a statute is better than another, and provides the direction for coherent development of the statute, if it provides a more accurate or more sensitive or sounder analysis of the underlying moral principles. So judges must decide which of the two competing justifications is superior as a matter of political morality, and apply the statute so as to further that justification. Different judges, who disagree about morality, will therefore disagree about the statute. But that is inevitable, and if each judge faces the moral decision openly, an informed public will be in a better position to understand and criticize them than if the moral grounds of decision lie hidden under confused arguments about nonexistent legislative intents.

It is no use protesting that this procedure allows judges to substitute their own political judgment for the judgment of elected representatives of the people. That protest is doubly misleading. It suggests, first, that the legislators have in fact made a judgment so that it is wrong for the judges to displace that judgment. But if there is no institutionalized intention, no pertinent collective understanding, and two competing justifications, there is no such judgment. Second, the protest suggests that judges have some way to decide such a case that does not require them to make a political judgment. But there simply is no such procedure, except a method that leaves the decision to chance, like flipping a coin.

The jurisprudential point at stake here can be put two different ways. We can say that the legislation a statute produces, when the words of the statute are indecisive and there is no institutionalized intention, directly depends upon political morality. When a court asks, for example, whether Congress outlawed affirmative action in Title VII, the court must ask, as part of that question, whether affirmative action is unfair, because if it is, then Congress did. Or we can say that, in such a case, what Congress has done is not uncertain, but rather indeterminate: it has neither outlawed affirmative action nor not done so, so that when a court decides on the basis of a judgment about the fairness of affirmative action it cannot be displacing a congressional judgment either way. It must be supplementing that judgment in the only rational way available to it. I believe that the first of these two descriptions is more accurate: it reflects a deeper understanding of the complex idea of legislation. But the second may seem more sensible to lawyers who favor more traditional theories of that institution. The difference is not important in the present context, because under either interpretation the objection to the majority's decision in *Weber*—that that decision is based on the judges' own beliefs about the fairness and wisdom of affirmative action—is no objection at all.

We can now see why Rehnquist's bitter condemnation of the majority was so misguided. *Weber* offered the Supreme Court not an exercise in reconstructing the mental states of a variety of senators and congressmen but a serious and complex issue about the nature of discrimination and the fairness of affirmative action. It was, in fact, the same issue that the Court faced in *Bakke,* but did not, as a Court, answer. Discrimination of the conventional sort, practiced against blacks in America for centuries, is wrong. But why? Is it wrong because any race-conscious distinction is always and inevitably wrong, even when used to redress inequality? If so, then it would be correct, under the coherence theory of legislation, to interpret Title VII as outlawing all such distinctions in employment. Or is traditional discrimination wrong because it reflects prejudice and contempt for a disadvantaged group, and so increased the disadvantage of that group? In that case, it would be sounder to attribute to Title VII the different program of outlawing such malign discrimination, and seeking to remove its inegalitarian consequences, and it would be perverse, rather than sensible, to understand the statute to bar private efforts in that direction.[2]

Either decision in the case—the decision of the minority as well as that of the majority—must be supported by some answer to these questions if it is to be supported at all. Chief Justice Burger's remark—that he would vote to permit plans like Kaiser's if he were in Congress, but nevertheless believed that Congress had made them illegal—is therefore more perplexing than it first appears. If Burger's interpretation of Title VII can be supported only by supposing that affirmative action is wrong as a matter of moral principle, and if he does not think it wrong, because he would have voted to permit it if he were in Congress, he cannot continue in his opinion of the law. If he accepted the jurisprudential argument of this essay, that is, he would have to switch his vote in *Weber* and later cases.

We cannot make the same assumption about Rehnquist's dissenting vote. He argued, as I said, that he was forced to his vote by neutral arguments of statutory construction. But even if he accepted that no such arguments are in fact available, and that any decision in the case must reflect some answer to the question of political morality, he might still answer that affirmative action is unfair and that Kaiser's plan is for that reason barred by the statute. Nothing in his opinion suggests or assumes the contrary.

What of the five judges who made up the majority? Four of them—Justices Brennan, Blackmun, Marshall, and White—voted in *Bakke* to uphold the constitutionality even of the quota plan used by the Davis Medical School to assure a fixed proportion of minority students. Their votes assumed that even a quota plan did not invade the fundamental political rights of white students who were thereby denied places. So their votes in *Weber* are consistent with their votes in *Bakke,* even if we assume that their *Weber* votes were based on Brennan's second and more successful argument. The fifth justice forming the majority was Mr. Justice Stewart, and that fact is, I think, of some importance.

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[2] For a discussion of this important issue, see my articles "Why Bakke Has No Case." *NYR,* November 10, 1977, and "The Bakke Decision: Did It Decide Anything?" August 17, 1978.

The *Bakke* decision was indecisive because the four justices who held that the Davis plan was illegal under Title VI of the Civil Rights Act expressed no opinion on whether it was unconstitutional, and therefore no explicit opinion on the underlying issue: the moral issue of the fairness of affirmative action. Stewart was one of these, and his present vote with the majority in *Weber* is especially important if it does signal his acceptance of Brennan's second argument, because that would establish a clear majority in favor of the principle that affirmative action of the sort used in *Weber*—a race-conscious policy aimed at improving racial equality and not subjecting any one to disadvantage because his or her race is disfavored—offends no one's political rights.

I put this point in a guarded way, because my argument does not supply any firm basis for predictions about future affirmative action cases. Stewart may have joined the majority because he accepted some argument about legislative intent, like Brennan's first argument. In any case the majority opinion Stewart joined is carefully limited in various ways. It emphasizes, for example, that the Kaiser plan was limited to securing rather than also maintaining a racial balance, and though that distinction is irrelevant as a matter of moral principle, it might be used to limit the impact of the decision for the future.

The opinion stresses, moreover, that it is an interpretation of one title of the Civil Rights Act only, and does not speak to any constitutional issue. Nevertheless the development of constitutional law is governed more by the latent moral principles that are presupposed by a good justification of Supreme Court decisions than by the more technical arguments and limitations set out in the discrete opinions, and this is especially true when, as in *Weber*, these more technical points do not withstand close analysis. The Court's decision in *Weber* is of great importance, and not simply because it permitted valuable programs developed by private initiative to go forward. For all its careful limitations, the case marks another step in the Court's efforts to develop a new conception of what equality requires in the search for racial justice. In retrospect, that step will seem more important than the Court's hesitant shuffle in *Bakke*.

DEFUNIS ET AL. v. ODEGAARD ET AL.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 73-235. Argued February 26, 1974—Decided April 23, 1974

PER CURIAM.

In 1971 the petitioner Marco DeFunis, Jr.,[1] applied for admission as a first-year student at the University of Washington Law School, a state-operated institution. The size of the incoming first-year class was to be limited to 150 persons, and the Law School received some 1,600 applications for these 150 places. DeFunis was eventually notified that he had been denied admission. He thereupon commenced this suit in a Washington trial court, contending that the procedures and criteria employed by the Law School Admissions Committee invidiously discriminated against him on account of his race in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

DeFunis brought the suit on behalf of himself alone, and not as the representative of any class, against the various respondents, who are officers, faculty members, and members of the Board of Regents of the University of Washington. He asked the trial court to issue a mandatory injunction commanding the respondents to admit him as a member of the first-year class entering in September 1971, on the ground that the Law School admissions policy had resulted in the unconstitutional denial of his application for admission. The trial court agreed with his claim and granted the requested relief.

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[1] Also included as petitioners are DeFunis' parents and his wife. Hereafter, the singular form "petitioner" is used.

DeFunis was, accordingly, admitted to the Law School and began his legal studies there in the fall of 1971. On appeal, the Washington Supreme Court reversed the judgment of the trial court and held that the Law School admissions policy did not violate the Constitution. By this time DeFunis was in his second year at the Law School.

He then petitioned this Court for a writ of certiorari, and MR. JUSTICE DOUGLAS, as Circuit Justice, stayed the judgment of the Washington Supreme Court pending the "final disposition of the case by this Court." By virtue of this stay, DeFunis has remained in law school, and was in the first term of his third and final year when this Court first considered his certiorari petition in the fall of 1973. Because of our concern that DeFunis' third-year standing in the Law School might have rendered this case moot, we requested the parties to brief the question of mootness before we acted on the petition. In response, both sides contended that the case was not moot. The respondents indicated that, if the decision of the Washington Supreme Court were permitted to stand, the petitioner could complete the term for which he was then enrolled but would have to apply to the faculty for permission to continue in the school before he could register for another term.[2]

We granted the petition for certiorari on November 19, 1973. 414 U. S. 1038. The case was in due course orally argued on February 26, 1974.

In response to questions raised from the bench during the oral argument, counsel for the petitioner has informed the Court that DeFunis has now registered "for his final quarter in law school." Counsel for the respondents have made clear that the Law School will not in any way seek to abrogate this registration.[3] In light of DeFunis' recent registration for the last quarter of his final law school year, and the Law School's assurance that his registration is fully effective, the insistent question again arises whether this case is not moot, and to that question we now turn.

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[2] By contrast, in their response to the petition for certiorari, the respondents had stated that DeFunis "will complete his third year [of law school] and be awarded his J. D. degree at the end of the 1973-74 academic year regardless of the outcome of this appeal."

The starting point for analysis is the familiar proposition that "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice,* 404 U. S. 244 246 (1971). The inability of the federal judiciary "to review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." *Liner* v. *Jafco, Inc.,* 375 U. S. 301, 306 n. 3 (1964); see also *Powell* v. *McCormack,* 395 U. S. 486, 496 n. 7 (1969); *Sibron* v. *New York,* 392 U. S. 40, 50 n. 8 (1968). Although as a matter of Washington state law it appears that this case would be saved from mootness by "the great public interest in the continuing issues raised by this appeal," 82 Wash. 2d 11, 23 n. 6, 507 P. 2d 1169, 1177 n. 6 (1973), the fact remains that under Art. III "[e]ven in cases arising in the state courts, the question of mootness is a federal one which a federal court must resolve before it assumes jurisdiction." *North Carolina* v. *Rice, supra,* at 246.

The respondents have represented that, without regard to the ultimate resolution of the issues in this case,

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[3] In their memorandum on the question of mootness, counsel for the respondents unequivocally stated: "If Mr. DeFunis registers for the spring quarter under the existing order of this court during the registration period from February 20, 1974, to March 1, 1974, that registration would not be canceled unilaterally by the university regardless of the outcome of this litigation."

DeFunis will remain a student in the Law School for the duration of any term in which he has already enrolled. Since he has now registered for his final term, it is evident that he will be given an opportunity to complete all academic and other requirements for graduation, and, if he does so, will receive his diploma regardless of any decision this Court might reach on the merits of this case. In short, all parties agree that DeFunis is now entitled to complete his legal studies at the University of Washington and to receive his degree from that institution. A determination by this Court of the legal issues tendered by the parties is no longer necessary to compel that result, and could not serve to prevent it. DeFunis did not cast his suit as a class action, and the only remedy he requested was an injunction commanding his admission to the Law School. He was not only accorded that remedy, but he now has also been irrevocably admitted to the final term of the final year of the Law School course. The controversy between the parties has thus clearly ceased to be "definite and concrete" and no longer "touch[es] the legal relations of parties having adverse legal interests." *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 240–241 (1937).

It matters not that these circumstances partially stem from a policy decision on the part of the respondent Law School authorities. The respondents, through their counsel, the Attorney General of the State, have professionally represented that in no event will the status of DeFunis now be affected by any view this Court might express on the merits of this controversy. And it has been the settled practice of the Court, in contexts no less significant, fully to accept representations such as these as parameters for decision. See *Gerende* v. *Election Board,* 341 U. S. 56 (1951); *Whitehill* v. *Elkins,* 389 U. S. 54, 57–58 (1967); *Ehlert* v. *United States,* 402 U. S. 99, 107 (1971); cf. *Law Students Research Council* v. *Wadmond,* 401 U. S. 154, 162–163 (1971).

There is a line of decisions in this Court standing for the proposition that the "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i. e.*, does not make the case moot." *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632 (1953); *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 308–310 (1897); *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37, 43 (1944); *Gray* v. *Sanders,* 372 U. S. 368, 376 (1963); *United States* v. *Phosphate Export Assn.*, 393 U. S. 199, 202–203 (1968). These decisions and the doctrine they reflect would be quite relevant if the question of mootness here had arisen by reason of a unilateral change in the *admissions procedures* of the Law School. For it was the admissions procedures that were the target of this litigation, and a voluntary cessation of the admissions practices complained of could make this case moot only if it could be said with assurance "that 'there is no reasonable expectation that the wrong will be repeated.'" *United States* v. *W. T. Grant Co., supra,* at 633. Otherwise, "[t]he defendant is free to return to his old ways," *id.*, at 632, and this fact would be enough to prevent mootness because of the "public interest in having the legality of the practices settled." *Ibid.* But mootness in the present case depends not at all upon a "voluntary cessation" of the admissions practices that were the subject of this litigation. It depends, instead, upon the simple fact that DeFunis is now in the final quarter of the final year of his course of study, and the settled and unchallenged policy of the Law School to permit him to complete the term for which he is now enrolled.

It might also be suggested that this case presents a question that is "capable of repetition, yet evading review," *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911); *Roe* v. *Wade*, 410 U. S. 113, 125 (1973), and is thus amenable to federal adjudication even though it might otherwise be considered moot. But DeFunis will never again be required to run the gantlet of the Law School's admission process, and so the question is certainly not "capable of repetition" so far as he is concerned. Moreover, just because this particular case did not reach the Court until the eve of the petitioner's graduation from law school, it hardly follows that the issue he raises will in the future evade review. If the admissions procedures of the Law School remain unchanged,[4] there is no reason to suppose that a subsequent case attacking those procedures will not come with relative speed to this Court, now that the Supreme Court of Washington has spoken. This case, therefore, in no way presents the exceptional situation in which the *Southern Pacific Terminal* doctrine might permit a departure from "[t]he usual rule in federal cases . . . that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated." *Roe* v. *Wade, supra,* at 125; *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950).

Because the petitioner will complete his law school studies at the end of the term for which he has now registered regardless of any decision this Court might reach on the merits of this litigation, we conclude that the Court cannot, consistently with the limitations of

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[4] In response to an inquiry from the Court, counsel for the respondents has advised that some changes have been made in the admissions procedures "for the applicants seeking admission to the University of Washington law school for the academic year commencing September, 1974." The respondents' counsel states, however, that "[these] changes do not affect the policy challenged by the petitioners . . . in that . . . special consideration still is given to applicants from 'certain ethnic groups.'"

Art. III of the Constitution, consider the substantive constitutional issues tendered by the parties.[5] Accordingly, the judgment of the Supreme Court of Washington is vacated, and the cause is remanded for such proceedings as by that court may be deemed appropriate.

It is so ordered.

MR. JUSTICE DOUGLAS, dissenting.

I agree with MR. JUSTICE BRENNAN that this case is not moot, and because of the significance of the issues raised I think it is important to reach the merits.

I

The University of Washington Law School received 1,601 applications for admission to its first-year class beginning in September 1971. There were spaces available for only about 150 students, but in order to enroll this number the school eventually offered admission to 275 applicants. All applicants were put into two groups, one of which was considered under the minority admissions program. Thirty-seven of those offered admission had indicated on an optional question on their application that their "dominant" ethnic origin was either black, Chicano, American Indian, or Filipino, the four groups included in the minority admissions program. Answers to this optional question were apparently the sole basis upon which eligibility for the program was determined. Eighteen of these 37 actually enrolled in the Law School.

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[5] It is suggested in dissent that "[a]ny number of unexpected events—illness, economic necessity, even academic failure—might prevent his graduation at the end of the term." *Post*, at 348. "But such speculative contingencies afford no basis for our passing on the substantive issues [the petitioner] would have us decide," *Hall* v. *Beals*, 396 U. S. 45, 49 (1969), in the absence of "evidence that this is a prospect of 'immediacy and reality.'" *Golden* v. *Zwickler*, 394 U. S. 103, 109 (1969); *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941).

In general, the admissions process proceeded as follows: An index called the Predicted First Year Average (Average) was calculated for each applicant on the basis of a formula combining the applicant's score on the Law School Admission Test (LSAT) and his grades in his last two years in college.[1] On the basis of its experience with previous years' applications, the Admissions Committee, consisting of faculty, administration, and students, concluded that the most outstanding applicants were those with averages above 77; the highest average of any applicant was 81. Applicants with averages above 77 were considered as their applications arrived by random distribution of their files to the members of the Committee who would read them and report their recommendations back to the Committee. As a result of the first three Committee meetings in February, March, and April 1971, 78 applicants from this group were admitted, although virtually no other applicants were offered admission this early.[2] By the final conclusion of the admissions process in August 1971, 147 applicants with averages above 77 had been admitted, including all applicants with averages above 78, and 93 of 105 applicants with averages between 77 and 78.

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[1] The grades are calculated on a conventional 4.0 scale, and the LSAT is scored on a scale ranging from 200 to 800. A Writing Test given on the same day as the LSAT and administered with it is also included in the formula; it is scored on a scale of 20 to 80. The Admissions Committee combines these scores into the Average by calculating the sum of 51.3, 3.4751 × the grade-point average, .0159 × LSAT score, and .0456 × the Writing Test score. App. 24. For a brief discussion of the use of the LSAT in combination with undergraduate grades to predict law school success, see Winterbottom, Comments on "A Study of the Criteria for Legal Education and Admission to the Bar," An Article by Dr. Thomas M. Goolsby, Jr., 21 J. Legal Ed. 75 (1968).

[2] The only other substantial group admitted at this point were 19 "military" applicants. These were students who had previously been admitted to the school but who had either been unable to come, or forced to leave during their tenure, because of the draft. They were

Also beginning early in the admissions process was the culling out of applicants with averages below 74.5. These were reviewed by the Chairman of the Admissions Committee, who had the authority to reject them summarily without further consideration by the rest of the Committee. A small number of these applications were saved by the Chairman for Committee consideration on the basis of information in the file indicating greater promise than suggested by the Average. Finally during the early months the Committee accumulated the applications of those with averages between 74.5 and 77 to be considered at a later time when most of the applications had been received and thus could be compared with one another. Since DeFunis' average was 76.23, he was in this middle group.

Beginning in their May meeting the Committee considered this middle group of applicants, whose folders had been randomly distributed to Committee members for their recommendations to the Committee. Also considered at this time were remaining applicants with averages below 74.5 who had not been summarily rejected, and some of those with averages above 77 who had not been summarily admitted, but instead held for further consideration. Each Committee member would consider the applications competitively, following rough guide-

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given preferential treatment upon reapplication after completing their military obligation. Since neither party has raised any issue concerning this group of applicants, the remaining consideration of the admissions procedure will not discuss them. Four minority applicants were also admitted at this time, although none apparently had scores above 77. App. 31. Their admission was presumably pursuant to the procedure for minority applicants described below.

lines as to the proportion who could be offered admission. After the Committee had extended offers of admission to somewhat over 200 applicants, a waiting list was constructed in the same fashion, and was divided into four groups ranked by the Committee's assessment of their applications. DeFunis was on this waiting list, but was ranked in the lowest quarter. He was ultimately told in August 1971 that there would be no room for him.

Applicants who had indicated on their application forms that they were either black, Chicano, American Indian, or Filipino were treated differently in several respects. Whatever their Averages, none were given to the Committee Chairman for consideration of summary rejection, nor were they distributed randomly among Committee members for consideration along with the other applications. Instead, all applications of black students were assigned separately to two particular Committee members: a first-year black law student on the Committee, and a professor on the Committee who had worked the previous summer in a special program for disadvantaged college students considering application to the Law School.[3] Applications from among the other three minority groups were assigned to an assistant dean who was on the Committee. The minority applications, while considered competitively with one another, were never directly compared to the remaining applications, either by the subcommittee or by the full Committee. As in the admissions process generally, the Committee sought to find "within the minority category, those persons who we thought had the highest probability of succeeding in Law School."[4] In reviewing the minority applications, the Committee attached less weight to the Average "in making a total judgmental evaluation as to the relative ability of the particular applicant to succeed in law school." 82 Wash. 2d 11, 21, 507 P. 2d 1169, 1175. In its publicly distributed Guide to Applicants, the Committee explained that "[a]n applicant's racial or ethnic background was considered as one factor in our general attempt to convert formal credentials into realistic predictions."[5]

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[3] This was a Council on Legal Education Opportunities program, federally funded by the Office of Economic Opportunity and sponsored by the American Bar Association, the Association of American Law Schools, the National Bar Association, and the Law School Admissions Council.

Thirty-seven minority applicants were admitted under this procedure. Of these, 36 had Averages below DeFunis' 76.23, and 30 had Averages below 74.5, and thus would ordinarily have been summarily rejected by the Chairman. There were also 48 nonminority applicants admitted who had Averages below DeFunis. Twenty-three of these were returning veterans, see n. 2, *supra*, and 25 were others who presumably were admitted because of other factors in their applications that made them attractive candidates despite their relatively low Averages.

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[4] Testimony of the Chairman of the Admissions Committee, Statement of Facts 353.

[5] The Guide to Applicants explained:

"We gauged the potential for outstanding performance in law school not only from the existence of high test scores and grade point averages, but also from careful analysis of recommendations, the quality of work in difficult analytical seminars, courses, and writing programs, the academic standards of the school attended by the applicant, the applicant's graduate work (if any), and the nature of the applicant's employment (if any), since graduation.

"An applicant's ability to make significant contributions to law school classes and the community at large was assessed from such factors as his extracurricular and community activities, employment, and general background.

"We gave no preference to, but did not discriminate against, either Washington residents or women in making our determinations. An applicant's racial or ethnic background was considered as one factor in our general attempt to convert formal credentials into realistic predictions." 82 Wash. 2d 11, 18–19, 507 P. 2d 1169, 1174.

It is reasonable to conclude from the above facts that while other factors were considered by the Committee, and were on occasion crucial, the Average was for most applicants a heavily weighted factor, and was at the extremes virtually dispositive.[6] A different balance was apparently struck, however, with regard to the minority applicants. Indeed, at oral argument, the respondents' counsel advised us that were the minority applicants considered under the same procedure as was generally used, none of those who eventually enrolled at the Law School would have been admitted.

The educational policy choices confronting a university admissions committee are not ordinarily a subject for judicial oversight; clearly it is not for us but for the law school to decide which tests to employ, how heavily to weigh recommendations from professors or undergraduate grades, and what level of achievement on the chosen criteria are sufficient to demonstrate that the candidate is qualified for admission. What places this case in a special category is the fact that the school did not choose one set of criteria but two, and then determined which to apply to a given applicant on the basis of his race. The

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[6] The respondents provided the following table in response to an interrogatory during the proceedings in the state court:

Predicted First Year Averages	Number of Applications Received	Number Accepted
81	1	1
80	2	2
79	11	11
78	42	42
77	105	93
76	169	53
75	210	22

App. 34.

Committee adopted this policy in order to achieve "a reasonable representation" of minority groups in the Law School. 82 Wash. 2d. at 20, 507 P. 2d, at 1175. Although it may be speculated that the Committee sought to rectify what it perceived to be cultural or racial biases in the LSAT or in the candidates' undergraduate records, the record in this case is devoid of any evidence of such bias, and the school has not sought to justify its procedures on this basis.

Although testifying that "[w]e do not have a quota . . ." the Law School dean explained that "[w]e want a reasonable representation. We will go down to reach it if we can," without "taking people who are unqualified in an absolute sense . . . ." Statement of Facts 420. By "unqualified in an absolute sense" the dean meant candidates who "have no reasonable probable likelihood of having a chance of succeeding in the study of law . . . ." *Ibid.* But the dean conceded that in "reaching," the school does take "some minority students who at least, viewed as a group, have a less such likelihood than the majority student group taken as a whole." *Id.,* at 423.

> "Q. Of those who have made application to go to the law school, I am saying you are not taking the best qualified?
>
> "A. In total?
>
> "Q. In total.
>
> "A. In using that definition, yes." *Id.,* at 423–424.

It thus appears that by the Committee's own assessment, it admitted minority students who, by the tests given, seemed less qualified than some white students who were not accepted, in order to achieve a "reasonable representation." In this regard it may be pointed out that for the year 1969–1970—two years before the class to which DeFunis was seeking admission—the Law School reported an enrollment of eight black students out of a total of 356.[7] Defendants' Ex. 7. That percentage, approximately 2.2%, compares to a percentage of blacks in the population of Washington of approximately 2.1%.[8]

II

There was a time when law schools could follow the advice of Wigmore, who believed that "the way to find out whether a boy has the makings of a competent lawyer is to see what he can do in a first year of law studies." Wigmore, Juristic Psychopoyemetrology—Or, How to Find Out Whether a Boy Has the Makings of a Lawyer, 24 Ill. L. Rev. 454, 463–464 (1929). In those days there were enough spaces to admit every applicant who met minimal credentials, and they all could be given the opportunity to prove themselves at law school. But by the 1920's many law schools found that they could not admit all minimally qualified applicants, and some selection process began.[9] The pressure to use some kind of admissions test mounted, and a number of schools instituted them. One early precursor to the modern day LSAT was the Ferson-Stoddard Law Aptitude examination. Wigmore conducted his own study of that test with 50 student volunteers, and concluded that it "had no substantial practical value." *Id.*, at 463. But his conclusions were not accepted, and the harried law schools still sought some kind of admissions test which would simplify the process of judging applicants, and in 1948 the LSAT was born. It has been with us ever since.[10]

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[7] Although there is apparently no evidence in point in the record, respondents suggest that at least some of these eight students were also admitted on a preferential basis. Brief for Respondents 40 n. 27.

[8] United States Bureau of the Census, Census of Population: 1970, General Population Characteristics, Washington, Final Report PC (1)—B49, Table 18.

[9] For a history of gradual acceptance among law schools of standardized tests as an admission tool, see Ramsey, Law School Admissions: Science, Art, or Hunch?, 12 J. Legal Ed. 503 (1960).

The test purports to predict how successful the applicant will be in his first year of law school, and consists of a few hours' worth of multiple-choice questions. But the answers the student can give to a multiple-choice question are limited by the creativity and intelligence of the test-maker; the student with a better or more original understanding of the problem than the test-maker may realize that none of the alternative answers are any good, but there is no way for him to demonstrate his understanding. "It is obvious from the nature of the tests that they do not give the candidate a significant opportunity to express himself. If he is subtle in his choice of answers it will go against him; and yet there is no other way for him to show any individuality. If he is strong-minded, nonconformist, unusual, original, or creative—as so many of the truly important people are—he must stifle his impulses and conform as best he can to the norms that the multiple-choice testers set up in their unimaginative, scientific way. The more profoundly gifted the candidate is, the more his resentment will rise against the mental strait jacket into which the testers would force his mind." B. Hoffmann, The Tyranny of Testing 91–92 (1962).

Those who make the tests and the law schools which use them point, of course, to the high correlations between the test scores and the grades at law school the first year. *E. g.*, Winterbottom, Comments on "A Study of the Criteria for Legal Education and Admission to the

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[10] For a survey of the use of the LSAT by American law schools as of 1965, see Lunneborg & Radford, The LSAT: A Survey of Actual Practice, 18 J. Legal Ed. 313 (1966).

Bar," An Article by Dr. Thomas M. Goolsby, Jr., 21 J. Legal Ed. 75 (1968). Certainly the tests do seem to do better than chance. But they do not have the value that their deceptively precise scoring system suggests. The proponents' own data show that, for example, most of those scoring in the bottom 20% on the test do better than that in law school—indeed six of every 100 of them will be in the *top* 20% of their law school class. *Id.*, at 79. And no one knows how many of those who were not admitted because of their test scores would in fact have done well were they given the chance. There are many relevant factors, such as motivation, cultural backgrounds of specific minorities that the test cannot measure, and they inevitably must impair its value as a predictor.[11] Of course, the law school that admits only those with the highest test scores finds that on the average they do much better, and thus the test is a convenient tool for the admissions committee. The price is paid by the able student who for unknown reasons did not achieve that high score—perhaps even the minority with a different cultural background. Some tests, at least in the past, have been aimed at eliminating Jews.

The school can safely conclude that the applicant with a score of 750 should be admitted before one with a score of 500. The problem is that in many cases the choice will be between 643 and 602 or 574 and 528. The numbers create an illusion of difference tending to overwhelm other factors. "The wiser testers are well aware of the defects of the multiple-choice format and the danger of placing reliance on any one method of assessment to the exclusion of all others. What is distressing is how little their caveats have impressed the people who succumb to the propaganda of the test-makers and use these tests mechanically as though they were a valid substitute for judgment." Hoffmann, *supra*, at 215.

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[11] Rock, Motivation, Moderators, and Test Bias, 1970 U. Tol. L. Rev. 527, 535.

Of course, the tests are not the only thing considered; here they were combined with the prelaw grades to produce a new number called the Average. The grades have their own problems; one school's A is another school's C. And even to the extent that this formula predicts law school grades, its value is limited. The law student with lower grades may in the long pull of a legal career surpass those at the top of the class. "[L]aw school admissions criteria have operated within a hermetically sealed system; it is now beginning to leak. The traditional combination of LSAT and GPA [undergraduate grade point average] may have provided acceptable predictors of likely performance in law school in the past. . . . [But] [t]here is no clear evidence that the LSAT and GPA provide particularly good evaluators of the intrinsic or enriched ability of an individual to perform as a law student or lawyer in a functioning society undergoing change. Nor is there any clear evidence that grades and other evaluators of law school performance, and the bar examination, are particularly good predictors of competence or success as a lawyer." Rosen, Equalizing Access to Legal Education: Special Programs for Law Students Who Are Not Admissible by Traditional Criteria, 1970 U. Tol. L. Rev. 321, 332-333.

But, by whatever techniques, the law school must make choices. Neither party has challenged the validity of the Average employed here as an admissions tool, and therefore consideration of its possible deficiencies is not presented as an issue. The Law School presented no evidence to show that adjustments in the process employed were used in order validly to compare applicants of different races; instead, it chose to avoid making such comparisons. Finally, although the Committee did consider other information in the files of all applicants, the Law School has made no effort to show that it was because of these additional factors that it admitted minority applicants who would otherwise have been rejected. To the contrary, the school appears to have conceded that by its own assessment—taking all factors into account—it admitted minority applicants who would have been rejected had they been white. We have no choice but to evaluate the Law School's case as it has been made.

III

The Equal Protection Clause did not enact a requirement that law schools employ as the sole criterion for admissions a formula based upon the LSAT and undergraduate grades, nor does it prohibit law schools from evaluating an applicant's prior achievements in light of the barriers that he had to overcome. A black applicant who pulled himself out of the ghetto into a junior college may thereby demonstrate a level of motivation, perseverance, and ability that would lead a fairminded admissions committee to conclude that he shows more promise for law study than the son of a rich alumnus who achieved better grades at Harvard. That applicant would be offered admission not because he is black, but because as an individual he has shown he has the potential, while the Harvard man may have taken less advantage of the vastly superior opportunities offered him. Because of the weight of the prior handicaps, that black applicant may not realize his full potential in the first year of law school, or even in the full three years, but in the long pull of a legal career his achievements may far outstrip those of his classmates whose earlier records appeared superior by conventional criteria. There is currently no test available to the Admissions

Committee that can predict such possibilities with assurance, but the Committee may nevertheless seek to gauge it as best it can, and weigh this factor in its decisions. Such a policy would not be limited to blacks, or Chicanos or Filipinos, or American Indians, although undoubtedly groups such as these may in practice be the principal beneficiaries of it. But a poor Appalachian white, or a second generation Chinese in San Francisco, or some other American whose lineage is so diverse as to defy ethnic labels, may demonstrate similar potential and thus be accorded favorable consideration by the Committee.

The difference between such a policy and the one presented by this case is that the Committee would be making decisions on the basis of individual attributes, rather than according a preference solely on the basis of race. To be sure, the racial preference here was not absolute—the Committee did not admit all applicants from the four favored groups. But it did accord all such applicants a preference by applying, to an extent not precisely ascertainable from the record, different standards by which to judge their applications, with the result that the Committee admitted minority applicants who, in the school's own judgment, were less promising than other applicants who were rejected. Furthermore, it is apparent that because the Admissions Committee compared minority applicants only with one another, it was necessary to reserve some proportion of the class for them, even if at the outset a precise number of places were not set aside.[12] That proportion, apparently 15% to

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[12] At the outset the Committee may have chosen only a range, with the precise number to be determined later in the process as the total number of minority applicants, and some tentative assessment of their quality, could be determined. This appears to be the current articulated policy, see App. to this opinion § 6, and we are advised by the respondents that § 6 "represents a more formal statement of the policy which was in effect in 1971 . . . but does not

20%, was chosen because the school determined it to be "reasonable," [13] although no explanation is provided as to how that number rather than some other was found appropriate. Without becoming embroiled in a semantic debate over whether this practice constitutes a "quota," it is clear that, given the limitation on the total number of applicants who could be accepted, this policy did reduce the total number of places for which DeFunis could compete—solely on account of his race. Thus, as the Washington Supreme Court concluded, whatever label one wishes to apply to it, "the minority admissions policy is certainly not benign with respect to nonminority students who are displaced by it." 82 Wash. 2d, at 32, 507 P. 2d, at 1182. A finding that the state school employed a racial classification in selecting its students subjects it to the strictest scrutiny under the Equal Protection Clause.

The consideration of race as a measure of an applicant's qualification normally introduces a capricious and irrelevant factor working an invidious discrimination, *Anderson* v. *Martin*, 375 U. S. 399, 402; *Loving* v. *Virginia*, 388 U. S. 1, 10; *Harper* v. *Virginia Board of Elections*, 383 U. S. 663, 668. Once race is a starting point educators and courts are immediately embroiled in competing claims of different racial and ethnic groups that would make difficult, manageable standards consistent

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represent any change in policy." Letter to the Court dated March 19, 1974, p. 1. The fact that the Committee did not set a precise number in advance is obviously irrelevant to the legal analysis. Nor does it matter that there is some minimal level of achievement below which the Committee would not reach in order to achieve its stated goal as to the proportion of the class reserved for minority groups, so long as the Committee was willing, in order to achieve that goal, to admit minority applicants who, in the Committee's own judgment, were less qualified than other rejected applicants and who would not otherwise have been admitted.

[13] See n. 12, *supra*, and App. to this opinion § 6.

with the Equal Protection Clause. "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." *Loving, supra,* at 10. The Law School's admissions policy cannot be reconciled with that purpose, unless cultural standards of a diverse rather than a homogeneous society are taken into account. The reason is that professional persons, particularly lawyers, are not selected for life in a computerized society. The Indian who walks to the beat of Chief Seattle of the Muckleshoot Tribe in Washington [14] has a different culture from examiners at law schools.

The key to the problem is the consideration of each application *in a racially neutral way.* Since the LSAT reflects questions touching on cultural backgrounds, the Admissions Committee acted properly in my view in setting minority applications apart for separate processing. These minorities have cultural backgrounds that are vastly different from the dominant Caucasian. Many Eskimos, American Indians, Filipinos, Chicanos, Asian Indians, Burmese, and Africans come from such disparate backgrounds that a test sensitively tuned for most applicants would be wide of the mark for many minorities.

The melting pot is not designed to homogenize people, making them uniform in consistency. The melting pot as I understand it is a figure of speech that depicts the wide diversities tolerated by the First Amendment under one flag. See 2 S. Morison & H. Commager, The Growth of the American Republic, c. VIII (4th ed. 1950). Minorities in our midst who are to serve actively in our public affairs should be chosen on talent and character alone, not on cultural orientation or leanings.

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[14] Uncommon Controversy, Report Prepared for American Friends Service Committee 29-30 (1970).

I do know, coming as I do from Indian country in Washington, that many of the young Indians know little about Adam Smith or Karl Marx but are deeply imbued with the spirit and philosophy of Chief Robert B. Jim of the Yakimas, Chief Seattle of the Muckleshoots, and Chief Joseph of the Nez Perce which offer competitive attitudes towards life, fellow man, and nature.[15]

I do not know the extent to which blacks in this country are imbued with ideas of African Socialism.[16] Leopold Senghor and Sékou Touré, the most articulate of African leaders, have held that modern African political philosophy is not oriented either to Marxism or to capitalism.[17] How far the reintroduction into educational curricula of ancient African art and history has reached the minds of young Afro-Americans I do not know. But at least as respects Indians, blacks, and Chicanos—as well as those from Asian cultures—I think a separate classification of these applicants is warranted, lest race be a subtle force in eliminating minority members because of cultural differences.

Insofar as LSAT's reflect the dimensions and orientation of the Organization Man they do a disservice to minorities. I personally know that admissions tests were once used to eliminate Jews. How many other minorities they aim at I do not know. My reaction is that the presence of an LSAT is sufficient warrant for a school to put racial minorities into a separate class in order better to probe their capacities and potentials.

The merits of the present controversy cannot in my view be resolved on this record. A trial would involve the disclosure of hidden prejudices, if any, against certain minorities and the manner in which substitute measurements of one's talents and character were employed in the conventional tests. I could agree with the majority of the Washington Supreme Court only if, on the record, it could be said that the Law School's selection was racially neutral. The case, in my view, should be remanded for a new trial to consider, *inter alia,* whether the established LSAT's should be eliminated so far as racial minorities are concerned.

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[15] See C. Fee, Chief Joseph, The Biography of a Great Indian (1936).

[16] See F. Brockway, African Socialism (1963); African Socialism (W. Friedland & C. Rosberg ed. 1964).

[17] See L. Senghor, On African Socialism (M. Cook ed. 1964).

This does not mean that a separate LSAT must be designed for minority racial groups, although that might be a possibility. The reason for the separate treatment of minorities as a class is to make more certain that racial factors do not militate *against an applicant or on his behalf.*[16]

There is no constitutional right for any race to be preferred. The years of slavery did more than retard the progress of blacks. Even a greater wrong was done the whites by creating arrogance instead of humility and by encouraging the growth of the fiction of a superior race.

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[16] We are not faced here with a situation where barriers are overtly or covertly put in the path of members of one racial group which are not required by others. There was also no showing that the purpose of the school's policy was to eliminate arbitrary and irrelevant barriers to entry by certain racial groups into the legal profession groups. *Griggs* v. *Duke Power Co.,* 401 U. S. 424. In *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 16, we stated that as a matter of educational policy school authorities could, within their broad discretion, specify that each school within its district have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole, in order to disestablish a dual school system. But there is a crucial difference between the policy suggested in *Swann* and that under consideration here: the *Swann* policy would impinge on no person's constitutional rights, because no one would be excluded from a public school and no one has a right to attend a segregated public school.

There is no superior person by constitutional standards. A DeFunis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner.

The slate is not entirely clean. First, we have held that pro rata representation of the races is not required either on juries, see *Cassell* v. *Texas,* 339 U. S. 282, 286-287, or in public schools, *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 24. Moreover, in *Hughes* v. *Superior Court,* 339 U. S. 460, we reviewed the contempt convictions of pickets who sought by their demonstration to force an employer to prefer Negroes to whites in his hiring of clerks, in order to ensure that 50% of the employees were Negro. In finding that California could constitutionally enjoin the picketing there involved we quoted from the opinion of the California Supreme Court, which noted that the pickets would " 'make the right to work for Lucky dependent not on fitness for the work nor on an equal right of all, regardless of race, to compete in an open market, but, rather, on membership in a particular race. If petitioners were upheld in their demand then other races, white, yellow, brown and red, would have equal rights to demand discriminatory hiring on a racial basis.' " *Id.,* at 463-464. We then noted that

> "[t]o deny to California the right to ban picketing in the circumstances of this case would mean that there could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portuguese in New Bedford, of Mexicans in San Antonio, of the

> numerous minority groups in New York, and so on through the whole gamut of racial and religious concentrations in various cities." *Id.*, at 464.

The reservation of a proportion of the law school class for members of selected minority groups is fraught with similar dangers, for one must immediately determine which groups are to receive such favored treatment and which are to be excluded, the proportions of the class that are to be allocated to each, and even the criteria by which to determine whether an individual is a member of a favored group. There is no assurance that a common agreement can be reached, and first the schools, and then the courts, will be buffeted with the competing claims. The University of Washington included Filipinos, but excluded Chinese and Japanese; another school may limit its program to blacks, or to blacks and Chicanos. Once the Court sanctioned racial preferences such as these, it could not then wash its hands of the matter, leaving it entirely in the discretion of the school, for then we would have effectively overruled *Sweatt* v. *Painter*, 339 U. S. 629, and allowed imposition of a "zero" allocation.[19] But what standard is the Court to apply when a rejected applicant of Japanese ancestry brings suit to require the University of Washington to extend the same privileges to his group? The Committee might conclude that the population of Washington is now 2% Japanese, and that Japanese also constitute 2% of the

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[19] *Sweatt* held that a State could not justify denying a black admission to its regular law school by creating a new law school for blacks. We held that the new law school did not meet the requirements of "equality" set forth in *Plessy* v. *Ferguson*, 163 U. S. 537. The student, we said, was entitled to "legal education equivalent to that offered by the State to students of other races. Such education is not available to him in a separate law school as offered by the State." 339 U. S., at 635.

Bar, but that had they not been handicapped by a history of discrimination, Japanese would now constitute 5% of the Bar, or 20%. Or, alternatively, the Court could attempt to assess how grievously each group has suffered from discrimination, and allocate proportions accordingly; if that were the standard the current University of Washington policy would almost surely fall, for there is no Western State which can claim that it has always treated Japanese and Chinese in a fair and evenhanded manner. See, *e. g., Yick Wo* v. *Hopkins,* 118 U. S. 356; *Terrace* v. *Thompson,* 263 U. S. 197; *Oyama* v. *California,* 332 U. S. 633. This Court has not sustained a racial classification since the wartime cases of *Korematsu* v. *United States,* 323 U. S. 214, and *Hirabayashi* v. *United States,* 320 U. S. 81, involving curfews and relocations imposed upon Japanese-Americans.[20]

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[20] Those cases involved an exercise of the war power, a great leveler of other rights. Our Navy was sunk at Pearl Harbor and no one knew where the Japanese fleet was. We were advised on oral argument that if the Japanese landed troops on our west coast nothing could stop them west of the Rockies. The military judgment was that, to aid in the prospective defense of the west coast, the enclaves of Americans of Japanese ancestry should be moved inland, lest the invaders by donning civilian clothes would wreak even more serious havoc on our western ports. The decisions were extreme and went to the verge of wartime power; and they have been severely criticized. It is, however, easy in retrospect to denounce what was done, as there actually was no attempted Japanese invasion of our country. While our Joint Chiefs of Staff were worrying about Japanese soldiers landing on the west coast, they actually were landing in Burma and at Kota Bharu in Malaya. But those making plans for defense of the Nation had no such knowledge and were planning for the worst. Moreover, the day we decided *Korematsu* we also decided *Ex parte Endo,* 323 U. S. 283, holding that while evacuation of the Americans of Japanese ancestry was allowable under extreme war conditions, their detention after evacuation was not. We said:

"A citizen who is concededly loyal presents no problem of espio-

Nor obviously will the problem be solved if next year the Law School included only Japanese and Chinese, for then Norwegians and Swedes, Poles and Italians, Puerto Ricans and Hungarians, and all other groups which form this diverse Nation would have just complaints.

The key to the problem is consideration of such applications *in a racially neutral way.* Abolition of the LSAT would be a start. The invention of substitute tests might be made to get a measure of an applicant's cultural background, perception, ability to analyze, and his or her relation to groups. They are highly subjective, but unlike the LSAT they are not concealed, but in the open. A law school is not bound by any legal principle to admit students by mechanical criteria which are insensitive to the potential of such an applicant which may be realized in a more hospitable environment. It will be necessary under such an approach to put more effort into assessing each individual than is required when LSAT scores and undergraduate grades dominate the selection process. Interviews with the applicant and others who know him is a time-honored test. Some schools currently run summer programs in which potential students who likely would be bypassed under conventional admissions criteria are given the opportunity to try their hand at law courses,[21] and certainly their performance in such programs could be weighed heavily. There is, moreover, no bar to considering an individual's prior achievements in

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nage or sabotage. Loyalty is a matter of the heart and mind, not of race, creed, or color. He who is loyal is by definition not a spy or a saboteur. When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized." *Id.*, at 302.

[21] See n. 3, *supra.*

light of the racial discrimination that barred his way, as a factor in attempting to assess his true potential for a successful legal career. Nor is there any bar to considering on an individual basis, rather than according to racial classifications, the likelihood that a particular candidate will more likely employ his legal skills to service communities that are not now adequately represented than will competing candidates. Not every student benefited by such an expanded admissions program would fall into one of the four racial groups involved here, but it is no drawback that other deserving applicants will also get an opportunity they would otherwise have been denied. Certainly such a program would substantially fulfill the Law School's interest in giving a more diverse group access to the legal profession. Such a program might be less convenient administratively than simply sorting students by race, but we have never held administrative convenience to justify racial discrimination.

The argument is that a "compelling" state interest can easily justify the racial discrimination that is practiced here. To many, "compelling" would give members of one race even more than *pro rata* representation. The public payrolls might then be deluged say with Chicanos because they are as a group the poorest of the poor and need work more than others, leaving desperately poor individual blacks and whites without employment. By the same token large quotas of blacks or browns could be added to the Bar, waiving examinations required of other groups, so that it would be better racially balanced.[22]

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[22] In *Johnson* v. *Committee on Examinations,* 407 U. S. 915, we denied certiorari in a case presenting a similar issue. There the petitioner claimed that the bar examiners reconsidered the papers submitted by failing minority applicants whose scores were close to the cutoff point, with the result that some minority appli-

The State, however, may not proceed by racial classification to force strict population equivalencies for every group in every occupation, overriding individual preferences. The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. The purpose of the University of Washington cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans and not to place First Amendment barriers against anyone.[23] That is the point at the heart of all our

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cants were admitted to the Bar although they initially had examination scores lower than those of white applicants who failed.

As the Arizona Supreme Court denied Johnson admission summarily, in an original proceeding, there were no judicial findings either sustaining or rejecting his factual claims of racial bias, putting the case in an awkward posture for review here. Johnson subsequently brought a civil rights action in Federal District Court, seeking both damages and injunctive relief. The District Court dismissed the action and the Court of Appeals affirmed, holding that the lower federal courts did not have jurisdiction to review the decisions of the Arizona Supreme Court on admissions to the state Bar. Johnson then sought review here and we denied his motion for leave to file a petition for mandamus, prohibition and/or certiorari on February 19, 1974. *Johnson* v. *Wilmer*, 415 U. S. 911. Thus in the entire history of the case no court had ever actually sustained Johnson's factual contentions concerning racial bias in the bar examiners' procedures. *DeFunis* thus appears to be the first case here squarely presenting the problem.

[23] Underlying all cultural background tests are potential ideological issues that have plagued bar associations and the courts. *In re Summers*, 325 U. S. 561, involved the denial of the practice of law to a man who could not conscientiously bear arms. The vote against him was five to four. *Konigsberg* v. *State Bar*, 353 U. S. 252, followed, after remand, by *Konigsberg* v. *State Bar*, 366 U. S. 36, resulted in barring one from admission to a state bar because of his refusal to answer questions concerning Communist Party member-

school desegregation cases, from *Brown* v. *Board of Education*, 347 U. S. 483, through *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1. A segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom, and in the end it may produce that result despite its contrary intentions. One other assumption must be clearly disapproved: that blacks or browns cannot make it on their individual merit. That is a stamp of inferiority that a State is not permitted to place on any lawyer.

If discrimination based on race is constitutionally permissible when those who hold the reins can come up with "compelling" reasons to justify it, then constitutional guarantees acquire an accordionlike quality. Speech is closely brigaded with action when it triggers a fight, *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, as shouting "fire" in a crowded theater triggers a riot. It may well be that racial strains, racial susceptibility to certain diseases, racial sensitiveness to environmental conditions that other races do not experience, may in an extreme situation justify differences in racial treatment that no fairminded person would call "invidious" discrimination. Mental ability is not in that category. All races can compete fairly at all professional levels. So

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ship. He, too, was excluded five to four. The petitioner in *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, was, however, admitted to practice even though he had about 10 years earlier been a member of the Communist Party. But *In re Anastaplo*, 366 U. S. 82, a five-to-four decision, barred a man from admission to a state bar not because he invoked the Fifth Amendment when asked about membership in the Communist Party, but because he asserted that the First and Fourteenth Amendments protected him from that inquiry. *Baird* v. *State Bar of Arizona*, 401 U. S. 1, held by a divided vote that a person could not be kept out of the state bar for refusing to answer whether he had ever been a member of the Communist Party; and see *In re Stolar*, 401 U. S. 23.

far as race is concerned, any state-sponsored preference to one race over another in that competition is in my view "invidious" and violative of the Equal Protection Clause.

The problem tendered by this case is important and crucial to the operation of our constitutional system; and educators must be given leeway. It may well be that a whole congeries of applicants in the marginal group defy known methods of selection. Conceivably, an admissions committee might conclude that a selection by lot of, say, the last 20 seats is the only fair solution. Courts are not educators; their expertise is limited; and our task ends with the inquiry whether, judged by the main purpose of the Equal Protection Clause—the protection against racial discrimination[24]—there has been an "invidious" discrimination.

We would have a different case if the suit were one to displace the applicant who was chosen in lieu of DeFunis. What the record would show concerning his potentials would have to be considered and weighed. The educational decision, provided proper guidelines were used, would reflect an expertise that courts should honor. The problem is not tendered here because the physical facilities were apparently adequate to take DeFunis in addition to the others. My view is only that I cannot say by the tests used and applied he was invidiously discriminated against because of his race.

I cannot conclude that the admissions procedure of the Law School of the University of Washington that excluded DeFunis is violative of the Equal Protection Clause of the Fourteenth Amendment. The judgment of the Washington Supreme Court should be vacated and the case remanded for a new trial.

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[24] See *Slaughter House Cases*, 16 Wall. 36, 81.

APPENDIX TO OPINION OF DOUGLAS, J., DISSENTING

The following are excerpts from the Law School's current admissions policy, as provided to the Court by counsel for the respondents.

ADMISSIONS

A. Policy Statement Regarding Admission to Entering Classes of Juris Doctor Program—Adopted by the Law Faculty December 4, 1973.

§ 1. The objectives of the admissions program are to select and admit those applicants who have the best prospect of high quality academic work at the law school and, in the minority admissions program described below, the further objective there stated.

§ 2. In measuring academic potential the law school relies primarily on the undergraduate grade-point average and the performance on the Law School Admission Test (LSAT). The weighting of these two indicators is determined statistically by reference to past experience at this school. For most applicants the resulting applicant ranking is the most nearly accurate of all available measures of relative academic potential. In truly exceptional cases, *i. e.*, those in which the numerical indicators clearly appear to be an inaccurate measure of academic potential, the admission decision indicated by them alone may be altered by a consideration of the factors listed below. The number of these truly exceptional cases in any particular year should fall somewhere from zero to approximately forty. These factors are used, however, only as an aid in assessing the applicant's academic potential in its totality, without undue emphasis or reliance upon one or a few and without an attempt to quantify in advance the strength of their application, singly or as a whole, in a particular case. They are:

a) the difficulty or ease of the undergraduate curriculum track pursued;

b) the demanding or non-demanding quality of the undergraduate school or department;

c) the attainment of an advanced degree, the nature thereof, and difficulty or ease of its attainment;

d) the applicant's pursuits subsequent to attainment of the undergraduate degree and the degree of success therein, as bearing on the applicant's academic potential;

e) the possibility that an applicant many years away from academic work may do less well on the LSAT than his or her counterpart presently or recently in academic work;

f) substantial change in mental or physical health that indicates prospect for either higher or lower quality of academic work;

g) substantial change in economic pressures or other circumstances that indicates prospect for either higher or lower quality of academic work;

h) exceptionally good or bad performance upon the writing test ingredient of the LSAT, if the current year's weighting of the numerical indicators does not otherwise take the writing score into account;

i) the quality and strength of recommendations bearing upon the applicant's academic potential;

j) objective indicators of motivation to succeed at the academic study of law;

k) variations in the level of academic achievement over time; and

l) any other indicators that serve the objective stated above.

. . . . .

§ 6. Because certain ethnic groups in our society have historically been limited in their access to the legal profession and because the resulting underrepresentation can affect the quality of legal services available to members of such groups, as well as limit their opportunity for full participation in the governance of our communities, the faculty recognizes a special obligation in its admissions policy to contribute to the solution of the problem.

Qualified minority applicants are therefore admitted under the minority admissions program in such number that the entering class will have a reasonable proportion of minority persons, in view of the obligation stated above and of the overall objective of the law school to provide legal education for qualified persons generally. For the purpose of determining the number to be specially admitted under the program, and not as a ceiling on minority admissions generally, the faculty currently believes that approximately 15 to 20 percent is such a reasonable proportion if there are sufficient qualified applicants available. Under the minority admissions program, admission is offered to those applicants who have a reasonable prospect of academic success at the law school, determined in each case by considering the numerical indicators along with the listed factors in Section 2, above, but without regard to the restriction upon number contained in that section.

No particular internal percentage or proportion among various minority groups in the entering class is specified; rather, the law school strives for a reasonable internal balance given the particular makeup of each year's applicant population.

As to some or all ethnic groups within the scope of the minority admissions program, it may be appropriate to give a preference in some degree to residents of the state; that determination is made each year in view of all the particulars of that year's situation, and the preference is given when necessary to meet some substantial local need for minority representation.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL concur, dissenting.

I respectfully dissent. Many weeks of the school term remain, and petitioner may not receive his degree despite respondents' assurances that petitioner will be allowed to complete this term's schooling regardless of our decision. Any number of unexpected events—illness, economic necessity, even academic failure—might prevent his graduation at the end of the term. Were that misfortune to befall, and were petitioner required to register for yet another term, the prospect that he would again face the hurdle of the admissions policy is real, not fanciful; for respondents warn that "Mr. DeFunis would have to take some appropriate action to request continued admission for the remainder of his law school education, and *some discretionary action by the University on such request would have to be taken.*" Respondents' Memorandum on the Question of Mootness 3-4 (emphasis supplied). Thus, respondents' assurances have not dissipated the possibility that petitioner might once again have to run the gantlet of the University's allegedly unlawful admissions policy. The Court therefore proceeds on an erroneous premise in resting its mootness holding on a supposed inability to render any judgment that may affect one way or the other petitioner's completion of his law studies. For surely if we were to reverse the Washington Supreme Court, we could insure that, if for some reason petitioner did not graduate this spring, he would be entitled to re-enrollment at a later time on the same basis as others who have not faced the hurdle of the University's allegedly unlawful admissions policy.

In these circumstances, and because the University's position implies no concession that its admissions policy is unlawful, this controversy falls squarely within the Court's long line of decisions holding that the "[m]ere voluntary cessation of allegedly illegal conduct does not moot a case." *United States* v. *Phosphate Export Assn.*, 393 U. S. 199, 203 (1968); see *Gray* v. *Sanders*, 372 U. S. 368 (1963); *United States* v. *W. T. Grant Co.*, 345 U. S. 629 (1953); *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37 (1944); *FTC* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257 (1938); *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290 (1897). Since respondents' voluntary representation to this Court is only that they will permit petitioner to complete this term's studies, respondents have not borne the "heavy burden," *United States* v. *Phosphate Export Assn.*, *supra*, at 203, of demonstrating that there was not even a "mere possibility" that petitioner would once again be subject to the challenged admissions policy. *United States* v. *W. T. Grant Co.*, *supra*, at 633. On the contrary, respondents have positioned themselves so as to be "free to return to [their] old ways." *Id.*, at 632.

I can thus find no justification for the Court's straining to rid itself of this dispute. While we must be vigilant to require that litigants maintain a personal stake in the outcome of a controversy to assure that "the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution," *Flast* v. *Cohen*, 392 U. S. 83, 106 (1968), there is no want of an adversary contest in this case. Indeed, the Court concedes that, if petitioner has lost his stake in this controversy, he did so only when he registered for the spring term. But petitioner took that action only after the case had been fully litigated in the state courts, briefs had been filed in this Court, and oral argument had been heard. The case is thus ripe for decision on a fully developed factual record with sharply defined and fully canvassed legal issues. Cf. *Sibron* v. *New York*, 392 U. S. 40, 57 (1968).

Moreover, in endeavoring to dispose of this case as moot, the Court clearly disserves the public interest. The constitutional issues which are avoided today concern vast numbers of people, organizations, and colleges and universities, as evidenced by the filing of twenty-six *amicus curiae* briefs. Few constitutional questions in recent history have stirred as much debate, and they will not disappear. They must inevitably return to the federal courts and ultimately again to this Court. Cf. *Richardson* v. *Wright*, 405 U. S. 208, 212 (1972) (dissenting opinion). Because avoidance of repetitious litigation serves the public interest, that inevitability counsels against mootness determinations, as here, not compelled by the record. Cf. *United States* v. *W. T. Grant Co., supra*, at 632; *Parker* v. *Ellis*, 362 U. S. 574, 594 (1960) (dissenting opinion). Although the Court should, of course, avoid unnecessary decisions of constitutional questions, we should not transform principles of avoidance of constitutional decisions into devices for sidestepping resolution of difficult cases. Cf. *Cohens* v. *Virginia*, 6 Wheat. 264, 404–405 (1821) (Marshall, C. J.).

On what appears in this case, I would find that there is an extant controversy and decide the merits of the very important constitutional questions presented.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 76-811

Regents of the University of California, Petitioner, *v.* Allan Bakke. | On Writ of Certiorari to the Supreme Court of California.

[June 28, 1978]

MR. JUSTICE POWELL announced the judgment of the Court.

This case presents a challenge to the special admissions program of the petitioner, the Medical School of the University of California at Davis, which is designed to assure the admission of a specified number of students from certain minority groups. The Superior Court of California sustained respondent's challenge, holding that petitioner's program violated the California Constitution, Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d, and the Equal Protection Clause of the Fourteenth Amendment. The court enjoined petitioner from considering respondent's race or the race of any other applicant in making admissions decisions. It refused, however, to order respondent's admission to the Medical School, holding that he had not carried his burden of proving that he would have been admitted but for the constitutional and statutory violations. The Supreme Court of California affirmed those portions of the trial court's judgment declaring the special admissions program unlawful and enjoining petitioner from considering the race of any applicant.* It modified that

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*MR. JUSTICE STEVENS views the judgment of the California court as limited to prohibiting the consideration of race only in passing upon Bakke's application. *Post,* at 1-4. It must be remembered, however, that petitioner here cross-complained in the trial court for a declaratory portion of the judgment denying respondent's requested injunction and directed the trial court to order his admission.

For the reasons stated in the following opinion, I believe that so much of the judgment of the California court as holds petitioner's special admissions program unlawful and directs that respondent be admitted to the Medical School must be affirmed. For the reasons expressed in a separate opinion, my Brothers THE CHIEF JUSTICE, MR. JUSTICE STEWART, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS concur in this judgment.

I also conclude for the reasons stated in the following opinion that the portion of the court's judgment enjoining petitioner from according any consideration to race in its admissions process must be reversed. For reasons expressed in separate opinions, my Brothers MR. JUSTICE BRENNAN, MR.

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judgment that its special program was constitutional and lost. The trial court's judgment that the special program was unlawful was affirmed by the California Supreme Court in an opinion which left no doubt that the reason for its holding was petitioner's use of race in consideration of *any candidate's* application. Moreover, in explaining the scope of its holding, the court quite clearly stated that petitioner was prohibited from taking race into account in any way in making admissions decisions:

> "In addition, the University may properly as it in fact does, consider other factors in evaluating an applicant, such as the personal interview, recommendations, character, and matters relating to the needs of the profession and society, such as an applicant's professional goals. In short, the standards for admission employed by the University are not constitutionally infirm except to the extent that they are utilized in a racially discriminatory manner. Disadvantaged applicants of all races must be eligible for sympathetic consideration, and no applicant may be rejected because of his race, in favor of another who is less qualified, as measured by standards applied without regard to race. We reiterate, in view of the dissent's misinterpretation, that we do not compel the University to utilize only 'the highest objective academic credentials' as the criterion for admission." 18 Cal. 3d 34, 54–55, 553 P. 2d 1152, 1166 (1976) (footnote omitted).

This explicit statement makes it unreasonable to assume that the reach of the California court's judgment can be limited in the manner suggested by MR. JUSTICE STEVENS.

JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN concur in this judgment.

Affirmed in part and reversed in part.

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The Medical School of the University of California at Davis opened in 1968 with an entering class of 50 students. In 1971, the size of the entering class was increased to 100 students, a level at which it remains. No admissions program for disadvantaged or minority students existed when the school opened, and the first class contained three Asians but no blacks, no Mexican-Americans, and no American Indians. Over the next two years, the faculty devised a special admissions program to increase the representation of "disadvantaged" students in each medical school class.[1] The special program consisted of

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†MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN join Parts I and V–C of this opinion. MR. JUSTICE WHITE also joins Part III–A of this opinion.

[1] Material distributed to applicants for the class entering in 1973 described the special admissions program as follows:

"A special subcommittee of the Admissions Committee, made up of faculty and medical students from minority groups, evaluates applications from economically and/or educationally disadvantaged backgrounds. The applicant may designate on the application form that he or she requests such an evaluation. Ethnic minorities are not categorically considered under the Task Force program unless they are from disadvantaged backgrounds. Our goals are (1) a short range goal in the identification and recruitment of potential candidates for admission to medical school in the near future, and (2) our long range goal is to stimulate career interest in health professions among junior high and high school students.

"After receiving all pertinent information selected applicants will receive a letter inviting them to our School of Medicine in Davis for an interview. The interviews are conducted by at least one faculty member and one student member of the Task Force Committee. Recommendations are then made to the Admissions Committee of the medical school. Some of the Task Force Faculty are also members of the Admissions Committee.

"Long-range goals will be approached by meeting with counselors and a separate admissions system operating in coordination with the regular admissions process.

Under the regular admissions procedure, a candidate could submit his application to the medical school beginning in July of the year preceding the academic year for which admission was sought. Record 149. Because of the large number of applications,[2] the admissions committee screened each one to select candidates for further consideration. Candidates whose overall undergraduate grade point averages fell below 2.5 on a scale of 4.0 were summarily rejected. *Id.*, at 63. About one out of six applicants was invited for a personal interview. *Ibid.* Following the interviews, each candidate was rated on a scale of 1 to 100 by his interviewers and four other members of the admissions committee. The rating embraced the interviewers' summaries, the candidate's overall grade point average, grade point average in science courses, and scores on the Medical College Admissions Test (MCAT),

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students of schools with large minority populations, as well as with local youth and adult community groups.

"Applications for financial aid are available only *after* the applicant has been accepted and can only be awarded after registration. Financial aid is available to students in the form of scholarships and loans. In addition to the Regents' Scholarships and the President's Scholarship programs, the medical school participates in the Health Professions Scholarship Program, which makes funds available to students who otherwise might not be able to pursue a medical education. Other scholarships and awards are available to students who meet special eligibility qualifications. Medical students are also eligible to participate in the Federally Insured Student Loan Program and the American Medical Association Education and Research Foundation Loan Program.

"Applications for Admissions are available from:

"Admissions Office
School of Medicine
University of California
Davis, California 95616"

Record 195. The letter distributed the following year was virtually identical, except that the third paragraph was omitted.

[2] For the 1973 entering class of 100 seats, the Davis medical school received 2,464 applications. Record 117. For the 1974 entering class, 3,737 applications were submitted. *Id.*, at 289.

letters of recommendation, extracurricular activities, and other biographical data. *Id.*, at 62. The ratings were added together to arrive at each candidate's "benchmark" score. Since five committee members rated each candidate in 1973, a perfect score was 500; in 1974, six members rated each candidate, so that a perfect score was 600. The full committee then reviewed the file and scores of each applicant and made offers of admission on a "rolling" basis.[3] The chairman was responsible for placing names on the waiting list. They were not placed in strict numerical order; instead, the chairman had discretion to include persons with "special skills." *Ibid.*

The special admissions program operated with a separate committee, a majority of whom were members of minority groups. *Id.*, at 163. On the 1973 application form, candidates were asked to indicate whether they wished to be considered as "economically and/or educationally disadvantaged" applicants; on the 1974 form the question was whether they wished to be considered as members of a "minority group," which the medical school apparently viewed as "Blacks," "Chicanos," "Asians," and "American Indians." *Id.*, at 65–66, 146, 197, 203–205, 216–218. If these questions were answered affirmatively, the application was forwarded to the special admissions committee. No formal definition of "disadvantage" was ever produced, *id.*, at 163–164, but the chairman of the special committee screened each application to see whether it reflected economic or educational deprivation.[4] Having passed this initial hurdle, the applications then were rated by the special committee in a fashion similar to that used by the general admissions committee, except that special candidates did not have to meet the 2.5 grade point average cut-off applied to regular applicants. About one-fifth of the total number of special applicants were invited for interviews in 1973 and 1974.[5] Following each interview, the special committee assigned each special applicant a benchmark score. The special committee then presented its top choices to the general admissions committee. The latter did not rate or compare the special candidates against the general applicants, *id.*, at 388, but could reject recommended special candidates for failure to meet course requirements or other specific deficiencies. *Id.*, at 171–172. The special committee continued to recommend special applicants until a number prescribed by faculty vote were admitted. While the overall class size was still 50, the prescribed number was eight; in 1973 and 1974, when the class size had doubled to 100, the prescribed number of special admissions also doubled, to 16. *Id.*, at 164, 166.

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[3] That is, applications were considered and acted upon as they were received, so that the process of filling the class took place over a period of months, with later applications being considered against those still on file from earlier in the year. Record 64.

[4] The chairman normally checked to see if, among other things, the applicant had been granted a waiver of the school's application fee, which required a means test; whether the applicant had worked during college or interrupted his education to support himself or his family; and whether the applicant was a member of a minority group. Record 65–66.

From the year of the increase in class size—1971—through 1974, the special program resulted in the admission of 21 black students, 30 Mexican-Americans, and 12 Asians, for a total of 63 minority students. Over the same period, the regular admissions program produced one black, six Mexican-Americans, and 37 Asians, for a total of 44 minority students.[6] Although

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[5] For the class entering in 1973, the total number of special applicants was 297, of whom 73 were white. In 1974, 628 persons applied to the special committee, of whom 172 were white. Record 133–134.

[6] The following table provides a year-by-year comparison of minority admissions at the Davis Medical School:

	Special Admissions Program				General Admissions				Total
	Blacks	Chicanos	Asians	Total	Blacks	Chicanos	Asians	Total	
1970	5	3	0	8	0	0	4	4	12
1971	4	9	2	15	1	0	8	9	24
1972	5	6	5	16	0	0	11	11	27
1973	6	8	2	16	0	2	13	15	31
1974	6	7	3	16	0	4	5	9	25

Record 216–218. Sixteen persons were admitted under the special program

disadvantaged whites applied to the special program in large numbers, see n. 5, *supra,* none received an offer of admission through that process. Indeed, in 1974, at least, the special committee explicitly considered only "disadvantaged" special applicants who were members of one of the designated minority groups. Record 171.

Allan Bakke is a white male who applied to the Davis Medical School in both 1973 and 1974. In both years Bakke's application was considered by the general admissions program, and he received an interview. His 1973 interview was with Dr. Theodore H. West, who considered Bakke "a very desirable applicant to [the] medical school." *Id.,* at 225. Despite a strong benchmark score of 468 out of 500, Bakke was rejected. His application had come late in the year, and no applicants in the general admissions process with scores below 470 were accepted after Bakke's application was completed. *Id.,* at 69. There were four special admissions slots unfilled at that time, however, for which Bakke was not considered. *Id.,* at 70. After his 1973 rejection, Bakke wrote to Dr. George H. Lowrey, Associate Dean and Chairman of the Admissions Committee, protesting that the special admissions program operated as a racial and ethnic quota. *Id.,* at 259.

Bakke's 1974 application was completed early in the year. *Id.,* at 70. His student interviewer gave him an overall rating of 94, finding him "friendly, well tempered, conscientious and delightful to speak with." *Id.,* at 229. His faculty interviewer was, by coincidence, the same Dr. Lowrey to whom he had written in protest of the special admissions program. Dr. Lowrey found Bakke "rather limited in his approach" to the problems of the medical profession and found disturbing Bakke's "very definite opinions which were based more on his personal viewpoints than upon a study of the total problem."

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in 1974, *ibid.,* but one Asian withdrew before the start of classes, and the vacancy was filled by a candidate from the general admissions waiting list. Brief for Petitioner 4 n. 5.

Id., at 226. Dr. Lowrey gave Bakke the lowest of his six ratings, an 86; his total was 549 out of 600. *Id.*, at 230. Again, Bakke's application was rejected. In neither year did the chairman of the admissions committee, Dr. Lowrey, exercise his discretion to place Bakke on the waiting list. *Id.*, at 64. In both years, applicants were admitted under the special program with grade point averages, MCAT scores, and bench mark scores significantly lower than Bakke's.[7]

After the second rejection, Bakke filed the instant suit in the Superior Court of California.[8] He sought mandatory,

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[7] The following table compares Bakke's science grade point average, overall grade point average, and MCAT Scores with the average scores of regular admittees and of special admittees in both 1973 and 1974. Record 210, 223, 231, 234:

Class Entering in 1973

			MCAT (Percentiles)			
	SGPA	OGPA	Verbal	Quantitative	Science	Gen. Infor.
Bakke	3.44	3.51	96	94	97	72
Average of Regular Admittees	3.51	3.49	81	76	83	69
Average of Special Admittees	2.62	2.88	46	24	35	33

Class Entering in 1974

			MCAT (Percentiles)			
	SGPA	OGPA	Verbal	Quantitative	Science	Gen. Infor.
Bakke	3.44	3.51	96	94	97	72
Average of Regular Admittees	3.36	3.29	69	67	82	72
Average of Special Admittees	2.42	2.62	34	30	37	18

Applicants admitted under the special program also had benchmark scores significantly lower than many students, including Bakke, rejected under the general admissions program, even though the special rating system apparently gave credit for overcoming "disadvantage." Record 181, 388.

[8] Prior to the actual filing of the suit, Bakke discussed his intentions with Peter C. Storandt, Assistant to the Dean of Admissions at the Davis Medical School. Record 259–269. Storandt expressed sympathy for Bakke's position and offered advice on litigation strategy. Several *amici* imply

injunctive, and declaratory relief compelling his admission to the Medical School. He alleged that the Medical School's special admissions program operated to exclude him from the school on the basis of his race, in violation of his rights under the Equal Protection Clause of the Fourteenth Amendment,[9] Art. I, § 21 of the California Constitution,[10] and § 601 of Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d.[11] The University cross-complained for a declaration that its special admissions program was lawful. The trial court found that the special program operated as a racial quota, because minority applicants in the special program were rated only against one another, Record 388, and 16 places in the class of 100 were reserved for them. *Id.*, at 295–296. Declaring that the University could not take race into account in making admissions decisions, the trial court held the challenged program violative of the Federal Constitution, the state constitution and Title VI. The court refused to order Bakke's admission, however, holding that he had failed to carry his burden of proving that he would have been admitted but for the existence of the special program.

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that these discussions render Bakke's suit "collusive." There is no indication, however, that Storandt's views were those of the medical school or that anyone else at the school even was aware of Storandt's correspondence and conversations with Bakke. Storandt is no longer with the University.

[9] ". . . [N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

[10] "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges, or immunities which, upon the same terms, shall not be granted to all citizens."

This section was recently repealed and its provisions added to Art. I, § 7 of the state constitution.

[11] Section 601 of Title VI provides as follows:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Bakke appealed from the portion of the trial court judgment denying him admission, and the University appealed from the decision that its special admissions program was unlawful and the order enjoining it from considering race in the processing of applications. The Supreme Court of California transferred the case directly from the trial court, "because of the importance of the issues involved." 18 Cal. 3d 34, 39, 553 P. 2d 1152, 1156 (1976). The California court accepted the findings of the trial court with respect to the University's program.[12] Because the special admissions program involved a racial classification, the supreme court held itself bound to apply strict scrutiny. *Id.*, at 49, 553 P. 2d, at 1162–1163. It then turned to the goals the University presented as justifying the special program. Although the court agreed that the goals of integrating the medical profession and increasing the number of physicians willing to serve members of minority groups were compelling state interests, *id.*, at 53, 553 P. 2d, at 1165, it concluded that the special admissions program was not the least intrusive means of achieving those goals. Without passing on the state constitutional or the federal statutory grounds cited in the trial court's judgment, the California court held that the Equal Protection Clause of the Fourteenth Amendment required that "no applicant may be rejected because of his race, in favor of another who is less qualified, as measured by standards applied without regard to race." *Id.*, at 55, 553 P. 2d, at 1166.

Turning to Bakke's appeal, the court ruled that since Bakke had established that the University had discriminated against him on the basis of his race, the burden of proof shifted to the University to demonstrate that he would not have been admitted even in the absence of the special admissions program.[13] *Id.*, at 63–64, 553 P. 2d, at 1172. The court analogized Bakke's situation to that of a plaintiff under Title VII to the Civil Rights Act of 1964, 42 U. S. C. §§ 2000e–17, see, *e. g., Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 772 (1976). *Ibid.* On this basis, the court initially ordered a remand for the purpose of determining whether, under the newly allocated burden of proof, Bakke would have been admitted to either the 1973 or the 1974 entering class in the absence of the special admissions program. Appendix A to Application for Stay, at 48. In its petition for rehearing below, however, the University conceded its inability to carry that burden. Appendix B to Application for Stay, at 19–20.[14] The

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[12] Indeed, the University did not challenge the finding that applicants who were not members of a minority group were excluded from consideration in the special admissions process. 18 Cal. 3d, at 44, 553 P. 2d, at 1159.

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[13] Petitioner has not challenged this aspect of the decision. The issue of the proper placement of the burden of proof, then, is not before us.

[14] Several *amici* suggest that Bakke lacks standing, arguing that he never showed that his injury—exclusion from the medical school—will be redressed by a favorable decision, and that the petitioner "fabricated" jurisdiction by conceding its inability to meet its burden of proof. Petitioner does not object to Bakke's standing, but inasmuch as this charge concerns our jurisdiction under Art. III, it must be considered and rejected. First, there appears to be no reason to question the petitioner's concession. It was not an attempt to stipulate to a conclusion of law or to disguise actual facts of record. Compare *Swift & Co.* v. *Hocking Valley R. Co.*, 243 U. S. 281 (1917).

Second, even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing. The constitutional element of standing is plaintiff's demonstration of any injury to himself that is likely to be redressed by favorable decision of his claim. *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975). The trial court found such an injury, apart from failure to be admitted, in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race. Record 323. Hence the constitutional requirements of Art. III were met. The question of respondent's admission *vel non* is merely one of relief.

Nor is it fatal to Bakke's standing that he was not a "disadvantaged" applicant. Despite the program's purported emphasis on disadvantage, it was a minority enrollment program with a secondary disadvantage element. White disadvantaged students were never considered under the special

California court thereupon amended its opinion to direct that the trial court enter judgment ordering Bakke's admission to the medical school. 18 Cal. 3d, at 64, 553 P. 2d, at 1172. That order was stayed pending review in this Court. 429 U. S. 953 (1976). We granted certiorari to consider the important constitutional issue. 429 U. S. 1090 (1977).

II

In this Court the parties neither briefed nor argued the applicability of Title VI of the Civil Rights of 1964. Rather, as had the California court, they focused exclusively upon the validity of the special admissions program under the Equal Protection Clause. Because it was possible, however, that a decision on Title VI might obviate resort to constitutional interpretation, see *Ashwander* v. *TVA*, 297 U. S. 288, 346–348 (1936), we requested supplementary briefing on the statutory issue.

A

At the outset we face the question whether a right of action for private parties exists under Title VI. Respondent argues that there is a private right of action, invoking the test set forth in *Cort* v. *Ash*, 422 U. S. 66, 78 (1975). He contends that the statute creates a federal right in his favor, that legislative history reveals an intent to permit private actions,[15] that such actions would further the remedial purposes of the statute, and that enforcement of federal rights under the Civil Rights Act generally is not relegated to the States. In addition, he cites several lower court decisions which have recognized or assumed the existence of a private right of action.[16] Petitioner denies the existence of a private right of

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program, and the University acknowledges that its goal in devising the program was to increase minority enrollment.

[15] See, *e. g.*, 110 Cong. Rec. 5255 (1964) (remarks of Sen. Case).

[16] *E. g., Boissier Parish School Board* v. *Lemon*, 370 F. 2d 847, 851–852 (CA5), cert. denied, 388 U. S. 911 (1967); *Natonabah* v. *Board of Educa-*

action, arguing that the sole function of § 601, see n. 11, *supra,* was to establish a predicate for administrative action under § 602, 42 U. S. C. § 2000d-1.[17] In its view, administrative curtailment of federal funds under that section was the only sanction to be imposed upon recipients that violated § 601.

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tion, 355 F. Supp. 716, 724 (N. M. 1973); cf. *Lloyd* v. *Regional Transportation Authority,* 548 F. 2d 1277, 1284-1287 (CA7 1977) (Title V); *Piascik* v. *Cleveland Museum of Art,* 426 F. Supp. 779, 780 n. 1 (ND Ohio 1976) (Title IX).

[17] § 602 reads as follows:

"Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report."

Petitioner also points out that Title VI contains no explicit grant of a private right of action, in contrast to Titles II, III, IV, and VII, of the same statute, 42 U. S. C. §§ 2000a–3 (a), 2000b–2, 2000c–8, and 2000e–5 (f).[18]

We find it unnecessary to resolve this question in the instant case. The question of respondent's right to bring an action under Title VI was neither argued nor decided in either of the courts below, and this Court has been hesitant to review questions not addressed below. *McGoldrick* v. *Compagnie Generale Transatlantique,* 309 U. S. 430, 434–435 (1940). See also *Massachusetts* v. *Wescott,* 431 U. S. 322 (1977); *Cardinale* v. *Louisiana,* 394 U. S. 437, 439 (1969). Cf. *Singleton* v. *Wulff,* 428 U. S. 106, 121 (1976). We therefore do not address this difficult issue. Similarly, we need not pass upon petitioner's claim that private plaintiffs under Title VI must exhaust administrative remedies. We assume only for the purposes of this case that respondent has a right of action under Title VI. See *Lau* v. *Nichols,* 414 U. S. 563, 571 n. 2 (1974) (STEWART, J., concurring in the result).

B

The language of § 601, like that of the Equal Protection Clause, is majestic in its sweep:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to

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[18] Several comments in the debates cast doubt on the existence of any intent to create a private right of action. For example, Representative Gill stated that no private right of action was contemplated:

"Nowhere in this section do you find a comparable right of legal action for a person who feels he has been denied his rights to participate in the benefits of federal funds. Nowhere. Only those who have been cut off can go to court and present their claim." 110 Cong. Rec. 2467 (1964).

Accord, *id.,* at 7065 (remarks of Sen. Keating); *id.,* at 6562 (remarks of Sen. Kuchel).

> discrimination under any program or activity receiving Federal financial assistance."

The concept of "discrimination," like the phrase "equal protection of the laws," is susceptible to varying interpretations, for as Mr. Justice Holmes declared, "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne* v. *Eisner*, 245 U. S. 418, 425 (1918). We must, therefore, seek whatever aid is available in determining the precise meaning of the statute before us. *Train* v. *Colorado Public Interest Research Group*, 426 U. S. 1, 10 (1976), quoting *United States* v. *American Trucking Assns.*, 310 U. S. 534, 543–544 (1940). Examination of the voluminous legislative history of Title VI reveals a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution. Although isolated statements of various legislators, taken out of context, can be marshalled in support of the proposition that § 601 enacted a purely color-blind scheme,[19] without regard to the reach of the Equal Protection Clause, these comments must be read against the background of both the problem that Congress was addressing and the broader view of the statute that emerges from a full examination of the legislative debates.

The problem confronting Congress was discrimination against Negro citizens at the hands of recipients of federal moneys. Indeed, the color-blindness pronouncements cited in the margin at n. 19, generally occur in the midst of extended remarks dealing with the evils of segregation in federally funded programs. Over and over again, proponents of the bill detailed the plight of Negroes seeking equal treatment in such programs.[20] There simply was no reason for Congress to consider the validity of hypothetical preferences that might be accorded minority citizens; the legislators were dealing with the real and pressing problem of how to guarantee those citizens equal treatment.

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[19] For example, Senator Humphrey stated as follows:

"Racial discrimination or segregation in the administration of disaster relief is particularly shocking; and offensive to our sense of justice and fair play. Human suffering draws no color lines, and the administration of help to the sufferers should not." 110 Cong. Rec. 6547 (1964).

See also *id.*, at 12675 (remarks of Sen. Allott); *id.*, at 6561 (remarks of Sen. Kuchel); *id.*, at 2494, 6047 (remarks of Sen. Pastore). But see *id.*, at 15893 (remarks of Rep. MacGregor); *id.*, at 13821 (remarks of Sen. Saltonstall); *id.*, at 10920 (remarks of Sen. Javits); *id.*, at 5266, 5807 (remarks of Sen. Keating).

In addressing that problem, supporters of Title VI repeatedly declared that the bill enacted constitutional principles. For example, Representative Celler, the Chairman of the House Judiciary Committee and floor manager of the legislation in the House, emphasized this in introducing the bill:

> "The bill would offer assurance that hospitals financed by Federal money would not deny adequate care to Negroes. It would prevent abuse of food distribution programs whereby Negroes have been known to be denied food surplus supplies when white persons were given such food. It would assure Negroes the benefits now accorded only white students in programs of higher education financed by Federal funds. It would, in short, *assure the existing right to equal treatment* in the enjoyment of Federal funds. It would not destroy any rights of private property or freedom of association." 110 Cong. Rec. 1519 (1964) (emphasis added).

Other sponsors shared Representative Celler's view that Title VI embodied constitutional principles.[21]

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[20] See, *e. g.*, 110 Cong. Rec. 7064–7065 (1964) (remarks of Sen. Ribicoff); *id.*, at 7054–7055 (remarks of Sen. Pastore); *id.*, at 6543–6544 (remarks of Sen. Humphrey); *id.*, at 2595 (remarks of Rep. Donahue); *id.*, at 2467–2468 (remarks of Rep. Celler); *id.*, at 1643, 2481–2482 (remarks of Rep. Ryan); H. Rep. No. 914, 88th Cong., 1st Sess., Part II, 24–25 (1964).

[21] See, *e. g.*, 110 Cong. Rec. 2467 (remarks of Rep. Lindsay). See also

In the Senate, Senator Humphrey declared that the purpose of Title VI was "to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation." *Id.*, at 6544. Senator Ribicoff agreed that Title VI embraced the constitutional standard: "Basically, there is a constitutional restriction against discrimination in the use of federal funds; and title VI simply spells out the procedure to be used in enforcing that restriction." *Id.*, at 13333. Other Senators expressed similar views.[22]

Further evidence of the incorporation of a constitutional standard into Title VI appears in the repeated refusals of the legislation's supporters precisely to define the term "discrimination." Opponents sharply criticized this failure,[23] but proponents of the bill merely replied that the meaning of "discrimination" would be made clear by reference to the Constitution or other existing law. For example, Senator Humphrey noted the relevance of the Constitution:

> "As I have said, the bill has a simple purpose. That purpose is to give fellow citizens—Negroes—the same rights and opportunities that white people take for granted. This is no more than what was preached by the prophets, and by Christ Himself. It is no more than what our Constitution guarantees." *Id.*, at 6553.[24]

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id., at 2766 (remarks of Rep. Matsunaga); *id.*, at 2731–2732 (remarks of Rep. Dawson); *id.*, at 2595 (remarks of Rep. Donahue); *id.*, at 1527–1528, (remarks of Rep. Celler).

[22] See, *e. g.*, 110 Cong. Rec. 12675, 12677 (1964) (remarks of Sen. Allott); *id.*, at 7064 (remarks of Sen. Pell); *id.*, at 7057, 7062–7064 (remarks of Sen. Pastore); *id.*, at 5243 (remarks of Sen. Clark).

[23] See, *e. g.*, 110 Cong. Rec. 6052 (remarks of Sen. Johnston); *id.*, at 5863 (remarks of Sen. Eastland); *id.*, at 5612 (remarks of Sen. Ervin); *id.*, at 5251 (remarks of Sen. Talmadge); *id.*, at 1632 (remarks of Rep. Dowdy); *id.*, at 1619 (remarks of Rep. Abernethy).

[24] See also 110 Cong. Rec. 7057, 13333 (remarks of Sen. Ribicoff); *id.*, at 7057 (remarks of Sen. Pastore); *id.*, at 5606–5607 (remarks of Sen. Javits); *id.*, at 5253, 5863–5864, 13442 (remarks of Sen. Humphrey).

In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.

III

A

Petitioner does not deny that decisions based on race or ethnic origin by faculties and administrations of state universities are reviewable under the Fourteenth Amendment. See, *e. g., Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337 (1938); *Sipuel* v. *Board of Regents,* 332 U. S. 631 (1948); *Sweatt* v. *Painter,* 339 U. S. 629 (1950); *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637 (1950). For his part, respondent does not argue that all racial or ethnic classifications are *per se* invalid. See, *e. g., Hirabayashi* v. *United States,* 320 U. S. 81 (1943); *Korematsu* v. *United States,* 323 U. S. 214 (1944); *Lee* v. *Washington,* 390 U. S. 333, 334 (1968) (Black, Harlan, and STEWART, JJ., concurring); *United Jewish Organizations* v. *Carey,* 430 U. S. 144 (1977). The parties do disagree as to the level of judicial scrutiny to be applied to the special admissions program. Petitioner argues that the court below erred in applying strict scrutiny, as this inexact term has been applied in our cases. That level of review, petitioner asserts, should be reserved for classifications that disadvantage "discrete and insular minorities." See *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152 n. 4 (1938). Respondent, on the other hand, contends that the California court correctly rejected the notion that the degree of judicial scrutiny accorded a particular racial or ethnic classification hinges upon membership in a discrete and insular minority and duly recognized that the "rights established [by the Fourteenth Amendment] are personal rights." *Shelley* v. *Kraemer,* 334 U. S. 1, 22 (1948).

En route to this crucial battle over the scope of judicial review,[25] the parties fight a sharp preliminary action over the proper characterization of the special admissions program. Petitioner prefers to view it as establishing a "goal" of minority representation in the medical school. Respondent, echoing the courts below, labels it a racial quota.[26]

This semantic distinction is beside the point: the special admissions program is undeniably a classification based on race and ethnic background. To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status.[27]

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[25] That issue has generated a considerable amount of scholarly controversy. See, *e. g.*, Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723 (1974); Greenawalt, Judicial Scrutiny of "Benign" Racial Preferences in Law School Admissions, 75 Colum. L. Rev. 559 (1975); Kaplan, Equal Justice in an Unequal World: Equality for the Negro, 61 Nw. U. L. Rev. 363 (1966); Karst & Horowitz, Affirmative Action and Equal Protection, 60 Va. L. Rev. 955 (1974); O'Neil, Racial Preference and Higher Education: The Larger Context, 60 Va. L. Rev. 925 (1974); Posner, The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities, 1974 Sup. Ct. Rev. 1; Redish, Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments, 22 U. C. L. A. L. Rev. 343 (1974); Sandalow, Racial Preferences in Higher Education: Political Responsibility and the Judicial Role, 42 U. Chi. L. Rev. 653 (1975); Sedler, Racial Preference, Reality and the Constitution: Bakke v. Regents of the University of California, 17 Santa Clara L. Rev. 329 (1977); Seeburger, A Heuristic Argument Against Preferential Admissions, 39 U. Pitt. L. Rev. 285 (1977).

[26] Petitioner defines "quota" as a requirement which must be met but can never be exceeded, regardless of the quality of the minority applicants. Petitioner declares that there is no "floor" under the total number of minority students admitted; completely unqualified students will not be admitted simply to meet a "quota." Neither is there a "ceiling," since an unlimited number could be admitted through the general admissions process. On this basis the special admissions program does not meet petitioner's definition of a quota.

The court below found—and petitioner does not deny—that white applicants could not compete for the 16 places reserved solely for the special admissions program. 18 Cal. 3d, at 44, 553 P. 2d, at 1159. Both courts below characterized this as a "quota" system.

The guarantees of the Fourteenth Amendment extend to persons. Its language is explicit: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." It is settled beyond question that the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. They are personal rights," *Shelley* v. *Kraemer, supra,* at 22. Accord, *Missouri ex rel. Gaines* v. *Canada, supra,* at 351; *McCabe* v. *Atchison, T. & S. F. R. Co.,* 235 U. S. 151, 161-162 (1914). The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.

Nevertheless, petitioner argues that the court below erred in applying strict scrutiny to the special admissions programs because white males, such as respondent, are not a "discrete and insular minority" requiring extraordinary protection from the majoritarian political process. *Carolene Products Co., supra,* at 152-153, n. 4. This rationale, however, has never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny. Nor has this Court held that discreteness and insularity constitute necessary preconditions to a holding that a particular classification is invidious.[28] See, *e. g., Skinner* v. *Oklahoma,* 316 U. S. 535,

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[27] Moreover, the University's special admissions program involves a purposeful, acknowledged use of racial criteria. This is not a situation in which the classification on its face is racially neutral, but has a disproportionate racial impact. In that situation, plaintiff must establish an intent to discriminate. *Village of Arlington Heights* v. *Metropolitan Housing Devel. Corp.,* 429 U. S. 252, 264-265 (1977); *Washington* v. *Davis,* 426 U. S. 229, 242 (1976); see *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886).

[28] After *Carolene Products,* the first specific reference in our decisions

541 (1942); *Carrington* v. *Rash,* 380 U. S. 89, 94–97 (1965). These characteristics may be relevant in deciding whether or not to add new types of classifications to the list of "suspect" categories or whether a particular classfication survives close examination. See, *e. g., Massachusetts Bd. of Retirement* v. *Murgia,* 427 U. S. 307, 313 (1976) (age); *San Antonio Indep. School Dist.* v. *Rodriguez,* 411 U. S. 1, 28 (1973) (wealth); *Graham* v. *Richardson,* 403 U. S. 365, 372 (1971) (aliens). Racial and ethnic classifications, however, are subject to stringent examination without regard to these additional characteristics. We declared as much in the first cases explicitly to recognize racial distinctions as suspect:

> "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi,* 320 U. S., at 100.
>
> ". . . [A]ll legal restrictions which curtail the rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny." *Korematsu,* 323 U. S., at 216.

The Court has never questioned the validity of those pronouncements. Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.

B

This perception of racial and ethnic distinctions is rooted in our Nation's constitutional and demographic history. The

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to the elements of "discreteness and insularity" appears in *Minersville School District* v. *Gobitis,* 310 U. S. 586, 606 (1940) (Stone, J., dissenting). The next does not appear until 1970. *Oregon* v. *Mitchell,* 400 U. S. 112, 295 n. 14 (1970) (STEWART, J., concurring in part and dissenting in part). These elements have been relied upon in recognizing a suspect class in only one group of cases, those involving aliens. *E. g., Graham* v. *Richardson,* 403 U. S. 365, 372 (1971).

Court's initial view of the Fourteenth Amendment was that its "one pervading purpose" was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised dominion over him." *Slaughter-House Cases,* 16 Wall. 36, 71 (1873). The Equal Protection Clause, however, was "[v]irtually strangled in its infancy by post-civil-war judicial reactionism." [29] It was relegated to decades of relative desuetude while the Due Process Clause of the Fourteenth Amendment, after a short germinal period, flourished as a cornerstone in the Court's defense of property and liberty of contract. See, *e. g., Mugler* v. *Kansas,* 123 U. S. 623, 661 (1887); *Allgeyer* v. *Louisiana,* 165 U. S. 578 (1897); *Lochner* v. *New York,* 198 U. S. 45 (1905). In that cause, the Fourteenth Amendment's "one pervading purpose" was displaced. See, *e. g., Plessy* v. *Ferguson,* 163 U. S. 537 (1896). It was only as the era of substantive due process came to a close, see, *e. g., Nebbia* v. *New York,* 291 U. S. 502 (1934); *West Coast Hotel* v. *Parrish,* 300 U. S. 379 (1937), that the Equal Protection Clause began to attain a genuine measure of vitality, see, *e. g., Carolene Products, supra; Skinner* v. *Oklahoma, supra.*

By that time it was no longer possible to peg the guarantees of the Fourteenth Amendment to the struggle for equality of one racial minority. During the dormancy of the Equal Protection Clause, the United States had become a nation of minorities.[30] Each had to struggle [31]—and to some extent struggles still[32]—to overcome the prejudices not of a monolithic majority, but of a "majority" composed of various minority groups of whom it was said—perhaps unfairly in many cases—that a shared characteristic was a willingness to disadvantage other groups.[33] As the Nation filled with the stock of many lands, the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination. See *Strauder* v. *West Virginia,* 100 U. S. 303, 308 (1880). (Celtic Irishmen) (dictum); *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886) (Chinese); *Truax* v. *Raich,* 239 U. S. 33, 41 (1915) (Austrian resident aliens); *Korematsu, supra* (Japanese); *Hernandez* v. *Texas,* 347 U. S. 475 (1954) (Mexican-Americans). The guarantees of equal protection, said the Court in *Yick Wo,* "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws." 118 U. S., at 369.

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[29] Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 381 (1949).

[30] M. Jones, American Immigration 177–246 (1960).

[31] J. Higham, Strangers in the Land (1955); G. Abbott, The Immigrant and the Community (1917); P. Roberts, The New Immigration 66–73, 86–91, 248–261 (1912). See also E. Fenton, Immigrants and Unions: A Case Study 561–562 (1975).

Although many of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white "majority," *Slaughter-House Cases, supra,* the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude. As this Court recently remarked in interpreting the 1866 Civil Rights Act to extend to claims of racial discrimination against white persons, "the 39th Congress was intent upon establishing in federal law a broader principle than would have been necessary to meet the particular and immediate plight of the newly freed Negro slaves." *McDonald* v. *Santa Fe Trail Transp. Co.,* 427 U. S. 273, 296 (1976). And that legislation was specifically broadened in 1870 to ensure that "all persons," not merely "citizens," would enjoy equal rights under the law. See *Runyon* v. *McCrary,* 427 U. S. 160, 192–202 (1976) (WHITE, J., dissenting). Indeed, it is not unlikely that among the Framers were many who would have applauded a reading of the Equal Protection Clause which states a principle of universal application and is responsive to the racial, ethnic and cultural diversity of the Nation. See, *e. g.,* Cong. Globe, 39th Cong., 1st Sess., 1056 (1866) (remarks of Rep. Niblack); *id.,* at 2891–2892 (remarks of Sen. Corness); *id.,* 40th Cong., 2d Sess., 883 (1868) (remarks of Sen. Howe) (Fourteenth Amendment "protect[s] classes from class legislation"). See also Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1, 60–63 (1955).

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[32] "Members of various religious and ethnic groups, primarily but not exclusively of eastern, and middle and southern European ancestry, such as Jews, Catholics, Italians, Greeks and Slavic groups [continue] to be excluded from executive, middle-management and other job levels because of discrimination based upon their religion and/or national origin." 41 CFR § 60-50.1 (b) (1977).

[33] *E. g.,* P. Roberts, The New Immigration 75 (1912); G. Abbott, The Immigrant and the Community 270-271 (1917). See generally n. 31, *supra.*

Over the past 30 years, this Court has embarked upon the crucial mission of interpreting the Equal Protection Clause with the view of assuring to all persons "the protection of equal laws," *Yick Wo, supra,* at 369, in a Nation confronting a legacy of slavery and racial discrimination. See, *e. g., Shelley* v. *Kraemer,* 334 U. S. 1 (1948); *Brown* v. *Board of Education,* 347 U. S. 483 (1954); *Hills* v. *Gautreaux,* 425 U. S. 284 (1976). Because the landmark decisions in this area arose in response to the continued exclusion of Negroes from the mainstream of American society, they could be characterized as involving discrimination by the "majority" white race against the Negro minority. But they need not be read as depending upon that characterization for their results. It suffices to say that "[o]ver the years, this Court consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.' " *Loving* v. *Virginia,* 388 U. S. 1, 11 (1967), quoting *Hirabayashi,* 320 U. S., at 100.

Petitioner urges us to adopt for the first time a more restrictive view of the Equal Protection Clause and hold that discrimination against members of the white "majority" cannot be suspect if its purpose can be characterized as "benign." [34] The clock of our liberties, however, cannot be turned back to 1868. *Brown* v. *Board of Education, supra,* at 492; accord, *Loving* v. *Virginia, supra,* at 9. It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others.[35] "The Fourteenth Amend-

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[34] In the view of Mr. Justice Brennan, Mr. Justice White, Mr. Justice Marshall, and Mr. Justice Blackmun, the pliable notion of "stigma" is the crucial element in analyzing racial classifications. See, *e. g., post,* at 38. The Equal Protection Clause is not framed in terms of "stigma." Certainly the word has no clearly defined constitutional meaning. It reflects a subjective judgment that is standardless. *All* state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened. The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious. These individuals are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority and that its imposition is inspired by the supposedly benign purpose of aiding others. One should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies, a system of allocating benefits and privileges on the basis of skin color and ethnic origin. Moreover, Mr. Justice Brennan, Mr. Justice White, Mr. Justice Marshall, and Mr. Justice Blackmun offer no principle for deciding whether preferential classifications reflect a benign remedial purpose or a malevolent stigmatic classification, since they are willing in this case to accept mere *post hoc* declarations by an isolated state entity—a medical school faculty—unadorned by particularized findings of past discrimination, to establish such a remedial purpose.

[35] Professor Bickel noted the self-contradiction of that view:

"The lesson of the great decisions of the Supreme Court and the lesson ment is not directed solely against discrimination due to a 'two-class theory'—that is, based upon differences between 'white' and Negro." *Hernandez, supra,* at 478.

Once the artificial line of a "two-class theory" of the Fourteenth Amendment is put aside, the difficulties entailed in varying the level of judicial review according to a perceived "preferred" status of a particular racial or ethnic minority are intractable. The concepts of "majority" and "minority" necessarily reflect temporary arrangements and political judgments. As observed above, the white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the state and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only "majority" left would be a new minority of White Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit "heightened judicial solicitude" and which would not.[36] Courts would be

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of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution." A. Bickel, The Morality of Consent 133 (1975).

[36] As I am in agreement with the view that race may be taken into account as a factor in an admissions program, I agree with my Brothers BRENNAN, WHITE, MARSHALL, and BLACKMUN that the portion of the judgment that would proscribe all consideration of race must be reversed. See Part V, *infra.* But I disagree with much that is said in their opinion.

They would require as a justification for a program such as petitioner's, only two findings: (i) that there has been some form of discrimination against the preferred minority groups "by society at large," *post,* at 45 (it being conceded that petitioner had no history of discrimination), and asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable.[37]

(ii) that "there is reason to believe" that the disparate impact sought to be rectified by the program is the "product" of such discrimination:

"If it was reasonable to conclude—as we hold that it was—that the failure of Negroes to qualify for admission at Davis under regular procedures was due principally to the effects of past discrimination, then there is a reasonable likelihood that, but for pervasive racial discrimination, respondent would have failed to qualify for admission even in the absence of Davis's special admission program." *Post,* at 41–42.

The breadth of this hypothesis is unprecedented in our constitutional system. The first step is easily taken. No one denies the regrettable fact that there has been societal discrimination in this country against various racial and ethnic groups. The second step, however, involves a speculative leap: but for this discrimination by society at large, Bakke "would have failed to qualify for admission" because Negro applicants—nothing is said about Asians, cf., *e. g., post,* at 50 n. 57—would have made better scores. Not one word in the record supports this conclusion, and the plurality offers no standard for courts to use in applying such a presumption of causation to other racial or ethnic classifications. This failure is a grave one, since if it may be concluded *on this record* that each of the minority groups preferred by the petitioner's special program is entitled to the benefit of the presumption, it would seem difficult to determine that any of the dozens of minority groups that have suffered "societal discrimination" cannot also claim it, in any area of social intercourse. See Part IV–B, *infra.*

[37] Mr. Justice Douglas has noted the problems associated with such inquiries:

"The reservation of a proportion of the law school class for members

Moreover, there are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is in fact benign. Courts may

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of selected minority groups is fraught with . . . dangers, for one must immediately determine which groups are to receive such favored treatment and which are to be excluded, the proportions of the class that are to be allocated to each, and even the criteria by which to determine whether an individual is a member of a favored group. [Cf. *Plessy* v. *Ferguson,* 163 U. S. 537, 549, 552 (1896).] There is no assurance that a common agreement can be reached, and first the schools, and then the courts, will be buffeted with the competing claims. The University of Washington included Filipinos, but excluded Chinese and Japanese; another school may limit its program to blacks, or to blacks and Chicanos. Once the Court sanctioned racial preferences such as these, it could not then wash its hands of the matter, leaving it entirely in the discretion of the school, for then we would have effectively overruled *Sweatt* v. *Painter,* 339 U. S. 629, and allowed imposition of a "zero" allocation. But what standard is the Court to apply when a rejected applicant of Japanese ancestry brings suit to require the University of Washington to extend the same privileges to his group? The Committee might conclude that the population of Washington is now 2% Japanese, and that Japanese also constitute 2% of the Bar, but that had they not been handicapped by a history of discrimination, Japanese would now constitute 5% of the Bar, or 20%. Or, alternatively, the Court could attempt to assess how grievously each group has suffered from discrimination, and allocate proportions accordingly; if that were the standard the current University of Washington policy would almost surely fall, for there is no Western State which can claim that it has always treated Japanese and Chinese in a fair and even-handed manner. See, *e. g., Yick Wo* v. *Hopkins,* 118 U. S. 356; *Terrace* v. *Thompson,* 263 U. S. 197; *Oyama* v. *California,* 332 U. S. 633. This Court has not sustained a racial classification since the wartime cases of *Korematsu* v. *United States,* 323 U. S. 214, and *Hirabayashi* v. *United States,* 320 U. S. 81, involving curfews and relocations imposed upon Japanese-Americans.

"Nor obviously will the problem be solved if next year the Law School included only Japanese and Chinese, for then Norwegians and Swedes, Poles and Italians, Puerto Ricans and Hungarians, and all other groups which form this diverse Nation would have just complaints." *DeFunis* v.

be asked to validate burdens imposed upon individual members of particular groups in order to advance the group's general interest. See *United Jewish Organizations* v. *Carey,* 430 U. S. 144, 172–173 (BRENNAN, J., concurring in part). Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups. Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. See *DeFunis* v. *Odegaard,* 416 U. S. 312, 343 (Douglas, J., dissenting). Third, there is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making.

By hitching the meaning of the Equal Protection Clause to these transitory considerations, we would be holding, as a constitutional principle, that judicial scrutiny of classifications touching on racial and ethnic background may vary with the ebb and flow of political forces. Disparate constitutional tolerance of such classifications well may serve to exacerbate racial and ethnic antagonisms rather than alleviate them. *United Jewish Organizations, supra,* at 173–174 (BRENNAN, J., concurring). Also, the mutability of a constitutional principle, based upon shifting political and social judgments, undermines the chances for consistent application of the Constitution from one generation to the next, a critical feature of its coherent interpretation. *Pollock* v. *Farmers Loan & Trust Co.,* 157 U. S. 429, 650–651 (1895) (White, J., dissenting). In expounding the Constitution, the Court's role is to discern "principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments

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Odegaard, 416 U. S. 312, 337–340 (1974) (Douglas, J., dissenting) (footnotes omitted).

of a particular time and place." A. Cox, The Role of the Supreme Court in American Government 114 (1976).

If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently. Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, *Korematsu* v. *United States,* 323 U. S. 214 (1944), but the standard of justification will remain constant. This is as it should be, since those political judgments are the product of rough compromise struck by contending groups within the democratic process.[38] When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest. The Constitution guarantees that right to every person regardless of his background. *Shelley* v. *Kraemer,* 334 U. S. 1, 22 (1948); *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, 351 (1938).

C

Petitioner contends that on several occasions this Court has approved preferential classifications without applying the most exacting scrutiny. Most of the cases upon which petitioner relies are drawn from three areas: school desegregation, employment discrimination, and sex discrimination. Each of the cases cited presented a situation materially different from the facts of this case.

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[38] R. Dahl, A Preface to Democratic Theory (1956); Posner, The DeFunis Case and the Constitutionality of Preferential Treatment of Minorities, 1974 Sup. Ct. Rev. 1, 27; cf. Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1683–1685, and nn. 64–67 (1975) and sources cited therein.

The school desegregation cases are inapposite. Each involved remedies for clearly determined constitutional violations. *E. g., Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971); *McDaniel* v. *Barresi,* 402 U. S. 39 (1971); *Green* v. *County School Board,* 391 U. S. 430 (1968). Racial classifications thus were designed as remedies for the vindication of constitutional entitlement.[39] Moreover, the scope of the remedies was not permitted to exceed the extent of the violations. *E. g., Dayton Board of Education* v. *Brinkman,* 433 U. S. 406 (1977); *Milliken* v. *Bradley,* 418 U. S. 717 (1974); see *Pasadena City Board of Education* v. *Spangler,* 427 U. S. 424 (1976). See also *Austin Indep. School Dist.* v. *United States,* 429 U. S. 990, 991–995 (1976) (POWELL, J., concurring). Here, there was no judicial determination of constitutional violation as a predicate for the formulation of a remedial classification.

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[39] Petitioner cites three lower court decisions allegedly deviating from this general rule in school desegregation cases: *Offermann* v. *Nitkowski,* 378 F. 2d 22 (CA2 1967); *Wanner* v. *County School Board,* 357 F. 2d 452 (CA4 1966); *Springfield School Committee* v. *Barksdale,* 348 F. 2d 261 (CA1 1965). Of these, *Wanner* involved a school system held to have been *de jure* segregated and enjoined from maintaining segregation; racial districting was deemed necessary. 357 F. 2d, at 454. Cf. *United Jewish Organizations* v. *Carey,* 430 U. S. 144 (1977). In *Barksdale* and *Offermann,* courts did approve voluntary districting designed to eliminate discriminatory attendance patterns. In neither, however, was there any showing that the school board planned extensive pupil transportation that might threaten liberty or privacy interests. See *Keyes* v. *School District No. 1,* 413 U. S. 189, 240–250 (1973) (POWELL, J., concurring in part and dissenting in part). Nor were white students deprived of an equal opportunity for education.

Respondent's position is wholly dissimilar to that of a pupil bused from his neighborhood school to a comparable school in another neighborhood in compliance with a desegregation decree. Petitioner did not arrange for respondent to attend a different medical school in order to desegregate Davis Medical School; instead, it denied him admission and may have deprived him altogether of a medical education.

The employment discrimination cases also do not advance petitioner's cause. For example, in *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1975), we approved a retroactive award of seniority to a class of Negro truck drivers who had been the victims of discrimination—not just by society at large, but by the respondent in that case. While this relief imposed some burdens on other employees, it was held necessary " 'to make [the victims] whole for injuries suffered on account of unlawful employment discrimination.' " *Id.*, at 771, quoting *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 418 (1975). The courts of appeals have fashioned various types of racial preferences as remedies for constitutional or statutory violations resulting in identified, race-based injuries to individuals held entitled to the preference. *E. g., Bridgeport Guardians, Inc.* v. *Civil Service Commission*, 482 F. 2d 1333 (CA2 1973); *Carter* v. *Gallagher*, 452 F. 2d 315, modified on rehearing en banc, 452 F. 2d 327 (CA8 1972). Such preferences also have been upheld where a legislative or administrative body charged with the responsibility made determinations of past discrimination by the industries affected, and fashioned remedies deemed appropriate to rectify the discrimination. *E. g., Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F. 2d 159 (CA3), cert. denied, 404 U. S. 954 (1971);[40] *Associated General Contractors of Massachusetts, Inc.* v. *Altschuler*, 490

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[40] Every decision upholding the requirement of preferential hiring under the authority of Executive Order 11246 has emphasized the existence of previous discrimination as a predicate for the imposition of a preferential remedy. *Contractors Association, supra; Southern Illinois Builders Assn.* v. *Ogilvie*, 471 F. 2d 680 (CA7 1972); *Joyce* v. *McCrane*, 320 F. Supp. 1284 (N. J. 1970); *Weiner* v. *Cuyahoga Community College District*, 19 Ohio 2d 35, 249 N. E. 907, cert. denied, 396 U. S. 1004 (1970). See also *Rosetti Contr. Co.* v. *Brennan*, 408 F. 2d 1039, 1041 (CA7 1975); *Associated General Contractors of Massachusetts, Inc.* v. *Altschuler*, 490 F. 2d 9 (CA1 1973), cert. denied, 416 U. S. 957 (1974); *Northeast Const. Co.* v. *Romney*, 157 U. S. App. D. C. 381, 485 F. 2d 752, 754, 761 (1973).

F. 2d 9 (CA1 1973), cert. denied, 416 U. S. 957 (1974); cf. *Katzenbach* v. *Morgan,* 384 U. S. 641 (1966). But we have never approved preferential classifications in the absence of proven constitutional or statutory violations.[41]

Nor is petitioner's view as to the applicable standard supported by the fact that gender-based classifications are not subjected to this level of scrutiny. *E. g., Califano* v. *Webster,* 430 U. S. 313, 316–317 (1977); *e. g., Craig* v. *Boren,* 429 U. S. 190, 211 n.* (1976) (POWELL, J., concurring). Gender-based distinctions are less likely to create the analytical and practical problems present in preferential programs premised on racial or ethnic criteria. With respect to gender there are only two possible classifications. The incidence of the burdens imposed by preferential classifications is clear. There are no rival groups who can claim that they, too, are entitled to preferential treatment. Classwide questions as to the group suffering previous injury and groups which fairly can be burdened are relatively manageable for reviewing courts. See, *e. g., Califano* v. *Goldfarb,* 430 U. S. 199, 212–217 (1977);

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[41] This case does not call into question congressionally authorized administrative actions, such as consent decrees under Title VII or approval of reapportionment plans under § 5 of the Voting Rights Act of 1965, 42 U. S. C. § 1973c. In such cases, there has been detailed legislative consideration of the various indicia of previous constitutional or statutory violations, *e. g., South Carolina* v. *Katzenbach,* 383 U. S. 301, 308–310 (1966) (§ 5), and particular administrative bodies have been charged with monitoring various activities in order to detect such violations and formulate appropriate remedies. See *Hampton* v. *Mow Sun Wong,* 426 U. S. 88, 103 (1976).

Furthermore, we are not here presented with an occasion to review legislation by Congress pursuant to its powers under § 2 of the Thirteenth Amendment and § 5 of the Fourteenth Amendment to remedy the effects of prior discrimination. *Katzenbach* v. *Morgan,* 384 U. S. 641 (1966); *Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409 (1968). We have previously recognized the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures.

Weinberger v. *Wiesenfeld,* 420 U. S. 636, 645 (1975). The resolution of these same questions in the context of racial and ethnic preferences presents far more complex and intractable problems than gender-based classifications. More importantly, the perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share. In sum, the Court has never viewed such classification as inherently suspect or as comparable to racial or ethnic classifications for the purpose of equal-protection analysis.

Petitioner also cites *Lau* v. *Nichols,* 414 U. S. 563 (1974), in support of the proposition that discrimination favoring racial or ethnic minorities has received judicial approval without the exacting inquiry ordinarily accorded "suspect" classifications. In *Lau,* we held that the failure of the San Francisco school system to provide remedial English instruction for some 1,800 students of oriental ancestry who spoke no English amounted to a violation of Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d, and the regulations promulgated thereunder. Those regulations required remedial instruction where inability to understand English excluded children of foreign ancestry from participation in educational programs. *Id.,* at 568. Because we found that the students in *Lau* were denied "a meaningful opportunity to participate in the educational program," *ibid.,* we remanded for the fashioning of a remedial order.

Lau provides little support for petitioner's argument. The decision rested solely on the statute, which had been construed by the responsible administrative agency to reach educational practices "which have the effect of subjecting individuals to discrimination," *id.,* at 568. We stated: "Under these state-imposed standards there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers and curriculum; for students who do not understand

English are effectively foreclosed from any meaningful education." *Id.*, at 566. Moreover, the "preference" approved did not result in the denial of the relevant benefit—"meaningful participation in the educational program"—to anyone else. No other student was deprived by that preference of the ability to participate in San Francisco's school system, and the applicable regulations required similar assistance for all students who suffered similar linguistic deficiencies. *Id.*, at 570–571 (STEWART, J., concurring).

In a similar vein,[42] petitioner contends that our recent decision in *United Jewish Organizations* v. *Carey*, 430 U. S. 144 (1977), indicates a willingness to approve racial classifications designed to benefit certain minorities, without denominating the classifications as "suspect." The State of New York had redrawn its reapportionment plan to meet objections of the Department of Justice under § 5 of the Voting Rights Act of 1965, 42 U. S. C. § 1973c. Specifically, voting districts were redrawn to enhance the electoral power of certain "nonwhite" voters found to have been the victims of unlawful "dilution" under the original reapportionment plan. *United Jewish Organizations*, like *Lau*, properly is viewed as a case in which the remedy for an administrative finding of discrimination encompassed measures to improve the previously disadvantaged group's ability to participate, without excluding individuals belonging to any other group from enjoyment of the relevant opportunity—meaningful participation in the electoral process.

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[42] Petitioner also cites our decision in *Morton* v. *Mancari*, 417 U. S. 535 (1974), for the proposition that the State may prefer members of traditionally disadvantaged groups. In *Mancari*, we approved a hiring preference for qualified Indians in the Bureau of Indian Affairs of the Department of the Interior (BIA). We observed in that case, however, that the legal status of BIA is *sui generis*. *Id.*, at 554. Indeed, we found that the preference was not racial at all, but "an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to groups [,] . . . whose lives are governed by the BIA in a unique fashion." *Ibid.*

In this case, unlike *Lau* and *United Jewish Organizations,* there has been no determination by the legislature or a responsible administrative agency that the University engaged in a discriminatory practice requiring remedial efforts. Moreover, the operation of petitioner's special admissions program is quite different from the remedial measures approved in those cases. It prefers the designated minority groups at the expense of other individuals who are totally foreclosed from competition for the 16 special admissions seats in every medical school class. Because of that foreclosure, some individuals are excluded from enjoyment of a state-provided benefit—admission to the medical school—they otherwise would receive. When a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as suspect. *E. g., McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637, 641–642 (1950).

IV

We have held that in "order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." *In re Griffiths,* 413 U. S. 717, 722–723 (1973) (footnotes omitted); *Loving* v. *Virginia,* 388 U. S. 1, 11 (1967); *McLaughlin* v. *Florida,* 379 U. S. 184, 196 (1964). The special admissions program purports to serve the purposes of: (i) "reducing the historic deficit of traditionally disfavored minorities in medical schools and the medical profession," Brief for Petitioner 32; (ii) countering the effects of societal discrimination;[43]

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[43] A number of distinct sub-goals have been advanced as falling under the rubric of "compensation for past discrimination." For example, it is said that preferences for Negro applicants may compensate for harm done them

(iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body. It is necessary to decide which, if any, of these purposes is substantial enough to support the use of a suspect classification.

A

If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the

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personally, or serve to place them at economic levels they might have attained but for discrimination against their forebears. Greenawalt, *supra*, n. 1, at 581–586. Another view of the "compensation" goal is that it serves as a form of reparation by the "majority" to a victimized group as a whole. B. Bittker, The Case for Black Reparations (1973). That justification for racial or ethnic preference has been subjected to much criticism. *E. g.*, Greenawalt, *supra*, at 581; Posner, *supra*, n. 25, at 16–17, and n. 33. Finally, it has been argued that ethnic preferences "compensate" the group by providing examples of success whom other members of the group will emulate, thereby advancing the group's interest and society's interest in encouraging new generations to overcome the barriers and frustrations of the past. Redish, *supra*, n. 25, at 391. For purposes of analysis these sub-goals need not be considered separately.

Racial classifications in admissions conceivably could serve a fifth purpose, one which petitioner does not articulate: fair appraisal of each individual's academic promise in the light of some cultural bias in grading or testing procedures. To the extent that race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that there is no "preference" at all. Nothing in this record, however, suggests either that any of the quantitative factors considered by the Medical School were culturally biased or that petitioner's special admissions program was formulated to correct for any such biases. Furthermore, if race or ethnic background were used solely to arrive at an unbiased pediction of academic success, the reservation of fixed numbers of seats would be inexplicable.

Constitution forbids. *E. g., Loving* v. *Virginia, supra,* at 11; *McLaughlin* v. *Florida, supra,* at 196; *Brown* v. *Board of Education,* 347 U. S. 483 (1954).

B

The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination. The line of school desegregation cases, commencing with *Brown,* attests to the importance of this state goal and the commitment of the judiciary to affirm all lawful means towards its attainment. In the school cases, the States were required by court order to redress the wrongs worked by specific instances of racial discrimination. That goal was far more focused than the remedying of the effects of "societal discrimination," an amorphous concept of injury that may be ageless in its reach into the past.

We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. See, *e. g., Teamsters* v. *United States,* 431 U. S. 324, 367–376 (1977); *United Jewish Organizations,* 430 U. S., at 155–156; *South Carolina* v. *Katzenbach,* 383 U. S. 308 (1966). After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case, the extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined. Also, the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit. Without such findings of constitutional or statutory violations,[44] it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm.

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[44] Mr. Justice Brennan, Mr. Justice White, Mr. Justice Marshall,

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and MR. JUSTICE BLACKMUN misconceive the scope of this Court's holdings under Title VII when they suggest that "disparate impact" alone is sufficient to establish a violation of that statute and, by analogy, other civil rights measures. See *post,* at 39-45, and n. 42. That this was not the meaning of Title VII was made quite clear in the seminal decision in this area, *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971):

"*Discriminatory preference* for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of *artificial, arbitrary, and unnecessary barriers* to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.*, at 431 (emphasis added).

Thus, disparate impact is a basis for relief under Title VII only if the practice in question is not founded on "business necessity," *ibid.*, or lacks "a manifest relationship to the employment in question," *id.*, at 432. See also *McDonnell Douglas Corp.* v. *Green,* 411 U. S. 792, 802-803, 805-806 (1973). Nothing *in this record*—as opposed to some of the general literature cited by MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN—even remotely suggests that the disparate impact of the general admissions program at Davis Medical School, resulting primarily from the sort of disparate test scores and grades set forth in footnote 7, *supra,* is without educational justification.

Moreover, the presumption in *Griggs*—that disparate impact without any showing of business justification established the existence of discrimination in violation of the statute—was based on legislative determinations, wholly absent here, that past discrimination had handicapped various minority groups to such an extent that disparate impact could be traced to identifiable instances of past discrimination:

"[Congress sought] to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs, supra,* 429-430.

See, *e. g.*, H. R. Rep. No. 914, 88th Cong., 2d Sess., at 26 (1963) ("Testimony concerning the fact of discrimination in employment is overwhelm-

Petitioner does not purport to have made, and is in no position to make, such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality. For reasons similar to those stated in Part III of this opinion, isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria.[45] Cf. *Hampton* v. *Mow Sun Wong,* 426 U. S. 88 (1976). Compare n. 41, *supra.* Before relying upon these sorts of findings in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination. See, *e. g., Califano* v. *Webster,* 430 U. S. 313, 316–321 (1977); *Califano* v. *Goldfarb,* 430 U. S. 199, 212–217 (1977). Lacking this capability, petitioner has not carried its burden of justification on this issue.

Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of "societal discrimination" does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the

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ing.") See generally Vaas, Title VII: The Legislative History, 7 B. C. Ind. & Com. L. Rev. 431 (1966). The Court emphasized that "the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group." *Id.,* at 430–431. Indeed, § 703 (j) of the Act makes it clear that preferential treatment for an individual or minority group to correct an existing "imbalance" may not be required under Title VII. 42 U. S. C. § 2000e–2 (j). Thus, Title VII principles support the proposition that findings of identified discrimination must precede the fashioning of remedial measures embodying racial classifications.

[45] For example, the University is unable to explain its selection of only the three favored groups—Negroes, Mexican-Americans, and Asians—for preferential treatment. The inclusion of the last group is especially curious in light of the substantial numbers of Asians admitted through the regular admissions process. See also n. 37, *supra.*

special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved. Cf. *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424 (1976).

C

Petitioner identifies, as another purpose of its program, improving the delivery of health care services to communities currently underserved. It may be assumed that in some situations a State's interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification. But there is virtually no evidence in the record indicating that petitioner's special admissions program is either needed or geared to promote that goal.[46] The court below addressed this failure of proof:

> "The University concedes it cannot assure that minority doctors who entered under the program, all of whom express an 'interest' in participating in a disadvantaged community, will actually do so. It may be correct to assume that some of them will carry out this intention, and that it is more likely they will practice in minority communities than the average white doctor. (See Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role* (1975) 42 U. Chi. L. Rev. 653, 688). Nevertheless, there are more precise and reliable ways to identify applicants who are genuinely interested in the medical problems of minorities than by race. An applicant of whatever race who has demonstrated his concern for disadvantaged minorities in the

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[46] The only evidence in the record with respect to such underservice is a newspaper article. Record 473.

> past and who declares that practice in such a community is his primary professional goal would be more likely to contribute to alleviation of the medical shortage than one who is chosen entirely on the basis of race and disadvantage. In short, there is [sic] no empirical data to demonstrate that any one race is more selflessly socially oriented or by contrast that another is more selfishly acquisitive." 18 Cal. 3d, at 56, 553 P. 2d, at 1167.

Petitioner simply has not carried its burden of demonstrating that it must prefer members of particular ethnic groups over all other individuals in order to promote better health care delivery to deprived citizens. Indeed, petitioner has not shown that its preferential classification is likely to have any significant effect on the problem.[47]

D

The fourth goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. Mr. Justice Frankfurter summarized the "four essential freedoms" that comprise academic freedom:

> "'. . . It is the business of a university to provide that

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[47] It is not clear that petitioner's two-track system, even if adopted throughout the country, would substantially increase representation of blacks in the medical profession. That is the finding of a recent study by Sleeth & Mishell, Black Under-Representation in United States Medical Schools, New England J. of Med. 1146 (Nov. 24, 1977). Those authors maintain that the cause of black under-representation lies in the small size of the national pool of qualified black applicants. In their view, this problem is traceable to the poor premedical experiences of black undergraduates, and can be remedied effectively only by developing remedial programs for black students before they enter college.

> atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'" *Sweezy* v. *New Hampshire,* 354 U. S. 234, 263 (1957) (Frankfurter, J., concurring).

Our national commitment to the safeguarding of these freedoms within university communities was emphasized in *Keyishian* v. *Board of Regents,* 385 U. S. 589, 603 (1967):

> "Our Nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment. . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, rather than through any kind of authoritative selection.' *United States* v. *Associated Press,* 52 F. Supp. 362, 372."

The atmosphere of "speculation, experiment and creation"—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body.[48] As the Court

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[48] The president of Princeton University has described some of the benefits derived from a diverse student body:

". . . [A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours once observed in commenting on this aspect of the educational process, 'People do not learn very much when they are surrounded only by the likes of themselves.'

. . . .

"In the nature of things, it is hard to know how, and when, and even if, noted in *Keyishian,* it is not too much to say that the "nation's future depends upon leaders trained through wide exposure" to the ideas and mores of students as diverse as this Nation of many peoples.

Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.

It may be argued that there is greater force to these views at the undergraduate level than in a medical school where the training is centered primarily on professional competency. But even at the graduate level, our tradition and experience lend support to the view that the contribution of diversity is substantial. In *Sweatt* v. *Painter,* 339 U. S. 629, 634 (1950), the Court made a similar point with specific reference to legal education:

> "The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned."

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this informal 'learning through diversity' actually occurs. It does not occur for everyone. For many, however, the unplanned, casual encounters with roommates, fellow sufferers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and personal growth." Bowen, Admissions and the Relevance of Race, Princeton Alumni Weekly 7, 9 (Sept. 26, 1977).

Physicians serve a heterogenous population. An otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.[49]

Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body. Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded. Respondent urges—and the courts below have held—that petitioner's dual admissions program is a racial classification that impermissibly infringes his rights under the Fourteenth Amendment. As the interest of diversity is compelling in the context of a university's admissions program, the question remains whether the program's racial classification is necessary to promote this interest. *In re Griffiths,* 413 U. S. 717, at 721–722 (1973).

V

A

It may be assumed that the reservation of a specified number of seats in each class for individuals from the preferred ethnic groups would contribute to the attainment of considerable ethnic diversity in the student body. But petitioner's argument that this is the only effective means of serving the interest of diversity is seriously flawed. In a most fundamental sense the argument misconceives the nature of the state interest that would justify consideration of race or ethnic background. It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity.[50]

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[49] Graduate admissions decisions, like those at the undergraduate level, are concerned with "assessing the potential contributions to the society of each individual candidate following his or her graduation—contributions defined in the broadest way to include the doctor and the poet, the most active participant in business or government affairs and the keenest critic of all things organized, the solitary scholar and the concerned parent." Bowen, *supra,* n. 48, at 10.

Nor would the state interest in genuine diversity be served by expanding petitioner's two-track system into a multitrack program with a prescribed number of seats set aside for each identifiable category of applicants. Indeed, it is inconceivable that a university would thus pursue the logic of petitioner's two-track program to the illogical end of insulating each category of applicants with certain desired qualifications from competition with all other applicants.

The experience of other university admissions programs, which take race into account in achieving the educational diversity valued by the First Amendment, demonstrates that the assignment of a fixed number of places to a minority group is not a necessary means toward that end. An illuminating example is found in the Harvard College program:

> "In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now

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[50] See Manning, The Pursuit of Fairness in Admissions to Higher Education, in Carnegie Council on Policy Studies in Higher Education, Selective Admissions in Higher Education 19, 57–59 (1977).

recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students.

. . . . .

"In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are 'admissible' and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer." See Appendix hereto.

. . . . .

"In Harvard college admissions the Committee has not set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given years. . . . But that awareness [of the necessity of including more than a token number of black students] does not mean that the Committee sets the minimum number of blacks or of people from west of the Mississippi who are to be admitted. It means only that in choosing among thousands of applicants who are not only 'admissible' academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many types and categories of students." Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as *Amici Curiae*, App. 2, 3.

In such an admissions program,[51] race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to a particular quality may vary from year to year depending upon the "mix" both of the student body and the applicants for the incoming class.

This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.[52]

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[51] The admissions program at Princeton has been described in similar terms:

"While race is not in and of itself a consideration in determining basic qualifications, and while there are obviously significant differences in background and experience among applicants of every race, in some situations race can be helpful information in enabling the admissions office to understand more fully what a particular candidate has accomplished—and against what odds. Similarly, such factors as family circumstances and previous educational opportunities may be relevant, either in conjunction with race or ethnic background (with which they may be associated) or on their own." Bowen, *supra,* n. 48, at 8–9.

For an illuminating discussion of such flexible admissions systems, see Manning, *supra,* n. 50, at 57–59.

It has been suggested that an admissions program which considers race only as one factor is simply a subtle and more sophisticated—but no less effective—means of according racial preference than the Davis program. A facial intent to discriminate, however, is evident in petitioner's preference program and not denied in this case. No such facial infirmity exists in an admissions program where race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process. "A boundary line," as Mr. Justice Frankfurter remarked in another connection, "is none the worse for being narrow." *McLeod* v. *Dilworth,* 322 U. S. 327, 329 (1944). And a Court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith would be presumed in the absence of a showing to the contrary in the manner permitted by our cases. See, *e. g., Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U. S. 252 (1977); *Washington* v. *Davis,* 426 U. S. 229 (1976); *Swain* v. *Alabama,* 380 U. S. 202 (1965).[53]

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[52] The denial to respondent of this right to individualized consideration without regard to his race is the principal evil of petitioner's special admissions program. Nowhere in the opinion of MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN is this denial even addressed.

[53] Universities, like the prosecutor in *Swain,* may make individualized

B

In summary, it is evident that the Davis special admission program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or "Chicano" that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admission seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class.

The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment. *Shelley* v. *Kraemer*, 334 U. S. 1, 22 (1948). Such rights are not absolute. But when a State's distribution of benefits or imposition of burdens hinges on the color of a

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decisions, in which ethnic background plays a part, under a presumption of legality and legitimate educational purpose. So long as the university proceeds on an individualized, case-by-case basis, there is no warrant for judicial interference in the academic process. If an applicant can establish that the institution does not adhere to a policy of individual comparisons, or can show that a systematic exclusion of certain groups results, the presumption of legality might be overcome, creating the necessity of proving legitimate educational purpose.

There also are strong policy reasons that correspond to the constitutional distinction between petitioner's preference program and one that assures a measure of competition among all applicants. Petitioner's program will be viewed as inherently unfair by the public generally as well as by applicants for admission to state universities. Fairness in individual competition for opportunities, especially those provided by the State, is a widely cherished American ethic. Indeed, in a broader sense, an underlying assumption of the rule of law is the worthiness of a system of justice based on fairness to the individual. As Mr. Justice Frankfurter declared in another connection, "[j]ustice must satisfy the appearance of justice." *Offut* v. *United States*, 348 U. S. 11, 14 (1954).

person's skin or ancestry, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest. Petitioner has failed to carry this burden. For this reason, that portion of the California court's judgment holding petitioner's special admissions program invalid under the Fourteenth Amendment must be affirmed.

C

In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.

VI

With respect to respondent's entitlement to an injunction directing his admission to the Medical School, petitioner has conceded that it could not carry its burden of proving that, but for the existence of its unlawful special admissions program, respondent still would not have been admitted. Hence, respondent is entitled to the injunction, and that portion of the judgment must be affirmed.[54]

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[54] There is no occasion for remanding the case to permit petitioner to reconstruct what might have happened if it had been operating the type of program described as legitimate in Part V, above. Compare *Mt. Healthy City Bd. of Ed.* v. *Doyle,* 429 U. S. 274, 284-287 (1977). In *Mt. Healthy,* there was considerable doubt whether protected First Amendment activity had been the "but for" cause of Doyle's protested discharge. Here, in contrast, there is no question as to the sole reason for respondent's rejection—purposeful racial discrimination in the form of the special admissions program. Having injured respondent solely on the basis of an unlawful classification, petitioner cannot now hypothesize that it might have employed lawful means of achieving the same result. See *Arlington Heights* v. *Metropolitan Housing Devel. Corp.,* 429 U. S. 252, 265-266

APPENDIX

Harvard College Admissions Program[55]

For the past 30 years Harvard College has received each year applications for admission that greatly exceed the number of places in the freshman class. The number of applicants who are deemed to be not "qualified" is comparatively small. The vast majority of applicants demonstrate through test scores, high school records and teachers' recommendations that they have the academic ability to do adequate work at Harvard, and perhaps to do it with distinction. Faced with the dilemma of choosing among a large number of "qualified" candidates, the Committee on Admissions could use the single criterion of scholarly excellence and attempt to determine who among the candidates were likely to perform best academically. But for the past 30 years the Committee on Admissions has never adopted this approach. The belief has been that if scholarly excellence were the sole or even predominant criterion, Harvard College would lose a great deal of its vitality and intellectual excellence and that the quality of the educational experience offered to all students would suffer. Final Report of W. J. Bender, Chairman of the Admission and Scholarship Committee and Dean of Admissions and Financial Aid, pp. 20 *et seq.* (Cambridge, 1960). Consequently, after selecting those students whose intellectual potential will seem extraordinary to the faculty—perhaps 150 or so out of an entering class of over 1,100—the Committee seeks—

> variety in making its choices. This has seemed impor-

(1977). No one can say how—or even if—petitioner would have operated its admissions process if it had known that legitimate alternatives were available. Nor is there a record revealing that legitimate alternate grounds for the decision existed, as there was in *Mt. Healthy*. In sum, a remand would result in fictitious recasting of past conduct.

[55] This statement appears in the Appendix to the Brief of Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as *Amici Curiae*.

> tant . . . in part because it adds a critical ingredient to the effectiveness of the educational experience [in Harvard College] . . . *The effectiveness of our students' educational experience has seemed to the Committee to be affected as importantly by a wide variety of interests, talents, backgrounds and career goals as it is by a fine faculty and our libraries, laboratories and housing arrangements.* (Dean of Admissions Fred L. Glimp, Final Report to the Faculty of Arts and Sciences, 65 Official Register of Harvard University No. 25, 93, 104–105 (1968) (emphasis supplied).

The belief that diversity adds an essential ingredient to the educational process has long been a tenet of Harvard College admissions. Fifteen or twenty years ago, however, diversity meant students from California, New York, and Massachusetts; city dwellers and farm boys; violinists, painters and football players; biologists, historians and classicists; potential stockbrokers, academics and politicians. The result was that very few ethnic or racial minorities attended Harvard College. In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students. Contemporary conditions in the United States mean that if Harvard College is to continue to offer a first-rate education to its students, minority representation in the undergraduate body cannot be ignored by the Committee on Admissions.

In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are "admissible" and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases.

A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them.

In Harvard College admissions the Committee has not set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. At the same time the Committee is aware that if Harvard College is to provide a truly heterogenous environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers. It would not make sense, for example, to have 10 or 20 students out of 1,100 whose homes are west of the Mississippi. Comparably, 10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States. Their small numbers might also create a sense of isolation among the black students themselves and thus make it more difficult for them to develop and achieve their potential. Consequently, when making its decisions, the Committee on Admissions is aware that there is some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted. But that awareness does not mean that the Committee sets a minimum number of blacks or of people from west of the Mississippi who are to be admitted. It means only that in choosing among thousands of applicants who are not only "admissible" academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many types and categories of students.

The further refinements sometimes required help to illustrate the kind of significance attached to race. The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently-abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; and vice versa. If C, a white student with extraordinary artistic talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B. Thus, the critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it.

SUPREME COURT OF THE UNITED STATES

No. 76-811

Regents of the University of California, Petitioner, *v.* Allan Bakke. | On Writ of Certiorari to the Supreme Court of California.

[June 28, 1978]

Opinion of MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN, concurring in the judgment in part and dissenting.

The Court today, in reversing in part the judgment of the Supreme Court of California, affirms the constitutional power of Federal and State Government to act affirmatively to achieve equal opportunity for all. The difficulty of the issue presented—whether Government may use race-conscious programs to redress the continuing effects of past discrimination—and the mature consideration which each of our Brethren has brought to it have resulted in many opinions, no single one speaking for the Court. But this should not and must not mask the central meaning of today's opinions: Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.

THE CHIEF JUSTICE and our Brothers STEWART, REHNQUIST, and STEVENS, have concluded that Title VI of the Civil Rights Act of 1964, 78 Stat. 252, as amended, 42 U. S. C. § 2000d *et seq.* (1970 ed. and Supp. V), prohibits programs such as that at the Davis Medical School. On this statutory theory alone, they would hold that respondent Allan Bakke's rights have been violated and that he must, therefore, be admitted to the

Medical School. Our Brother POWELL, reaching the Constitution, concludes that, although race may be taken into account in university admissions, the particular special admissions program used by petitioner, which resulted in the exclusion of respondent Bakke, was not shown to be necessary to achieve petitioner's stated goals. Accordingly, these Members of the Court form a majority of five affirming the judgment of the Supreme Court of California insofar as it holds that respondent Bakke "is entitled to an order that he be admitted to the University." *Bakke* v. *Regents of the University of California,* 18 Cal. 3d 34, 64, 132 Cal. Rptr. 680, 700, 553 P. 2d 1152, 1172 (1976).

We agree with MR. JUSTICE POWELL that, as applied to the case before us, Title VI goes no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment itself. We also agree that the effect of the California Supreme Court's affirmance of the judgment of the Superior Court of California would be to prohibit the University from establishing in the future affirmative action programs that take race into account. See *ante,* at 1 n.*. Since we conclude that the affirmative admissions program at the Davis Medical School is constitutional, we would reverse the judgment below in all respects. MR. JUSTICE POWELL agrees that some uses of race in university admissions are permissible and, therefore, he joins with us to make five votes reversing the judgment below insofar as it prohibits the University from establishing race-conscious programs in the future.[1]

I

Our Nation was founded on the principle that "all men are created equal." Yet candor requires acknowledgment that the Framers of our Constitution, to forge the Thirteen Colonies into one Nation, openly compromised this principle of equality with its antithesis: slavery. The consequences of this compromise are well known and have aptly been called our "American Dilemma." Still, it is well to recount how recent the time has been, if it has yet come, when the promise of our principles has flowered into the actuality of equal opportunity for all regardless of race or color.

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[1] We also agree with MR. JUSTICE POWELL that a plan like the "Harvard" plan, see *ante,* at 43–47, is constitutional under our approach, at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination.

The Fourteenth Amendment, the embodiment in the Constitution of our abiding belief in human equality, has been the law of our land for only slightly more than half its 200 years. And for half of that half, the Equal Protection Clause of the Amendment was largely moribund so that, as late as 1927, Mr. Justice Holmes could sum up the importance of that Clause by remarking that it was "the last resort of constitutional arguments." *Buck* v. *Bell,* 274 U. S. 200, 208 (1927). Worse than desuetude, the Clause was early turned against those whom it was intended to set free, condemning them to a "separate but equal" [2] status before the law, a status always separate but seldom equal. Not until 1954—only 24 years ago—was this odious doctrine interred by our decision in *Brown* v. *Board of Education,* 347 U. S. 483 (1954) (*Brown I*), and its progeny,[3] which proclaimed that separate schools and public facilities of all sorts were inherently unequal and forbidden under our Constitution. Even then inequality was not eliminated with "all deliberate speed." *Brown* v. *Board of Education,* 349 U. S. 294, 301 (1955). In 1968 [4] and again in 1971,[5] for example, we were forced to remind school boards of their obligation to eliminate racial discrimination root and branch. And a glance at our docket[6] and at those of lower courts will show that even today officially sanctioned discrimination is not a thing of the past.

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[2] See *Plessy* v. *Ferguson,* 163 U. S. 537 (1896).

[3] *New Orleans City Park Improvement Assn.* v. *Detiege,* 358 U. S. 54 (1959); *Muir* v. *Louisville Park Theatrical Assn.,* 347 U. S. 971 (1954); *Mayor of Baltimore* v. *Dawson,* 350 U. S. 877 (1955); *Holmes* v. *City of Atlanta,* 350 U. S. 879 (1955); *Gayle* v. *Browder,* 352 U. S. 903 (1956).

[4] See *Green* v. *County School Bd.,* 391 U. S. 430 (1968).

[5] See *Swann* v. *Charlotte-Mecklenburg Board of Ed.,* 402 U. S. 1 (1971); *Davis* v. *Board of School Comm'rs,* 402 U. S. 33 (1971); *North Carolina State Board of Ed.* v. *Swann,* 402 U. S. 43 (1971).

Against this background, claims that law must be "colorblind" or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. This is not to denigrate aspiration; for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities. Yet we cannot—and as we shall demonstrate, need not under our Constitution or Title VI, which merely extends the constraints of the Fourteenth Amendment to private parties who receive federal funds—let color blindness become myopia which masks the reality that many "created equal" have been treated within our lifetimes as inferior both by the law and by their fellow citizens.

II

The threshold question we must decide is whether Title VI of the Civil Rights Act of 1964 bars recipients of federal funds from giving preferential consideration to disadvantaged members of racial minorities as part of a program designed to enable such individuals to surmount the obstacles imposed by racial discrimination.[7] We join Parts I and V–C of our Brother POWELL's opinion and three of us agree with his conclusion in Part II that this case does not require us to resolve the question whether there is a private right of action under Title VI.[8]

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[6] See, *e. g.*, cases collected in *Monell* v. *Department of Social Services*, — U. S. —, — n. 5 (1978).

[7] Title VI provides:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U. S. C. § 2000d.

[8] MR. JUSTICE WHITE believes we should address the private right of action issue. Accordingly, he has filed a separate opinion stating his

In our view, Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies; it does not bar the preferential treatment of racial minorities as a means of remedying past societal discrimination to the extent that such action is consistent with the Fourteenth Amendment. The legislative history of Title VI, administrative regulations interpreting the statute, subsequent congressional and executive action, and the prior decisions of this Court compel this conclusion. None of these sources lends support to the proposition that Congress intended to bar all race conscious efforts to extend the benefits of federally financed programs to minorities who have been historically excluded from the full benefits of American life.

A

The history of Title VI—from President Kennedy's request that Congress grant executive departments and agencies authority to cut off federal funds to programs that discriminate against Negroes through final enactment of legislation incorporating his proposals—reveals one fixed purpose: to give the Executive Branch of Government clear authority to terminate federal funding of private programs that use race as a means of disadvantaging minorities in a manner that would be prohibited by the Constitution if engaged in by government.

This purpose was first expressed in President Kennedy's June 19, 1963, message to Congress proposing the legislation that subsequently became the Civil Rights Act of 1964.[9]

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view that there is no private right of action under Title VI. See *post,* p. —.

[9] "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination. Direct discrimination by Federal, State, or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious; and it should not be necessary to resort to the courts to prevent

Representative Celler, the Chairman of the House Judiciary Committee, and the floor manager of the legislation in the House, introduced Title VI in words unequivocally expressing the intent to provide the Federal Government with the means of assuring that its funds were not used to subsidize racial discrimination inconsistent with the standards imposed by the Fourteenth and Fifth Amendments upon state and federal action.

> "The bill would offer assurance that hospitals financed by Federal money would not deny adequate care to Negroes. It would prevent abuse of food distribution programs whereby Negroes have been known to be denied food surplus supplies when white persons were given such food. It would assure Negroes the benefits now accorded

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each individual violation. Congress and the Executive have their responsibilities to uphold the Constitution also . . . .

"Many statutes providing Federal financial assistance, however, define with such precision both the administrator's role and the conditions upon which specified amounts shall be given to designated recipients that the amount of administrative discretion remaining—which might be used to withhold funds if discrimination were not ended—is at best questionable. No administrator has the unlimited authority to invoke the Constitution in opposition to the mandate of the Congress. Nor would it always be helpful to require unconditionally—as is often proposed—the withdrawal of all Federal funds from programs urgently needed by Negroes as well as whites; for this may only penalize those who least deserve it without ending discrimination.

"Instead of permitting this issue to become a political device often exploited by those opposed to social or economic progress, it would be better at this time to pass a single comprehensive provision making it clear that the Federal Government is not required, under any statute, to furnish any kind of financial assistance—by way of grant, loan, contract, guaranty, insurance or otherwise—to any program or activity in which racial discrimination occurs. This would not permit the Federal Government to cut off all Federal aid of all kinds as a means of punishing an area for the discrimination occurring therein—but it would clarify the authority of any administrator with respect to Federal funds or financial assistance and discriminatory practices." 109 Cong. Rec. 1161.

> only white students in programs of higher education financed by Federal funds. It would, in short, assure the existing right to equal treatment in the enjoyment of Federal funds. It would not destroy any rights of private property or freedom of association." 110 Cong. Rec. 1519.

It was clear to Representative Celler that Title VI, apart from the fact that it reached all federally funded activities even in the absence of sufficient state or federal control to invoke the Fourteenth or Fifth Amendments, was not placing new substantive limitations upon the use of racial criteria but rather was designed to extend to such facilities "the existing right to equal treatment" enjoyed by Negroes under those Amendments, and he later specifically defined the purpose of Title VI in this way:

> "In general, it seems rather anomalous that the Federal Government should aid and abet discrimination on the basis of race, color, or national origin by granting money and other kinds of financial aid. It seems rather shocking, moreover, that while we have on the one hand the 14th amendment, which is supposed to do away with discrimination since it provides for equal protection of the laws, on the other hand, we have the Federal Government aiding and abetting those who persist in practicing racial discrimination.
>
> "It is for these reasons that we bring forth title VI. The enactment of title VI will serve to override specific provisions of law which contemplate Federal assistance to racially segregated institutions." *Id.*, at 2467.

Representative Celler also filed a memorandum setting forth the legal basis for the enactment of Title VI which reiterated the theme of his oral remarks: "In exercising its authority to fix the terms on which Federal funds will be disbursed . . . , Congress clearly has power to legislate so as to insure that the Federal Government does not become involved in a violation of the Constitution." *Id.*, at 1528.

Other sponsors of the legislation agreed with Representative Celler that the function of Title VI was to end the Federal Government's complicity in conduct, particularly the segregation or exclusion of Negroes, inconsistent with the standards to be found in the antidiscrimination provisions of the Constitution. Representative Lindsay, also a member of the Judiciary Committee, candidly acknowledged, in the course of explaining why Title VI was necessary, that it did not create any new standard of equal treatment beyond that contained in the Constitution:

> "Both the Federal Government and the States are under constitutional mandates not to discriminate. Many have raised the question as to whether legislation is required at all. Does not the Executive already have the power in the distribution of Federal funds to apply those conditions which will enable the Federal Government itself to live up to the mandate of the Constitution and to require States and local government entities to live up to the Constitution, most especially the 5th and 14th amendments?" *Id.*, at 2467.

He then explained that legislation was needed to authorize the termination of funding by the Executive Branch because existing legislation seemed to contemplate the expenditure of funds to support racially segregated institutions. *Ibid.* The views of Representatives Celler and Lindsay concerning the purpose and function of Title VI were shared by other sponsors and proponents of the legislation in the House.[10] Nowhere is there any suggestion that Title VI was intended to terminate federal funding for any reason other than consideration of race or national origin by the recipient institution in a manner inconsistent with the standards incorporated in the Constitution.

The Senate's consideration of Title VI reveals an identical understanding concerning the purpose and scope of the legislation. Senator Humphrey, the Senate floor manager, opened the Senate debate with a section-by-section analysis of the Civil Rights Act in which he succinctly stated the purpose of Title VI:

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[10] See, *e. g.*, 110 Cong. Rec. 2732 (Rep. Dawson); *id.*, at 2481–2482 (Rep. Ryan); *id.*, at 2766 (Rep. Matsunga); *id.*, at 2595 (Rep. Donahue).

> "The purpose of title VI is to make sure that funds of the United States are not used to support racial discrimination. In many instances the practices of segregation or discrimination, which title VI seeks to end, are unconstitutional. This is clearly so wherever Federal funds go to a state agency which engages in racial discrimination. It may also be so where Federal funds go to support private, segregated institutions, under the decision in *Simkins* v. *Moses H. Cone Memorial Hospital,* 323 F. 2d 959 (C. A. 4, 1963), certificate denied, March 2, 1964. In all cases, such discrimination is contrary to national policy, and to the moral sense of the Nation. Thus, title VI is simply designed to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation." *Id.,* at 6544.

Senator Humphrey, in words echoing statements in the House, explained that legislation was needed to accomplish this objective because it was necessary to eliminate uncertainty concerning the power of federal agencies to terminate financial assistance to programs engaging in racial discrimination in the face of various federal statutes which appeared to authorize grants to racially segregated institutions. *Ibid.* Although Senator Humphrey realized that Title VI reached conduct which, because of insufficient governmental action, might be beyond the reach of the Constitution, it was clear to him that the substantive standard imposed by the statute was that of the Fifth and Fourteenth Amendments.

Senate supporters of Title VI repeatedly expressed agreement with Senator Humphrey's description of the legislation as providing the explicit authority and obligation to apply the standards of the Constitution to all recipients of federal funds. Senator Ribicoff described the limited function of Title VI:

> "Basically, there is a constitutional restriction against discrimination in the use of federal funds; and title VI simply spells out the procedure to be used in enforcing that restriction." *Id.*, at 13333.

Other strong proponents of the legislation in the Senate repeatedly expressed their intent to assure that federal funds would only be spent in accordance with constitutional standards. See remarks of Senator Pastore (*id.*, at 7057, 7062); Senator Pell (*id.*, at 7064); Senator Clark (*id.*, at 5243); Senator Allott (*id.*, at 12675, 12677).[11]

Respondent's contention that Congress intended Title VI to bar affirmative action programs designed to enable minorities disadvantaged by the effects of discrimination to participate in federally financed programs is also refuted by an examination of the type of conduct which Congress thought it was prohibiting by means of Title VI. The debates reveal that the legislation was motivated primarily by a desire to eradicate a very specific evil: federal financial support of programs which disadvantaged Negroes by excluding them from participation or providing them with separate facilities. Again and again supporters of Title VI emphasized that the purpose of the statute was to end segregation in federally funded activities and to end other discriminatory uses of race disadvantaging Negroes. Senator Humphrey set the theme in his speech presenting Title VI to the Senate:

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[11] There is also language in 42 U. S. C. § 2000d–5, enacted in 1966, which supports the conclusion that Title VI's standard is that of the Constitution. Section 2000d–5 provides that "for the purpose of determining whether a local educational agency is in compliance with [Title VI], compliance by such agency with a final order or judgment of a Federal court for the desegregation of the school or the school system operated by such agency shall be deemed to be compliance with [Title VI], insofar as the matters covered in the order or judgment are concerned." This provision was clearly intended to avoid subjecting local educational agencies simultaneously to the jurisdiction of the federal courts and the federal administrative agencies in connection with the imposition of remedial measures designed to end school segregation. Its inclusion reflects the congressional judgment that the requirements imposed by Title VI are identical to those imposed by the Constitution as interpreted by the federal courts.

> "Large sums of money are contributed by the United States each year for the construction, operation, and maintenance of segregated schools.
>
> . . . . .
>
> "Similarly, under the Hill-Burton Act, Federal grants are made to hospitals which admit whites only or Negroes only.
>
> . . . . .
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> "In higher education also, a substantial part of the Federal grants to colleges, medical schools and so forth, in the South is still going to segregated institutions.
>
> "Nor is this all. In several States, agricultural extension services, supported by Federal funds, maintain racially segregated offices for Negroes and whites. . . . Vocational training courses, supported with Federal funds, are given in segregated schools and institutions and often limit Negroes to training in less skilled occupations. In particular localities it is reported that Negroes have been cut off from relief rolls, or denied surplus agricultural commodities, or otherwise deprived of the benefit of federally assisted programs, in retaliation for their participation in voter registration drives, sit-in demonstrations and the like." *Id.,* at 6543–6544.

See also the remarks of Senator Pastore (*id.,* at 7054–7055); Senator Ribicoff (*id.,* at 7064–7065); Senator Clark (*id.,* at 5243, 9086); Senator Javits (*id.,* at 6050, 7102).[12]

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[12] As has already been seen, the proponents of Title VI in the House

The conclusion to be drawn from the foregoing is clear. Congress recognized that Negroes, in some cases with congressional acquiescence, were being discriminated against in the administration of programs and denied the full benefits of activities receiving federal financial support. It was aware that there were many federally funded programs and institutions which discriminated against minorities in a manner inconsistent with the standards of the Fifth and Fourteenth Amendments but whose activities might not involve sufficient state or federal action so as to be in violation of these Amendments. Moreover, Congress believed that it was questionable whether the Executive Branch possessed legal authority to terminate the funding of activities on the ground that they discriminated racially against Negroes in a manner violative of the standards contained in the Fourteenth and Fifth Amendments. Congress' solution was to end the Government's complicity in constitutionally forbidden racial discrimination by providing the Executive Branch with the authority and the obligation to terminate its financial support of any activity which employed racial criteria in a manner condemned by the Constitution.

Of course it might be argued that the Congress which enacted Title VI understood the Constitution to require strict racial neutrality or color blindness, and then enshrined that concept as a rule of statutory law. Later interpretation and clarification of the Constitution to permit remedial use of race would then not dislodge Title VI's prohibition upon race-conscious action. But there are three compelling reasons to reject such an hypothesis.

First, no decision of this Court has ever adopted the proposition that the Constitution must be colorblind. See *infra*, at 31–32.

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were motivated by the identical concern. See remarks of Representative Celler (*id.*, at 2467); Representative Ryan (*id.*, at 1643, 2481–2482); H. R. Rep. No. 914, 88th Cong., 1st Sess., Additional Views of Seven Representatives, 24–25.

Second, even if it could be argued in 1964 that the Constitution might conceivably require color blindness, Congress surely would not have chosen to codify such a view unless the Constitution clearly required it. The legislative history of Title VI, as well as the statute itself, reveals a desire to induce voluntary compliance with the requirement of nondiscriminatory treatment.[13] See § 602 of the Act, 42 U. S. C. § 2000d-1 (no funds shall be terminated unless and until it has been "determined that compliance cannot be secured by voluntary means"); H. R. Rep. No. 914, 88th Cong., 1st Sess., 25 (1963); 110 Cong. Rec. 13700 (Sen. Pastore); *id.*, at 6546 (Sen. Humphrey). It is inconceivable that Congress intended to encourage voluntary efforts to eliminate the evil of racial discrimination while at the same time forbidding the voluntary use of race-conscious remedies to cure acknowledged or obvious statutory violations. Yet a reading of Title VI as prohibiting all action predicated upon race which adversely affects any individual would require recipients guilty of discrimination to await the imposition of such remedies by the Executive Branch. Indeed, such an interpretation of Title VI would prevent recipients of federal funds from taking race into account even when necessary to bring their programs into compliance with federal constitutional requirements. This would be a remarkable reading of a statute designed to eliminate constitutional violations, especially in light of judicial decisions holding that under certain circumstances the remedial use of racial criteria is not only permissible but is constitutionally required to eradicate constitutional violations. For example, in *North Carolina State Board of Education* v. *Swann,* 402 U. S. 43 (1971), the Court held that a statute forbidding the assignment of students on the basis of race was unconstitutional because it would hinder the implementation of remedies necessary to accomplish the desegregation of a school system: "Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also race must be considered in formulating a remedy." *Id.*, at 46. Surely Congress did not intend to prohibit the use of racial criteria when constitutionally required or to terminate the funding of any entity which implemented such a remedy. It clearly desired to encourage all remedies, including the use of race, necessary to eliminate racial discrimination in violation of the Constitution rather than requiring the recipient to await a judicial adjudication of unconstitutionality and the judicial imposition of a racially oriented remedy.

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[13] See separate opinion of MR. JUSTICE WHITE, 4 n. 2.

Third, the legislative history shows that Congress specifically eschewed any static definition of discrimination in favor of broad language that could be shaped by experience, administrative necessity, and evolving judicial doctrine. Although it is clear from the debates that the supporters of Title VI intended to ban uses of race prohibited by the Constitution and, more specifically, the maintenance of segregated facilities, they never precisely defined the term "discrimination," or what constituted an exclusion from participation or a denial of benefits on the ground of race. This failure was not lost upon its opponents. Senator Ervin complained:

> "The word 'discrimination,' as used in this reference, has no contextual explanation whatever, other than the provision that the discrimination 'is to be against' individuals participating in or benefiting from federally assisted programs and activities on the ground specified. With this context, the discrimination condemned by this reference occurs only when an individual is treated unequally or unfairly because of his race, color, religion, or national origin. What constitutes unequal or unfair treatment? Section 601 and section 602 of title VI do not say. They leave the determination of that question to the executive department or agencies administering each program, without any guideline whatever to point out what is the congressional intent." 110 Cong. Rec., at 5612.

See also remarks of Representative Abernathy (*id.*, at 1619); Representative Dowdy (*id.*, at 1632); Senator Talmadge (*id.*, at 5251); Senator Sparkman (*id.*, at 6052). Despite these criticisms, the legislation's supporters refused to include in the statute or even provide in debate a more explicit definition of what Title VI prohibited.

The explanation for this failure is clear. Specific definitions were undesirable, in the views of the legislation's principal backers, because Title VI's standard was that of the Constitution and one that could and should be administratively and judicially applied. See remarks of Senator Humphrey (*id.*, at 5253, 6553); Senator Ribicoff (*id.*, at 7057, 13333); Senator Pastore (*id.*, at 7057); Senator Javits (*id.*, at 5606–5607, 6050.)[14] Indeed, there was a strong emphasis throughout Congress' consideration of Title VI on providing the Executive Branch with considerable flexibility in interpreting and applying the prohibition against racial discrimination. Attorney General Robert Kennedy testified that regulations had not been written into the legislation itself because the rules and regulations defining discrimination might differ from one program to another so that the term would assume different meanings in different contexts.[15] This determination to preserve flexibility in the administration of Title VI was shared by the legislation's supporters. When Senator Johnston offered an amendment that would have expressly authorized federal grantees to take race into account in placing children in adoptive and foster homes, Senator Pastore opposed the amendment, which was ultimately defeated by a 56–29 vote, on the ground that federal administrators could be trusted to act reasonably and that there was no danger that they would prohibit the use of racial criteria under such circumstances. *Id.*, at 13695.

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[14] These remarks also reflect the expectations of Title VI's proponents that the application of the Constitution to the conduct at the core of their concern—the segregation of Negroes in federally funded programs and their exclusion from the full benefits of such programs—was clear. See *supra*, pp. 10–12; *infra*, p. 17 n. 17.

[15] Testimony of Attorney General Kennedy before the Senate Committee on the Judiciary on S. 1731 and S. 1750, Legislative History of the Civil Rights Act of 1964, at 398–399.

Congress' resolve not to incorporate a static definition of discrimination into Title VI is not surprising. In 1963 and 1964, when Title VI was drafted and debated, the courts had only recently applied the Equal Protection Clause to strike down public racial discrimination in America, and the scope of that Clause's nondiscrimination principle was in a state of flux and rapid evolution. Many questions, such as whether the Fourteenth Amendment barred only *de jure* discrimination or in at least some circumstances reached *de facto* discrimination, had not yet received an authoritative judicial resolution. The congressional debate reflects an awareness of the evolutionary change constitutional law in the area of racial discrimination was undergoing in 1964.[16]

In sum, Congress' equating of Title VI's prohibition with the commands of the Fifth and Fourteenth Amendments, its refusal precisely to define that racial discrimination which it intended to prohibit, and its expectation that the statute would be administered in a flexible manner, compel the conclusion that Congress intended the meaning of the statute's prohibition to evolve with the interpretation of the commands of the Constitution. Thus any claim that the use of racial criteria is barred by the plain language of the statute must fail in light of the remedial purpose of Title VI and its legislative history. The cryptic nature of the language employed in Title VI merely reflects Congress' concern with the then prevalent use of racial standards as a means of excluding or disadvantaging Negroes and its determination to prohibit absolutely such discrimination. We have recently held that " '[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination." ' " *Train* v. *Colorado Public Interest Research Group,* 426 U. S. 1, 10 (1976), quoting *United States* v. *American Trucking Assn.,* 310 U. S. 534, 543–544 (1940). This is especially so when, as is the case here, the literal application of what is believed to be the plain language of the statute, assuming that it is so plain, would lead to results in direct conflict with Congress' unequivocally expressed legislative purpose.[17]

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[16] See, *e. g.*, 110 Cong. Rec. 6544, 13820 (Sen. Humphrey); *id.*, at 6050 (Sen. Javits); *id.*, at 12677 (Sen. Allott).

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[17] Our Brother STEVENS finds support for a colorblind theory of Title VI in its legislative history, but his interpretation gives undue weight to a few isolated passages from among the thousands of pages of the legislative history of Title VI. See 110 Cong. Rec. 6547 (Sen. Humphrey); *id.,* at 6047, 7055 (Sen. Pastore); *id.,* at 12675 (Sen. Allott); *id.,* at 6561 Sen. Kuchel). These fragmentary comments fall far short of supporting a congressional intent to prohibit a racially conscious admissions program designed to assist those who are likely to have suffered injuries from the effects of past discrimination. In the first place, these statements must be read in the context in which they were made. The concern of the speakers was far removed from the incidental injuries which may be inflicted upon nonminorities by the use of racial preferences. It was rather with the evil of the segregation of Negroes in federally financed programs and, in some cases, their arbitrary exclusion on account of race from the benefits of such programs. Indeed, in this context there can be no doubt that the Fourteenth Amendment does command color blindness and forbids the use of racial criteria. No consideration was given by these legislators, however, to the permissibility of racial preference designed to redress the effects of injuries suffered as a result of one's color. Significantly one of the legislators, Senator Pastore, and perhaps also Senator Kuchel, who described Title VI as proscribing decisionmaking based upon skin color, also made it clear that Title VI does not outlaw the use of racial criteria in all circumstances. See *supra,* pp. 15–16; 110 Cong. Rec. 6562. See also *id.,* at 2494 (Rep. Celler). Moreover, there are many statements in the legislative history explicitly indicating that Congress intended neither to require nor prohibit the remedial use of racial preferences where not otherwise required or prohibited by the Constitution. Representative MacGregor addressed directly the problem of preferential treatment:

"Your mail and mine, your contacts and mine with our constituents, indicates a great degree of misunderstanding about this bill. People com-

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Section 602 of Title VI, 42 U. S. C. § 2000d–1, instructs federal agencies to promulgate regulations interpreting Title

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plain about racial 'balancing' in the public schools, about open occupancy in housing, about preferential treatment or quotas in employment. There is a mistaken belief that Congress is legislating in these areas in this bill. When we drafted this bill we excluded these issues largely because the problems raised by these controversial questions are more properly handled at a governmental level close to the American people and by communities and individuals themselves. The Senate has spelled out our intentions more specifically." *Id.*, at 15893.

Other legislators explained that the achievement of racial balance in elementary and secondary schools where there had been no segregation by law was not compelled by Title VI but was rather left to the judgment of state and local communities. See, *e. g., id.*, at 10920 (Sen. Javits); *id.*, at 5807, 5266 (Sen. Keating); *id.*, at 13821 (Sens. Humphrey and Saltonstall). See also, *id.*, at 6562 (Sen. Kuchel); *id.*, at 13695 (Sen. Pastore).

Much the same can be said of the scattered remarks to be found in the legislative history of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e–1 *et seq.*, which prohibits employment discrimination on the basis of race in terms somewhat similar to those contained in Title VI, see 42 U. S. C. § 2000e–2 (a)(1) (unlawful "to fail or refuse to hire" any applicant "because of such individual's race, color, religion, sex or national orgin. . . ."), to the effect that any deliberate attempt by an employer to maintain a racial balance is not required by the statute and might in fact violate it. See, *e. g.*, 110 Cong. Rec. 7214 (Sens. Clark and Case); *id.*, at 6549 (Sen. Humphrey); *id.*, at 2560 (Rep. Goodell). Once again, there is no indication that Congress intended to bar the voluntary use of racial preferences to assist minorities to surmount the obstacles imposed by the remnants of past discrimination. Even assuming that Title VII prohibits employers from deliberately maintaining a particular racial composition in their work force as an end in itself, this does not imply, in the absence of any consideration of the question, that Congress intended to bar the use of racial preferences as a tool for achieving the objective of remedying past discrimination or other compelling ends. The former may well be contrary to the requirements of the Fourteenth Amendment (where state action is involved), while the latter presents very different constitutional considerations. Indeed, as discussed *infra*, this Court has construed Title VII as requiring the use of racial preferences for the purpose of hiring and

VI. These regulations, which, under the terms of the statute, require Presidential approval, are entitled to considerable deference in construing Title VI. See, *e. g., Lau* v. *Nichols,* 414 U. S. 563 (1964); *Mourning* v. *Family Publications Service, Inc.,* 411 U. S, 356, 369 (1973); *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 381 (1965). Consequently, it is most significant that the Department of Health, Education, and Welfare (HEW), which provides much of the federal assistance to institutions of higher education, has adopted regulations *requiring* affirmative measures designed to enable racial minorities which have been previously discriminated against by a federally funded institution or program to overcome the effects of such actions and *authorizing* the voluntary undertaking of affirmative action programs by federally funded institutions that have not been guilty of prior discrimination in order to overcome the effects of conditions which have adversely affected the degree of participation by persons of a particular race.

45 CFR § 80.3 (b)(6)(i) provides:

> "In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient

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advancing those who have been adversely affected by past discriminatory employment practices, even at the expense of other employees innocent of discrimination. *Franks* v. *Bowman Transportation Co.,* 424 U. S. 747, 767–768 (1976). Although Title VII clearly does not require employers to take action to remedy the disadvantages imposed upon racial minorities by hands other than their own, such an objective is perfectly consistent with the remedial goals of the statute. See *id.,* at 762–770; *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405, 418 (1975). There is no more indication in the legislative history of Title VII than in that of Title VI that Congress desired to prohibit such affirmative action to the extent that it is permitted by the Constitution, yet judicial decisions as well as subsequent executive and congressional action clearly establish that Title VII does not forbid race-conscious remedial action. See *infra,* pp. 29–31, and n. 28.

> must take affirmative action to overcome the effects of prior discrimination."

45 CFR § 80.5 (i) elaborates upon this requirement:

> "In some situations, even though past discriminatory practices attributable to a recipient or applicant have been abandoned, the consequences of such practices continue to impede the full availability of a benefit. If the efforts required of the applicant or recipient under § 80.6 (d), to provide information as to the availability of the program or activity and the rights of beneficiaries under this regulation, have failed to overcome these consequences, it will become necessary under the requirement stated in (i) of § 80.3 (b)(6) for such applicant or recipient to take additional steps to make the benefits fully available to racial and nationality groups previously subject to discrimination. This action might take the form, for example, of special arrangements for obtaining referrals or making selections which will insure that groups previously subjected to discrimination are adequately served."

These regulations clearly establish that where there is a need to overcome the effects of past racially discriminatory or exclusionary practices engaged in by a federally funded institution, race-conscious action is not only permitted but required to accomplish the remedial objectives of Title VI.[18] Of course, there is no evidence that the Medical School has been guilty of past discrimination and consequently these regulations would not compel it to employ a program of preferential admissions in behalf of racial minorities. It would be difficult to explain from the language of Title VI, however, much less from its legislative history, why the statute *compels* race conscious remedies where a recipient institution has engaged in past discrimination but *prohibits* such remedial action where racial minorities as a result of the effects of past discrimination imposed by entities other than the recipient are excluded from the benefits of federally funded programs. HEW was fully aware of the incongruous nature of such an interpretation of Title VI.

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[18] HEW has stated that the purpose of these regulations is "to specify that affirmative steps to make services more equitably available are not prohibited and that such steps are required when necessary to overcome the consequences of prior discrimination." 36 Fed. Reg. 23494 (1971). Other federal agencies which provide financial assistance pursuant to Title VI have adopted similar regulations. See Supplemental Brief for the United States as *Amicus Curiae,* 16 n. 14.

45 CFR § 80.3 (b)(6)(ii) provides:

> "Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin."

An explanatory regulation explicitly states that the affirmative action which § 80.3 (b)(6)(ii) contemplates includes the use of racial preferences:

> "Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service." 45 CFR § 80.5 (j).

This interpretation of Title VI is fully consistent with the statute's emphasis upon voluntary remedial action and reflects the views of an agency[19] responsible for achieving its objectives.[20]

The Court has recognized that the construction of a statute by those charged with its execution is particularly deserving of respect where Congress has directed its attention to the administrative construction and left it unaltered. Cf. *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 381 (1968); *Zemel* v. *Rusk*, 381 U. S. 1, 11–12 (1965). Congress recently took just this kind of action when it considered an amendment to the Departments of Labor and Health, Education, and Welfare appropriation bill for 1978, which would have restricted significantly the remedial use race in programs funded by the appropriation. The amendment, as originally submitted by Representative Ashbrook, provided that "[n]one of the funds appropriated in this Act may be used to initiate, carry out or enforce any program of affirmative action or any other system of quotas or goals in regard to admission policies or employment practices which encourage or require any discrimination on the basis of race, creed, religion, sex or age." 123 Cong. Rec. 6099. In support of the measure, Representative Ashbrook argued that the 1964 Civil Rights Act never authorized the imposition of affirmative action and that this was a creation of the bureaucracy. *Id.*, at 6106. He explicitly stated, however, that he favored permitting universities to adopt affirmative action programs giving consideration to racial identity but opposed the imposition of such programs by the Government. *Id.*, at 6099. His amendment was itself amended to reflect this position by only barring the *imposition* of race-conscious remedies by HEW:

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[19] Moreover, the President has delegated to the Attorney General responsibility for coordinating the enforcement of Title VI by federal departments and agencies and has directed him to "assist the departments and agencies in accomplishing effective implementation." Executive Order No. 11764, 39 Fed. Reg. 2575 (1974). Accordingly, the views of the Solicitor General, as well as those of HEW, that the use of racial preferences for remedial purposes is consistent with Title VI are entitled to considerable respect.

[20] HEW administers at least two explicitly race-conscious programs. Details concerning them may be found in the 1977 Catalogue of Federal Domestic Assistance, pp. 205–206, 401–402. The first program, No. 13–375, "Minority Biomedical Support," has as its objectives:

"To increase the number of ethnic minority faculty, students, and investigators engaged in biomedical research. To broaden the opportunities for participation in biomedical research of ethnic minority faculty, students, and investigators by providing support for biomedical research programs at eligible institutions."

Eligibility for grants under this program is limited to (1) four-year colleges, universities, and health professional schools with over 50% minority enrollments; (2) four-year institutions with significant but not necessarily over 50% minority enrollment provided they have a history of encouragement and assistance to minorities; (3) two-year colleges with 50% minority enrollment; and (4) American Indian Tribal Councils. Grants made pursuant to this program are estimated to total $9,711,000 for 1977.

The second program, No. 13,880, entitled "Minority Access To Research Careers," has as its objective to "assist minority institutions to train greater numbers of scientists and teachers in health related fields." Grants under this program are made directly to individuals and to institutions for the purpose of enabling them to make grants to individuals.

> "None of the funds appropriated in this Act may be obligated or expended in connection with the issuance, implementation, or enforcement of any rule, regulation, standard, guideline, recommendation, or order issued by the Secretary of Health, Education, and Welfare which for purposes of compliance with any ratio, quota, or other numerical requirement related to race, creed, color, national origin, or sex requires any individual or entity to take any action with respect to (1) the hiring or promotion policies or practices of such individual or entity, or (2) the admissions policies or practices of such individual or entity." *Id.*, at 6106.

This amendment was adopted by the House. *Ibid.* The Senate bill, however, contained no such restriction upon HEW's authority to impose race-conscious remedies and the

Conference Committee, upon the urging of the Secretary of HEW, deleted the House provision from the bill.[21] More significant for present purposes, however, is the fact that even the proponents of imposing limitations upon HEW's implementation of Title VI did not challenge the right of federally funded educational institutions voluntarily to extend preferences to racial minorities.

Finally, congressional action subsequent to the passage of Title VI eliminates any possible doubt about Congress' views concerning the permissibility of racial preferences for the purpose of assisting disadvantaged racial minorities. It confirms that Congress did not intend to prohibit and does not now believe that Title VI prohibits the consideration of race as part of a remedy for societal discrimination even where there is no showing that the institution extending the preference has been guilty of past discrimination nor any judicial finding that the particular beneficiaries of the racial preference have been adversely affected by societal discrimination.

Just last year Congress enacted legislation[22] explicitly requiring that no grants shall be made "for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises." The statute defines the term "minority business enterprise" as "a business, at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members." The term "minority group members" is defined in explicitly racial terms: "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." Although the statute contains an exemption from this requirement "to the extent that the Secretary determines otherwise," this escape clause was provided only to deal with the possibility that certain areas of the country might not contain sufficient qualified "minority business enterprises" to permit compliance with the quota provisions of the legislation.[23]

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[21] See Conference Report to accompany H. R. 7555, at 22; 123 Cong. Rec. H. 8330 (Aug. 2, 1977). Final passage of the bill has been delayed by the dispute over the funding of abortions.

[22] 42 U. S. C. § 6705 (f)(2).

The legislative history of this race-conscious legislation reveals that it represents a deliberate attempt to deal with the excessive rate of unemployment among minority citizens and to encourage the development of viable minority controlled enterprises.[24] It was believed that such a "set-aside" was required in order to enable minorities, still "new on the scene" and "relatively small," to compete with larger and more established companies which would always be successful in underbidding minority enterprises. 123 Cong. Rec. 1437 (Rep. Mitchell). What is most significant about the congressional consideration of the measure is that although the use of a racial quota or "set-aside" by a recipient of federal funds would constitute a direct violation of Title VI if that statute were read to prohibit race-conscious action, no mention was made during the debates in either the House or the Senate of even the possibility that the quota provisions for minority contractors might in any way conflict with or modify Title VI. It is inconceivable that such a purported conflict would have escaped congressional attention through an inadvertent failure to recognize the relevance of Title VI. Indeed, the Act of which this affirmative action provision is a part also contains a provision barring discrimination on the basis of sex which states that this prohibition "will be enforced through agency provisions and rules similar to those already established, with respect to racial and other discrimination under

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[23] 123 Cong. Rec. S. 3910 (Mar. 10, 1977); *id.*, at H. 1437–1439 (Feb. 24, 1977).

[24] See *id.*, at S. 3910 (Mar. 10, 1977) (Sen. Brooke); *id.*, at H. 1437 (Feb. 14, 1977) (Rep. Biaggi).

Title VI of the Civil Rights Act of 1964." 42 U. S. C. § 6709. Thus Congress was fully aware of the applicability of Title VI to the funding of public works projects. Under these circumstances, the enactment of the 10% "set-aside" for minority enterprises reflects a congressional judgment that the remedial use of race is permissible under Title VI. We have repeatedly recognized that subsequent legislation reflecting an interpretation of an earlier act is entitled to great weight in determining the meaning of the earlier statute. *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 380–381 (1968); *Erlenbaugh* v. *United States,* 409 U. S. 239, 243–244 (1972). See also *United States* v. *Stewart,* 311 U. S. 60, 64–65 (1940).[25]

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[25] In addition to the enactment of the 10% quota provision discussed *supra,* Congress has also passed other acts mandating race-conscious measures to overcome disadvantages experienced by racial minorities. Although these statutes have less direct bearing upon the meaning of Title VI, they do demonstrate that Congress believes race-conscious remedial measures to be both permissible and desirable under at least some circumstances. This in turn undercuts the likelihood that Congress intended to limit voluntary efforts to implement similar measures. For example, § 7 (a) of the National Science Foundation Authorization Act of 1977 provides:

"The Director of the National Science Foundation shall initiate an intensive search for qualified women, members of minority groups, and handicapped individuals to fill executive level positions in the National Science Foundation. In carrying out the requirement of this subsection, the Director shall work closely with organizations which have been active in seeking greater recognition and utilization of the scientific and technical capabilities of minorities, women, and handicapped individuals. The Director shall improve the representation of minorities, women, and handicapped individuals on advisory committees, review panels, and all other mechanisms by which the scientific community provides assistance to the Foundation." 42 U. S. C. § 1873.

Perhaps more importantly, the Act also authorizes the funding of Minority Centers for Graduate Education. The Act requires that these Centers:

"(A) have substantial minority student enrollment;

"(B) are geographically located near minority population centers;

"(C) demonstrate a commitment to encouraging and assisting minority students, researchers, and faculty;

. . . . .

C

Prior decisions of this Court also strongly suggest that Title VI does not prohibit the remedial use of race where such action is constitutionally permissible. In *Lau* v. *Nichols,* 414 U. S. 563 (1974), the Court held that the failure of the San Francisco school system to provide English language instruction to students of Chinese ancestry who do not speak English, or to provide them with instruction in Chinese, constituted a violation of Title VI. The Court relied upon a HEW regulation which stipulates that a recipient of federal funds "may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination" or have "the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin." 45 CFR § 80.3 (b)(2). It interpreted this regulation as requiring San Francisco to extend the same educational benefits to Chinese speaking students as to English speaking students, even though there was no finding or allegation that the city's failure to do so was a result of a purposeful design to discriminate on the basis of race.

Lau is significant in two related respects. First, it indicates

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"(F) will serve as a regional resource in science and engineering for the minority community which the Center is designed to serve; and

"(G) will develop joint educational programs with nearby undergraduate institutions of higher education which have a substantial minority student enrollment."

Once again, there is no indication in the legislative history of this Act or elsewhere that Congress saw any inconsistency between the race-conscious nature of such legislation and the meaning of Title VI. And once again, it is unlikely in the extreme that a Congress which believed that it had commanded recipients of federal funds to be absolutely colorblind would itself expend federal funds in such a race-conscious manner. See also the Railroad Revitalization Act of 1976, 45 U. S. C. § 801 *et seq.,* 49 U. S. C. § 1657 *et seq.;* the Emergency School Aid Act of 1972, 20 U. S. C. § 1601 *et seq.*

that in at least some circumstances agencies responsible for the administration of Title VI may require recipients who have not been guilty of any constitutional violations to depart from a policy of colorblindness and to be cognizant of the impact of their actions upon racial minorities. Secondly, *Lau* clearly requires that institutions receiving federal funds be accorded considerable latitude in voluntarily undertaking race-conscious action designed to remedy the exclusion of significant numbers of minorities from the benefits of federally funded programs. Although this Court has not yet considered the question, presumably, by analogy to our decisions construing Title VII, a medical school would not be in violation of Title VI under *Lau* because of the serious underrepresentation of racial minorities in its student body as long as it could demonstrate that its entrance requirements correlated sufficiently with the performance of minority students in medical school and the medical profession.[26] It would be inconsistent with *Lau* and the emphasis of Title VI and the HEW regulations on voluntary action, however, to require that an institution wait to be adjudicated to be in violation of the law before being permitted to voluntarily undertake corrective action based upon a good faith and reasonable belief that the failure of certain racial minorities to satisfy entrance requirements is not a measure of their ultimate performance as doctors but a result of the lingering effects of past societal discrimination.

We recognize that *Lau*, especially when read in light of our subsequent decision in *Washington* v. *Davis*, 426 U. S. 229 (1976), which rejected the general proposition that governmental action is unconstitutional solely because it has a racially disproportionate impact, may be read as being predicated upon the view that, at least under some circumstances, Title VI proscribes conduct which might not be prohibited by the Constitution. Since we are now of the opinion, for the reasons set forth above, that Title VI's standard, applicable alike to public and private recipients of federal funds, is no broader than the Constitution's, we have serious doubts concerning the correctness of what appears to be the premise of that decision. However, even accepting *Lau*'s implication that impact alone is in some contexts sufficient to establish a prima facie violation of Title VI, contrary to our view that Title VI's definition of racial discrimination is absolutely coextensive with the Constitution's, this would not assist the respondent in the least. First, for the reasons discussed *supra*, pp. 12–26, regardless of whether Title VI's prohibitions extend beyond the Constitution's, the evidence fails to establish, and, indeed, compels the rejection of, the proposition that Congress intended to prohibit recipients of federal funds from voluntarily employing race-conscious measures to eliminate the effects of past societal discrimination against racial minorities such as Negroes. Secondly, *Lau* itself, for the reasons set forth in the immediately preceding paragraph, strongly supports the view that voluntary race-conscious remedial action is permissible under Title VI. If discriminatory racial impact alone is enough to demonstrate at least a prima facie Title VI violation, it is difficult to believe that the Title would forbid the Medical School from attempting to correct the racially exclusionary effects of its initial admissions policy during the first two years of the School's operation.

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[26] Cf. *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971).

The Court has also declined to adopt a "colorblind" interpretation of other statutes containing nondiscrimination provisions similar to that contained in Title VI. We have held under Title VII that where employment requirements have a disproportionate impact upon racial minorities they constitute a statutory violation, even in the absence of discriminatory intent, unless the employer is able to demonstrate that the requirements are sufficiently related to the needs of the job.[27] More significantly, the Court has required that preferences be given by employers to members of racial minorities as a remedy for past violations of Title VII, even where there has been no finding that the employer has acted with a discriminatory intent.[28] Finally, we have construed the Voting

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[27] *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971); *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975).

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[28] *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976); *Teamsters* v. *United States*, 431 U. S. 324 (1977). Executive, judicial, and congressional action subsequent to the passage of Title VII conclusively established that the Title did not bar the remedial use of race. Prior to the 1972 amendments to Title VII (The Equal Employment Opportunities Act of 1972, Pub. L. 92-261) a number of courts of appeals approved race-conscious action to remedy the effects of employment discrimination. See, *e. g., Local 53, International Assn. of Heat & Frost Insulators & Asbestos Workers* v. *Vogler*, 407 F. 2d 1047 (CA5 1969); *United States* v. *International Brotherhood of Electrical Workers, Local 38*, 428 F. 2d 144, 149-159 (CA6), cert. denied, 400 U. S. 943, 91 S. Ct. 245, 27 L. Ed. 2d 248 (1970); *United States* v. *Sheetmetal Workers Local 36*, 416 F. 2d 123 (CA8 1969). In 1965, the President issued Executive Order 11246, 30 Fed. Reg. 12319, as amended 32 Fed. Reg. 14303, which required federal contractors to take affirmative action to remedy the disproportionately low employment of racial minorities in the construction industry. The Attorney General issued an opinion concluding that the race consciousness required by Executive Order 11246 did not conflict with Title VII:

"It is not correct to say that Title VII prohibits employers from making race or national origin a factor for consideration at any stage in the process of obtaining employees. The legal definition of discrimination is an evolving one, but it is now well recognized in judicial opinions that the obligation of nondiscrimination, whether imposed by statute or by the Constitution, does not require and, in some circumstances, may not permit obliviousness or indifference to the racial consequences of alternative courses of action which involve the application of outwardly neutral criteria." 42 Op. AG No. 37 (1969), at 7.

The federal courts agreed. See, *e. g., Contractors Assn. of Eastern Pa.* v. *Secretary of Labor*, 442 F. 2d 159 (CA3), cert. denied, 404 U. S. 854 (1971) (which also held, at 173, that race conscious affirmative action was permissible under Title VI); *Southern Illinois Builders Assn.* v. *Ogilvie*, 471 F. 2d 680 (CA7 1972). Moreover, Congress, in enacting the 1972 amendments to Title VII, explicitly considered and rejected proposals to alter Executive Order 11246 and the prevailing judicial interpretations of Title VII as permitting, and in some circumstances requiring, race conscious action. See Comment, The Philadelphia Plan: A Study on the

Rights Act of 1965, 42 U. S. C. § 1973, which contains a provision barring any voting procedure or qualification that denies or abridges "the right of any citizens of the United States to vote on account of race or color," as permitting States to voluntarily take race into account in a way that fairly represents the voting strengths of different racial groups in order to comply with the commands of the statute, even where the result is a gain for one racial group at the expense of others.[29]

These prior decisions are indicative of the Court's unwillingness to construe remedial statutes designed to eliminate discrimination against racial minorities in a manner which would impede efforts to obtain this objective. There is no justification for departing from this course in the case of Title VI and frustrating the clear judgment of Congress that race-conscious remedial action is permissible.

We turn, therefore, to our analysis of the Equal Protection Clause of the Fourteenth Amendment.

III

A

The assertion of human equality is closely associated with the proposition that differences in color or creed, birth or status, are neither significant nor relevant to the way in which persons should be treated. Nonetheless, the position that such

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Dynamics of Executive Power, 39 U. Chi. L. Rev. 732, 747–757 (1972). The section-by-section analysis of the 1972 amendments to Title VII undertaken by the Senate Subcommittee on Labor of the Senate Committee on Labor and Public Welfare reveals a resolve to accept the then (as now) prevailing judicial interpretations of the scope of Title VII:

"In any area where the new law does not address itself, or in any areas where a specific contrary intent is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII." Legislative History of Equal Employment Opportunities Act of 1972, at 1844.

[29] *United Jewish Organizations of Williamsburgh* v. *Carey*, 430 U. S. 144 (1977). See also *id.*, at 167–168 (opinion of WHITE, J.).

factors must be "[c]onstitutionally an irrelevance," *Edwards* v. *California*, 314 U. S. 160, 185 (1941) (Jackson, J., concurring), summed up by the shorthand phrase "[o]ur Constitution is color-blind," *Plessy* v. *Ferguson*, 163 U. S. 537, 559 (1896) (Harlan, J., dissenting), has never been adopted by this Court as the proper meaning of the Equal Protection Clause. Indeed, we have expressly rejected this proposition on a number of occasions.

Our cases have always implied that an "overriding statutory purpose," *McLaughlin* v. *Florida*, 379 U. S. 184, 192 (1964), could be found that would justify racial classifications. See, *e. g., ibid.; Loving* v. *Virginia*, 388 U. S. 1, 11 (1967); *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944); *Hirabayashi* v. *United States*, 320 U. S. 81, 100–101 (1943). More recently, in *McDaniel* v. *Barresi*, 402 U. S. 39 (1971), this Court unanimously reversed the Georgia Supreme Court which had held that a desegregation plan voluntarily adopted by a local school board, which assigned students on the basis of race, was *per se* invalid because it was not colorblind. And in *North Carolina State Board of Ed.* v. *Swann*, 402 U. S. 43 (1971), we held, again unanimously, that a statute mandating colorblind school assignment plans could not stand "against the background of segregation," since such a limit on remedies would "render illusory the promise of *Brown* [*I, supra*]." 402 U. S., at 45–46.

We conclude, therefore, that racial classifications are not *per se* invalid under the Fourteenth Amendment. Accordingly, we turn to the problem of articulating what our role should be in reviewing state action that expressly classifies by race.

B

Respondent argues that racial classifications are always suspect and, consequently, that this Court should weigh the importance of the objectives served by Davis' special admissions program to see if they are compelling. In addition, he asserts that this Court must inquire whether, in its judgment, there are alternatives to racial classifications which would suit Davis' purposes. Petitioner, on the other hand, states that our proper role is simply to accept petitioner's determination that the racial classifications used by its program are reasonably related to what it tells us are its benign purposes. We reject petitioner's view, but, because our prior cases are in many respects inapposite to that before us now, we find it necessary to define with precision the meaning of that inexact term, "strict scrutiny."

Unquestionably we have held that a government practice or statute which restricts "fundamental rights" or which contains "suspect classifications" is to be subjected to "strict scrutiny" and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available.[30] See, *e. g., San Antonio Indep. School Dist.* v. *Rodriguez,* 411 U. S. 1, 16–17 (1973); *Dunn* v. *Blumstein,* 405 U. S. 330 (1972). But no fundamental right is involved here. See *San Antonio, supra,* at 29–36. Nor do whites as a class have any of the "traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.,* at 28; see *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152 n. 4 (1938).[31]

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[30] We do not pause to debate whether our cases establish a "two-tier" analysis, a "sliding scale" analysis, or something else altogether. It is enough for present purposes that strict scrutiny is applied at least in some cases.

[31] Of course, the fact that whites constitute a political majority in our Nation does not necessarily mean that active judicial scrutiny of racial classifications that disadvantage whites is inappropriate. Cf. *Castaneda* v. *Partida,* 430 U. S. 482, 499–500 (1977); *id.,* at 501 (MARSHALL, J., concurring).

Moreover, if the University's representations are credited, this is not a case where racial classifications are "irrelevant and therefore prohibited." *Hirabayashi,* 320 U. S., at 100. Nor has anyone suggested that the University's purposes contravene the cardinal principle that racial classifications that stigmatize—because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism—are invalid without more. See *Yick Wo* v. *Hopkins,* 118 U. S. 356, 374 (1886);[32] accord, *Strauder* v. *West Virginia,* 100 U. S. 303, 308 (1879); *Korematsu* v. *United States,* 323 U. S., at 223; *Oyama* v. *California,* 332 U. S. 633, 663 (1948) (Murphy, J., concurring); *Brown I, supra; McLaughlin* v. *Florida,* 379 U. S., at 191–192; *Loving* v. *Virginia,* 388 U. S., at 11–12; *Reitman* v. *Mulkey,* 387 U. S. 369, 375–376 (1967); *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey,* 430 U. S. 144, 165 (1977) (opinion of WHITE, REHNQUIST, and STEVENS, JJ.) (*UJO*); *id.,* at 169 (concurring opinion).[33]

On the other hand, the fact that this case does not fit neatly into our prior analytic framework for race cases does not mean that it should be analyzed by applying the very loose rational-basis standard of review that is the very least that is always applied in equal protection cases.[34] "'[T]he mere recitation

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[32] "[T]he conclusion cannot be resisted that no reason for [the refusal to issue permits to Chinese] exists except hostility to the race and nationality to which petitioners belong . . . . The discrimination is, therefore, illegal . . . ."

[33] Indeed, even in *Plessy* v. *Ferguson, supra,* the Court recognized that a classification by race that presumed one race to be inferior to another would have to be condemned. See 163 U. S., at 544–551.

[34] Paradoxically, petitioner's argument is supported by the cases generally thought to establish the "strict scrutiny" standard in race cases, *Hirabayashi* v. *United States,* 320 U. S. 81 (1943), and *Korematsu* v. *United States,* 323 U. S. 214 (1944). In *Hirabayashi,* for example, the Court, responding to a claim that a racial classification was rational, sus-

First, race, like, "gender-based classifications too often [has] been inexcusably utilized to stereotype and stigmatize politically powerless segments of society." *Kahn* v. *Shevin*, 416 U. S. 351, 357 (1974) (dissenting opinion). While a carefully tailored statute designed to remedy past discrimination could avoid these vices, see *Califano* v. *Webster, supra; Schlesinger* v. *Ballard*, 419 U. S. 498 (1975); *Kahn* v. *Shevin, supra*, we nonetheless have recognized that the line between honest and thoughtful appraisal of the effects of past discrimination and paternalistic stereotyping is not so clear and that a statute based on the latter is patently capable of stigmatizing all women with a badge of inferiority. Cf. *Schlesinger* v. *Ballard, supra*, at 508; *UJO*, 430 U. S., at 174, and n. 3 (concurring opinion); *Califano* v. *Goldfarb*, 430 U. S. 199, 223 (1977) (STEVENS, J., concurring in the judgment). See also *Stanton* v. *Stanton*, 421 U. S. 7, 14–15 (1975). State programs designed ostensibly to ameliorate the effects of past racial discrimination obviously create the same hazard of stigma, since they may promote racial separatism and reinforce the views of those who believe that members of racial minorities are inherently incapable of succeeding on their own. See *UJO*, 430 U. S., at 172 (concurring opinion); *ante*, at 27 (opinion of POWELL, J.).

Second, race, like gender and illegitimacy, see *Weber* v. *Aetna Cas. & Surety Co.*, 406 U. S. 164 (1972), is an immutable characteristic which its possessors are powerless to escape or set aside. While a classification is not *per se* invalid

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then "the principle that calls for the closest scrutiny of distinctions in laws denying fundamental rights . . . is inapplicable," *Katzenbach* v. *Morgan*, 384 U. S. 641, 657 (1967), and the only question is whether it was rational for Davis to conclude that the groups it preferred had a greater claim to compensation than the groups it excluded. See *ibid.; San Antonio Indep. School Dist.* v. *Rodriguez*, 411 U. S. 1, 38–39 (1973) (applying *Katzenbach* test to state action intended to remove discrimination in educational opportunity). Thus, claims of rival groups, although they may create thorny political problems, create relatively simple problems for the courts.

because it divides classes on the basis of an immutable characteristic, see *supra,* pp. 31–32, it is nevertheless true that such divisions are contrary to our deep belief that "legal burdens should bear some relationship to individual responsibility or wrongdoing," *Weber, supra,* at 175; *Frontiero* v. *Richardson,* 411 U. S. 667, 686 (1973) (opinion of BRENNAN, WHITE, and MARSHALL, JJ.), and that advancement sanctioned, sponsored, or approved by the State should ideally be based on individual merit or achievement, or at the least on factors within the control of an individual. See *UJO,* 430 U. S., at 173 (concurring opinion); *Kotch* v. *Board of River Port Pilot Comm'rs,* 330 U. S. 552, 566 (1947) (Rutledge, J., dissenting).

Because this principle is so deeply rooted it might be supposed that it would be considered in the legislative process and weighed against the benefits of programs preferring individuals because of their race. But this is not necessarily so: The "natural consequence of our governing processes [may well be] that the most 'discrete and insular' of whites . . . will be called upon to bear the immediate, direct costs of benign discrimination." *UJO,* 430 U. S., at 174 (concurring opinion). Moreover, it is clear from our cases that there are limits beyond which majorities may not go when they classify on the basis of immutable characteristics. See, *e. g., Weber, supra.* Thus, even if the concern for individualism is weighed by the political process, that weighing cannot waive the personal rights of individuals under the Fourteenth Amendment. See *Lucas* v. *Forty-Fourth General Assembly,* 377 U. S. 713, 736 (1964).

In sum, because of the significant risk that racial classifications established for ostensibly benign purposes can be misused, causing effects not unlike those created by invidious classifications, it is inappropriate to inquire only whether there is any conceivable basis that might sustain such a classification. Instead, to justify such a classification an important and articulated purpose for its use must be shown. In addiof a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.' " *Califano* v. *Webster,* 430 U. S. 313, 317 (1977), quoting *Weinberger* v. *Weisenfeld,* 420 U. S. 636, 648 (1975). Instead, a number of considerations—developed in gender discrimination cases but which carry even more force when applied to racial classifications—lead us to conclude that racial classifications designed to further remedial purposes " 'must serve important governmental objectives and must be substantially related to achievement of those objectives.' " *Califano* v. *Webster, supra,* at 316, quoting *Craig* v. *Boren,* 429 U. S. 190, 197 (1976).[35]

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tained a racial classification solely on the basis of a conclusion in the double-negative that it could not say that facts which might have been available "could afford no ground for differentiating citizens of Japanese ancestry from other groups in the United States." *Id.,* at 101. A similar mode of analysis was followed in *Korematsu,* see 323 U. S., at 224, even though the Court stated there that racial classifications were "immediately suspect" and should be subject to "the most rigid scrutiny." *Id.,* at 216.

[35] We disagree with our Brother POWELL's suggestion, *ante,* at 31, that the presence of "rival groups who can claim that they, too, are entitled to preferential treatment," *ibid.,* distinguishes the gender cases or is relevant to the question of scope of judicial review of race classifications. We are not asked to determine whether groups other than those favored by the Davis program should similarly be favored. All we are asked to do is to pronounce the constitutionality of what Davis has done.

But, were we asked to decide whether any given rival group—German-Americans for example—must constitutionally be accorded preferential treatment, we do have a "principled basis," *ante,* at 25, for deciding this question, one that is well-established in our cases: The Davis program expressly sets out four classes which receive preferred status. *Ante,* at 4. The program clearly distinguishes whites, but one cannot reason from this to a conclusion that German-Americans, as a national group, are singled out for invidious treatment. And even if the Davis program had a differential impact on German-Americans, they would have no constitutional claim unless they could prove that Davis intended invidiously to discriminate against German-Americans. See *Village of Arlington Heights* v. *Metropolitan Housing Corp.,* 429 U. S. 252, 264–265 (1977); *Washington* v. *Davis,* 426 U. S. 229, 238–241 (1976). If this could not be shown, tion, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program. Thus our review under the Fourteenth Amendment should be strict—not " 'strict' in theory and fatal in fact," [36] because it is stigma that causes fatality—but strict and searching nonetheless.

IV

Davis' articulated purpose of remedying the effects of past societal discrimination is, under our cases, sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the medical school.

A

At least since *Green* v. *County School Board,* 391 U. S. 430 (1968), it has been clear that a public body which has itself been adjudged to have engaged in racial discrimination cannot bring itself into compliance with the Equal Protection Clause simply by ending its unlawful acts and adopting a neutral stance. Three years later, *Swann* v. *Charlotte-Mecklenburg Board of Ed.,* 402 U. S. 1 (1971), and its companion cases, *Davis* v. *Board of School Comm'rs,* 402 U. S. 33 (1971); *McDaniel* v. *Barresi, supra;* and *North Carolina State Board of Ed.* v. *Swann, supra,* reiterated that racially neutral remedies for past discrimination were inadequate where consequences of past discriminatory acts influence or control present decisions. See, *e. g., Charlotte-Mecklenburg, supra,* at 28. And the Court further held both that courts could enter desegregation orders which assigned students and faculty by reference to race, *Charlotte-Mecklenburg, supra; Davis, supra; United States* v. *Montgomery County Board of Ed.*, 395 U. S. 225 (1969), and that local school boards could *voluntarily* adopt desegregation plans which made express reference to race if this was necessary to remedy the effects of past discrimination. *McDaniel* v. *Barresi, supra.* Moreover, we stated that school boards, even in the absence of a judicial finding of past discrimination, could voluntarily adopt plans which assigned students with the end of creating racial pluralism by establishing fixed ratios of black and white students in each school. *Charlotte-Mecklenburg, supra,* at 16. In each instance, the creation of unitary school systems, in which the effects of past discrimination had been "eliminated root and branch," *Green, supra,* at 438, was recognized as a compelling social goal justifying the overt use of race.

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[36] Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972).

Finally, the conclusion that state educational institutions may constitutionally adopt admissions programs designed to avoid exclusion of historically disadvantaged minorities, even when such programs explicitly take race into account, finds direct support in our cases construing congressional legislation designed to overcome the present effects of past discrimination. Congress can and has outlawed actions which have a disproportionately adverse and unjustified impact upon members of racial minorities and has required or authorized race-conscious action to put individuals disadvantaged by such impact in the position they otherwise might have enjoyed. See *Franks* v. *Bowman, supra; International Brotherhood of Teamsters* v. *United States,* 431 U. S. 324 (1977). Such relief does not require as a predicate proof that recipients of preferential advancement have been individually discriminated against; it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination. See *id.*, at 357–362. Nor is it an objection to such relief that preference for minorities will upset the settled expectations of nonminorities. See *Franks, supra.* In addition, we have held that Congress, to remove barriers to equal opportunity, can and has required employers to use test criteria that fairly reflect the qualifications of minority applicants vis-à-vis nonminority applicants, even if this means interpreting the qualifications of an applicant in light of his race. See *Albemarle* v. *Moody*, 422 U. S. 405, 435 (1975).[37]

These cases cannot be distinguished simply by the presence of judicial findings of discrimination, for race-conscious remedies have been approved where such findings have not been made. *McDaniel* v. *Barresi, supra; UJO, supra;* see *Califano* v. *Webster, supra; Schlesinger* v. *Ballard, supra; Kahn* v. *Shevin, supra.* See also *Katzenbach* v. *Morgan*, 384 U. S. 641 (1967). Indeed, the requirement of a judicial determination of a constitutional or statutory violation as a predicate for race-conscious remedial actions would be self-defeating. Such a requirement would severely undermine efforts to achieve voluntary compliance with the requirements of law. And, our society and jurisprudence have always stressed the value of voluntary efforts to further the objectives of the law. Judicial intervention is a last resort to achieve cessation of illegal conduct or the remedying of its effects rather than a prerequisite to action.[38]

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[37] In *Albemarle*, we approved "differential validation" of employment tests. See 422 U. S., at 435. That procedure requires that an employer must ensure that a test score of, for example, 50 for a minority job applicant means the same thing as a score of 50 for a nonminority applicant. By implication, were it determined that a test score of 50 for a minority corresponded in "potential for employment" to a 60 for whites, the test could not be used consistent with Title VII unless the employer hired minorities with scores of 50 even though he might not hire nonminority applicants with scores above 50 but below 60. Thus, it is clear that employers, to ensure equal opportunity, may have to adopt race-conscious hiring practices.

Nor can our cases be distinguished on the ground that the entity using explicit racial classifications had itself violated § 1 of the Fourteenth Amendment or an antidiscrimination regulation, for again race-conscious remedies have been approved where this is not the case. See *UJO*, 430 U. S., at 157 (opinion of WHITE, BLACKMUN, REHNQUIST, and STEVENS, JJ.); [39] *id.*, at 167 (opinion of WHITE, REHNQUIST, and STEVENS, JJ.); [40] cf. *Califano* v. *Webster*, 430 U. S., at 317; *Kahn* v. *Shevin*, *supra*. Moreover, the presence or absence of past discrimination by universities or employers is largely irrelevant to resolving respondent's constitutional claims. The claims of those burdened by the race-conscious actions of a university or employer who has never been adjudged in violation of an antidiscrimination law are not any more or less entitled to deference than the claims of the burdened nonminority workers in *Franks* v. *Bowman*, 424 U. S. 747 (1976), in which the employer had violated Title VII, for in each case the employees are innocent of past discrimination. And, although it might be argued that, where an employer has violated an antidiscrimination law, the expectations of nonminority workers are themselves products of discrimination and hence "tainted," see *Franks*, *supra*, at 776, and therefore more easily upset, the same argument can be made with respect to respondent. If it was reasonable to conclude—as we hold that it was—that the failure of minorities to qualify for admission at Davis under regular procedures was due principally to the effects of past discrimination, then there is a reasonable likelihood that, but for pervasive racial discrimination, respondent would have failed to qualify for admission even in the absence of Davis' special admissions program.[41]

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[38] Indeed, Titles VI and VII of the Civil Rights Act of 1964 put great emphasis on voluntarism in remedial action. See *supra*, pp. 13–15. And, significantly, the Equal Employment Opportunities Commission has recently proposed guidelines authorizing employers to adopt racial preferences as a remedial measure where they have a reasonable basis for believing that they might otherwise be held in violation of Title VII. See 42 Fed. Reg. 64826 (1977).

[39] "[T]he [Voting Rights] Act's prohibition . . . is not dependent upon proving past unconstitutional apportionments . . . ."

[40] "[T]he State is [not] powerless to minimize the consequences of racial discrimination by voters when it is regularly practiced at the polls."

Thus, our cases under Title VII of the Civil Rights Act have held that, in order to achieve minority participation in previously segregated areas of public life, Congress may require or authorize preferential treatment for those likely disadvantaged by societal racial discrimination. Such legislation has been sustained even without a requirement of findings of intentional racial discrimination by those required or authorized to accord preferential treatment, or a case-by-case determination that those to be benefited suffered from racial discrimination. These decisions compel the conclusion that States also may adopt race-conscious programs designed to overcome substantial, chronic minority underrepresentation where there is reason to believe that the evil addressed is a product of past racial discrimination.[42]

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[41] Our cases cannot be distinguished by suggesting, as our Brother POWELL does, that in none of them was anyone deprived of "the relevant benefit." *Ante,* at 32; *id.,* at 33. Our school cases have deprived whites of the neighborhood school of their choice; our Title VII cases have deprived nondiscriminating employees of their settled seniority expectations; and *UJO* deprived the Hassidim of bloc voting strength. Each of these injuries was constitutionally cognizable as is respondent's here.

[42] We do not understand MR. JUSTICE POWELL to disagree that providing a remedy for past racial prejudice can constitute a compelling purpose sufficient to meet strict scrutiny. See *ante,* at 35–36. Yet, because petitioner is a university, he would not allow it to exercise such power in the absence of "judicial, legislative, or administrative findings of constitutional or statutory violations. *Ibid.* While we agree that reversal in this case would follow *a fortiori* had Davis been guilty of invidious racial discrimination or if a federal statute mandated that universities refrain from apply-

Title VII was enacted pursuant to Congress' power under the Commerce Clause and § 5 of the Fourteenth Amendment. To the extent that Congress acted under the Commerce Clause power, it was restricted in the use of race in governmental decisionmaking by the equal protection component of the Due Process Clause of the Fifth Amendment precisely to the same extent as are the States by § 1 of the Fourteenth Amend-

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ing any admissions policy that had a disparate and unjustified racial impact, see, *e. g., McDaniel* v. *Barresi,* 402 U. S. 39 (1971); *Franks* v. *Bowman Transp. Co.,* 424 U. S. 747 (1976), we do not think it of constitutional significance that Davis has not been so adjudged.

Generally, the manner in which a State chooses to delegate governmental functions is for it to decide. Cf. *Sweezy* v. *New Hampshire,* 354 U. S. 234, 256 (1957) (Frankfurter, J., concurring). California, by constitutional provision, has chosen to place authority over the operation of the University of California in the Board of Regents. See Cal. Const. Art. IX, § 9 (a) (1978). Control over the University is to be found not in the legislature, but rather in the Regents who have been vested with full legislative (including policymaking), administrative, and adjudicative powers by the citizens of California. See *ibid.; Ishmatsu* v. *Regents,* 266 Cal. App. 2d 854, 863–864, 73 Cal. Rptr. 753, 762–763 (1968); *Goldberg* v. *Regents,* 248 Cal. App. 2d 867, 874, 57 Cal. Rptr. 463, 468 (1967); 30 Ops. Atty. Gen. Cal. 162, 166 (1957) ("The Regents, not the legislature, have the general rule-making or policy-making power in regard to the University."). This is certainly a permissible choice, see *Sweezy, supra,* and we, unlike our Brother POWELL, find nothing in the Equal Protection Clause that requires us to depart from established principle by limiting the scope of power the Regents may exercise more narrowly than the powers that may constitutionally be wielded by the Assembly.

Because the Regents can exercise plenary legislative and administrative power, it elevates form over substance to insist that Davis could not use race-conscious remedial programs until it had been adjudged in violation of the Constitution or an antidiscrimination statute. For, if the Equal Protection Clause required such a violation as a predicate, the Regents could simply have promulgated a regulation prohibiting disparate treatment not justified by the need to admit only qualified students, and could have declared Davis to have been in violation of such a regulation on the basis of the exclusionary effect of the admissions policy applied during the first two years of its operation. See *infra,* at 46.

ment.[43] Therefore, to the extent that Title VII rests on the Commerce Clause power, our decisions such as *Franks* and *Teamsters, supra,* implicitly recognize that the affirmative use of race is consistent with the equal protection component of the Fifth Amendment and therefore of the Fourteenth Amendment. To the extent that Congress acted pursuant to § 5 of the Fourteenth Amendment, those cases impliedly recognize that Congress was empowered under that provision to accord preferential treatment to victims of past discrimination in order to overcome the effects of segregation, and we see no reason to conclude that the States cannot voluntarily accomplish under § 1 of the Fourteenth Amendment what Congress under § 5 of the Fourteenth Amendment validly may authorize or compel either the States or private persons to do. A contrary position would conflict with the traditional understanding recognizing the competence of the States to initiate measures consistent with federal policy in the absence of congressional pre-emption of the subject matter. Nothing whatever in the legislative history of either the Fourteenth Amendment or the Civil Rights Acts even remotely suggests that the States are foreclosed from furthering the fundamental purpose of equal opportunity to which the Amendment and those Acts are addressed. Indeed, voluntary initiatives by the States to achieve the national goal of equal opportunity have been recognized to be essential to its attainment. "To use the Fourteenth Amendment as a sword against such state power would stultify that Amendment." *Railway Mail Assn.* v. *Corsi,* 326 U. S. 88, 98 (Frankfurter, J., concurring).[44] We therefore conclude that

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[43] "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley* v. *Valeo,* 424 U. S. 1, 93 (*per curiam*), citing *Weinberger* v. *Weisenfeld,* 420 U. S. 636, 638 n. 2 (1975).

[44] *Railway Mail Association* held that a state statute forbidding racial discrimination by certain labor organizations did not abridge the Association's due process rights secured by the Fourteenth Amendment because that result "would be a distortion of the policy manifested in that amend-

Davis' goal of admitting minority students disadvantaged by the effects of past discrimination is sufficiently important to justify use of race-conscious admissions criteria.

B

Properly construed, therefore, our prior cases unequivocally show that a state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large. There is no question that Davis' program is valid under this test.

Certainly, on the basis of the undisputed factual submissions before this Court, Davis had a sound basis for believing that the problem of underrepresentation of minorities was substantial and chronic and that the problem was attributable to handicaps imposed on minority applicants by past and present racial discrimination. Until at least 1973, the practice of medicine in this country was, in fact, if not in law, largely the prerogative of whites.[45] In 1950, for example, while Negroes

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ment which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color." 326 U. S., at 94. That case thus established the principle that a State voluntarily could go beyond what the Fourteenth Amendment required in eliminating private racial discrimination.

[45] According to 89 schools responding to a questionnaire sent to 112 medical schools (all of the then-accredited medical schools in the United States except Howard and Meharry), substantial efforts to admit minority students did not begin until 1968. That year was the earliest year of involvement for 34% of the schools; an additional 66% became involved during the years 1969 to 1973. See C. Odegaard, Minorities in Medicine: From Receptive Passivity to Positive Action, 1966–1976, at 19 (1977) (hereinafter Odegaard). These efforts were reflected in a significant increase in the percentage of minority M. D. graduates. The number of American Negro graduates increased from 2.2% in 1970 to 3.3% in 1973 and 5.0% in 1975. Significant percentage increases in the number of Mexi-

comprised 10% of the total population, Negro physicians constituted only 2.2% of the total number of physicians.[46] The overwhelming majority of these, moreover, were educated in two predominantly Negro medical schools, Howard and Meharry.[47] By 1970, the gap between the proportion of Negroes in medicine and their proportion in the population had widened: The number of Negroes employed in medicine remained frozen at 2.2% [48] while the Negro population had increased to 11.1%.[49] The number of Negro admittees to predominantly white medical schools, moreover, had declined in absolute numbers during the years 1955 to 1964. Odegaard 19.

Moreover, Davis had very good reason to believe that the national pattern of underrepresentation of minorities in medicine would be perpetuated if it retained a single admissions standard. For example, the entering classes in 1968 and 1969, the years in which such a standard was used, included only one Chicano and two Negroes out of 100 admittees. Nor is there any relief from this pattern of underrepresentation in the statistics for the regular admissions program in later years.[50]

Davis clearly could conclude that the serious and persistent underrepresentation of minorities in medicine depicted by these statistics is the result of handicaps under which minority

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can American, American Indian, and Mainland Puerto Rican graduates were also recorded during those years. *Id.*, at 40.

The statistical information cited in this and the following notes was compiled by government officials or medical educators, and has been brought to our attention in many of the briefs. Neither the parties nor the *amici* challenge the validity of the statistics alluded to in our discussion.

[46] D. Reitzes, Negroes and Medicine XXVII, 3 (1958).

[47] Between 1955 and 1964, for example, the percentage of Negro physicians graduated in the United States who were trained at these schools ranged from 69.0% to 75.8%. See Odegaard, at 19.

[48] Minorities and Women in Health Fields, United States Dept. of Health, Education, and Welfare Pub. No. (HRA) 75-22, at 7 (May 1974).

[49] U. S. Bureau of the Census, 1970 Census, Vol. 1, Characteristics of the Population, Pt. 1, United States Summary, sec. 1, General Population Characteristics, 1-293 (Table 60) (1973).

[50] See *ante*, at 6 n. 6 (opinion of POWELL, J.).

applicants labor as a consequence of a background of deliberate, purposeful discrimination against minorities in education and in society generally, as well as in the medical profession. From the inception of our national life, Negroes have been subjected to unique legal disabilities impairing access to equal educational opportunity. Under slavery, penal sanctions were imposed upon anyone attempting to educate Negroes.[51] After enactment of the Fourteenth Amendment the States continued to deny Negroes equal educational opportunity, enforcing a strict policy of segregation that itself stamped Negroes as inferior, *Brown, supra,* which relegated minorities to inferior educational institutions,[52] and which denied them intercourse in the mainstream of professional life necessary to advancement. See *Sweatt* v. *Painter,* 339 U. S. 629 (1950). Segregation was not limited to public facilities, moreover, but was enforced by criminal penalties against private action as well. Thus, as late as 1908, this Court enforced a state criminal conviction against a private college for teaching Negroes together with whites. *Berea College* v. *Kentucky,* 211 U. S. 45. See also *Plessy* v. *Ferguson, supra.*

Green v. *County School Board, supra,* gave explicit recognition to the fact that the habit of discrimination and the cultural tradition of race prejudice cultivated by centuries of legal slavery and segregation were not immediately dissipated when *Brown I, supra,* announced the constitutional principle that equal educational opportunity and participation in all aspects of American life could not be denied on the basis of race. Rather, massive official and private resistance prevented, and to a lesser extent still prevents, attainment of equal opportunity in education at all levels and in the professions. The generation of minority students applying to Davis Medical School since it opened in 1968—most of whom were born before or about the time *Brown I* was decided—clearly have been victims of this discrimination. Judicial decrees recognizing discrimination in public education in California testify to the fact of widespread discrimination suffered by California-born minority applicants;[53] many minority group members living in California, moreover, were born and reared in school districts in southern States segregated by law.[54] Since separation of school children by race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone," *Brown I*, 347 U. S., at 494, the conclusion is inescapable that applicants to medical school must be few indeed who endured the effects of *de jure* segregation, the resistance to *Brown I*, or the equally debilitating pervasive private discrimination fostered by our long history of official discrimination, cf. *Reitman* v. *Mulkey*, *supra*, and yet come to the starting line with an education equal to whites.[55]

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[51] See, *e. g.,* R. Wade, Slavery in the Cities 90–91 (1964).

[52] For an example of unequal facilities in California schools, see *Soria* v. *Oxnard School Dist.,* 386 F. Supp. 539, 542 (C. D. Cal. 1974). See also R. Kluger, Simple Justice (1976).

Moreover, we need not rest solely on our own conclusion that Davis had sound reason to believe that the effects of past discrimination were handicapping minority applicants to the Medical School, because the Department of Health, Education, and Welfare, the expert agency charged by Congress with promulgating regulations enforcing Title VI of the Civil Rights Act of 1964, see *supra*, pp. 18–19, has also reached the conclusion that race may be taken into account in situations where a failure to do so would limit participation by minorities in federally funded programs, and regulations promulgated by the Department expressly contemplate that appropriate race-conscious programs may be adopted by universities to remedy unequal access to university programs caused by their own or by past societal discrimination. See *supra,* p. 21, discussing 45 CFR §§ 80.3 (b)(6)(ii) and 80.5 (j). It cannot be questioned that, in the absence of the special admissions program, access of minority students to the Medical School would be severely limited and, accordingly, race-conscious admissions would be deemed an appropriate response under these federal regulations. Moreover, the Department's regulatory policy is not one that has gone unnoticed by Congress. See *supra,* pp. 22–24. Indeed, although an amendment to an appropriations bill was introduced just last year that would have prevented the Secretary of Health, Education, and Welfare from mandating race-conscious programs in university admissions, proponents of this measure, significantly, did not question the validity of voluntary implementation of race-conscious admissions criteria. See *ibid.* In these circumstances, the conclusion implicit in the regulations—that the lingering effects of past discrimination continue to make race-conscious remedial programs appropriate means for ensuring equal educational opportunity in universities—deserves considerable judicial deference. See, *e. g., Katzenbach* v. *Morgan,* 384 U. S. 641 (1966); *UJO,* 430 U. S., at 175–178 (concurring opinion).[56]

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[53] See, *e. g.*, *Crawford* v. *Board of Educ.*, 17 Cal. 3d 280, 130 Cal. Rptr. 724, 551 P. 2d 28 (1976); *Soria* v. *Oxnard School District*, 386 F. Supp. 539 (CD Cal. 1974); *Spangler* v. *Pasadena City Board of Educ.*, 311 F. Supp. 501 (CD Cal. 1970); C. Wollenberg, All Deliberate Speed: Segregation and Exclusion in California's Schools, 1855–1975, at 136–177 (1976).

[54] For example, over 40% of American born Negro males aged 20 to 24 residing in California in 1970 were born in the South, and the same statistic for females was over 48%. These statistics were computed from data contained in Census, *supra*, n. 49, pt. 6, California, sec. 2, Detailed Characteristics, 6–1146 (table 139), 6–1149 (table 140).

[55] See, *e. g.*, O'Neil, Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education, 80 Yale L. J. 699, 729–731 (1971).

C

The second prong of our test—whether the Davis program stigmatizes any discrete group or individual and whether race is reasonably used in light of the program's objectives—is clearly satisfied by the Davis program.

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[56] Congress and the Executive have also adopted a series of race-conscious programs, each predicated on an understanding that equal opportunity cannot be achieved by neutrality because of the effects of past and present discrimination. See *supra,* pp. 24–26.

It is not even claimed that Davis' program in any way operates to stigmatize or single out any discrete and insular, or even any identifiable, nonminority group. Nor will harm comparable to that imposed upon racial minorities by exclusion or separation on grounds of race be the likely result of the program. It does not, for example, establish an exclusive preserve for minority students apart from and exclusive of whites. Rather, its purpose is to overcome the effects of segregation by bringing the races together. True, whites are excluded from participation in the special admissions program, but this fact only operates to reduce the number of whites to be admitted in the regular admissions program in order to permit admission of a reasonable percentage—less than their proportion of the California population [57]—of otherwise underrepresented qualified minority applicants.[58]

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[57] Negroes and Chicanos alone comprise approximately 22% of California's population. This percentage was computed from data contained in Census, *supra*, n. 49, pt. 6, California, sec. 1, 6-4, and *id.*, sec. 2, 6-1146 to 6-1147 (Table 139).

[58] The constitutionality of the special admissions program is buttressed by its restriction to only 16% of the positions in the Medical School, a percentage less than that of the minority population in California, see *id.*, and to those minority applicants deemed qualified for admission and deemed likely to contribute to the medical school and the medical profession. Record 67. This is consistent with the goal of putting minority applicants in the position they would have been in if not for the evil of racial discrimination. Accordingly, this case does not raise the question whether even a remedial use of race would be unconstitutional if it admitted unqualified minority applicants in preference to qualified applicants or admitted, as a result of preferential consideration, racial minorities in numbers significantly in excess of their proportional representation in the relevant population. Such programs might well be inadequately justified by the legitimate remedial objectives. Our allusion to the proportional percentage of minorities in the population of the State administering the program is not intended to establish either that figure or that population universe as a constitutional benchmark. In this case, even respondent, as we understand him, does not argue that, if the special admissions program is otherwise constitutional, the allotment of 16 places in each entering class for special admittees is unconstitutionally high.

Nor was Bakke in any sense stamped as inferior by the Medical School's rejection of him. Indeed, it is conceded by all that he satisfied those criteria regarded by the School as generally relevant to academic performance better than most of the minority members who were admitted. Moreover, there is absolutely no basis for concluding that Bakke's rejection as a result of Davis' use of racial preference will affect him throughout his life in the same way as the segregation of the Negro school children in *Brown I* would have affected them. Unlike discrimination against racial minorities, the use of racial preferences for remedial purposes does not inflict a pervasive injury upon individual whites in the sense that wherever they go or whatever they do there is a significant likelihood that they will be treated as second-class citizens because of their color. This distinction does not mean that the exclusion of a white resulting from the preferential use of race is not sufficiently serious to require justification; but it does mean that the injury inflicted by such a policy is not distinguishable from disadvantages caused by a wide range of government actions, none of which has ever been thought impermissible for that reason alone.

In addition, there is simply no evidence that the Davis program discriminates intentionally or unintentionally against any minority group which it purports to benefit. The program does not establish a quota in the invidious sense of a ceiling on the number of minority applicants to be admitted. Nor can the program reasonably be regarded as stigmatizing the program's beneficiaries or their race as inferior. The Davis program does not simply advance less qualified applicants; rather, it compensates applicants, whom it is uncontested are fully qualified to study medicine, for educational disadvantage which it was reasonable to conclude was a product of state-fostered discrimination. Once admitted, these students must satisfy the same degree requirements as regularly admitted students; they are taught by the same faculty in the same classes; and their performance is evaluated by the same standards by which regularly admitted students are judged. Under these circumstances, their performance and degrees must be regarded equally with the regularly admitted students with whom they compete for standing. Since minority graduates cannot justifiably be regarded as less well qualified than nonminority graduates by virtue of the special admissions program, there is no reasonable basis to conclude that minority graduates at schools using such programs would be stigmatized as inferior by the existence of such programs.

D

We disagree with the lower courts' conclusion that the Davis program's use of race was unreasonable in light of its objectives. First, as petitioner argues, there are no practical means by which it could achieve its ends in the foreseeable future without the use of race-conscious measures. With respect to any factor (such as poverty or family educational background) that may be used as a substitute for race as an indicator of past discrimination, whites greatly outnumber racial minorities simply because whites make up a far larger percentage of the total population and therefore far outnumber minorities in absolute terms at every socioeconomic level.[59] For example, of a class of recent medical school applicants from families with less than $10,000 income, at least 71% were white.[60] Of all 1970 families headed by a person *not* a high school graduate which included related children under 18, 80% were white and 20% were racial minorities.[61] Moreover, while race is positively correlated with differences in GPA and MCAT scores, economic disadvantage is not. Thus, it appears that economically disadvantaged whites do not score less well than economically advantaged whites, while economically advantaged blacks score less well than do disadvantaged whites.[62] These statistics graphically illustrate that the University's purpose to integrate its classes by compensating for past discrimination could not be achieved by a general preference for the economically disadvantaged or the children of parents of limited education unless such groups were to make up the entire class.

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[59] See Census, *supra,* n. 49, Sources and Structure of Family Income, 1–12.

[60] This percentage was computed from data presented in B. Waldman, Economic and Racial Disadvantage as Reflected in Traditional Medical School Selection Factors: A Study of 1976 Applicants to U. S. Medical Schools 34 (Table A-15), 42 (Table A-23) Association of American Medical Colleges.

[61] This figure was computed from data contained in Census, *supra,* n. 49, pt. 1, United States Summary, sec. 2, 1–666 (Table 209).

Second, the Davis admissions program does not simply equate minority status with disadvantage. Rather, Davis considers on an individual basis each applicant's personal history to determine whether he or she has likely been disadvantaged by racial discrimination. The record makes clear that only minority applicants likely to have been isolated from the mainstream of American life are considered in the special program; other minority applicants are eligible only through the regular admissions program. True, the procedure by which disadvantage is detected is informal, but we have never insisted that educators conduct their affairs through adjudicatory proceedings, and such insistence here is misplaced. A case-by-case inquiry into the extent to which each individual applicant has been affected, either directly or indirectly, by racial discrimination, would seem to be, as a practical matter, virtually impossible, despite the fact that there are excellent reasons for concluding that such effects generally exist. When individual measurement is impossible or extremely impractical, there is nothing to prevent a State from using categorical means to achieve its ends, at least where the category is closely related to the goal. Cf. *Gaston County* v. *United States*, 395 U. S. 285, 295–296 (1969); *Katzenbach* v. *Morgan*, *supra*. And it is clear from our cases that specific proof that a person has been victimized by discrimination is not a necessary predicate to offering him relief where the probability of victimization is great. See *Teamsters, supra.*

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[62] See Waldman, *supra*, n. 60, at 10–14 (Figures 1–5).

E

Finally, Davis' special admissions program cannot be said to violate the Constitution simply because it has set aside a predetermined number of places for qualified minority applicants rather than using minority status as a positive factor to be considered in evaluating the applications of disadvantaged minority applicants. For purposes of constitutional adjudication, there is no difference between the two approaches. In any admissions program which accords special consideration to disadvantaged racial minorities, a determination of the degree of preference to be given is unavoidable, and any given preference that results in the exclusion of a white candidate is no more or less constitutionally acceptable than a program such as that at Davis. Furthermore, the extent of the preference inevitably depends on how many minority applicants the particular school is seeking to admit in any particular year so long as the number of qualified minority applicants exceeds that number. There is no sensible, and certainly no constitutional, distinction between, for example, adding a set number of points to the admissions rating of disadvantaged minority applicants as an expression of the preference with the expectation that this will result in the admission of an approximately determined number of qualified minority applicants and setting a fixed number of places for such applicants as was done here.[63]

The "Harvard" program, see *ante,* at 43–47, as those employing it readily concede, openly and successfully employs a racial criterion for the purpose of ensuring that some of the scarce places in institutions of higher education are allocated to disadvantaged minority students. That the Harvard approach does not also make public the extent of the preference and the precise workings of the system while the Davis program employs a specific, openly stated number, does not condemn the latter plan for purposes of Fourteenth Amendment adjudication. It may be that the Harvard plan is more acceptable to the public than is the Davis "quota." If it is, any State, including California, is free to adopt it in preference to a less acceptable alternative, just as it is generally free, as far as the Constitution is concerned, to abjure granting any racial preferences in its admissions program. But there is no basis for preferring a particular preference program simply because in achieving the same goals that the Davis Medical School is pursuing, it proceeds in a manner that is not immediately apparent to the public.

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[63] The excluded white applicant, despite MR. JUSTICE POWELL's contention to the contrary, *ante,* at 47 n. 52, receives no more or less "individualized consideration" under our approach than under his.

IV

Accordingly, we would reverse the judgment of the Supreme Court of California holding the Medical School's special admissions program unconstitutional and directing respondent's admission, as well as that portion of the judgment enjoining the Medical School from according any consideration to race in the admissions process.

SUPREME COURT OF THE UNITED STATES

No. 76-811

Regents of the University of California, Petitioner, *v.* Allan Bakke.	On Writ of Certiorari to the Supreme Court of California.

[June 28, 1978]

Separate opinion of MR. JUSTICE WHITE.

I write separately concerning the question of whether Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d *et seq.*, provides for a private cause of action. Four Justices are apparently of the view that such a private cause of action exists, and four Justices assume it for purposes of this case. I am unwilling merely to assume an affirmative answer. If in fact no private cause of action exists, this Court and the lower courts as well are without jurisdiction to consider respondent's Title VI claim. As I see it, if we are not obliged to do so, it is at least advisable to address this threshold jurisdictional issue. See *United States* v. *Griffin*, 303 U. S. 226, 229 (1938).[1] Furthermore, just as it is inappropriate to address

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[1] It is also clear from *Griffin* that "lack of jurisdiction . . . touching the subject matter of the litigation cannot be waived by the parties. . . ." 303 U. S., at 229. See also *Mount Healthy City Bd. of Educ.* v. *Doyle*, 429 U. S. 274, 278 (1977); *Louisville & Nashville R. Co.* v. *Motley*, 211 U. S. 149, 152 (1908); *Mansfield, Coldwater & Lake Michigan R. Co.* v. *Swan*, 111 U. S. 379, 382 (1884).

In *Lau* v. *Nichols*, 414 U. S. 563 (1974), we did adjudicate a Title VI claim brought by a class of individuals. But the existence of a private cause of action was not at issue. In addition, the understanding of MR. JUSTICE STEWART's concurring opinion, which observed that standing was not being contested, was that the standing alleged by petitioners was as third-party beneficiaries of the funding contract between the Department of Health, Education, and Welfare and the San Francisco United School constitutional issues without determining whether statutory grounds urged before us are dispositive, it is at least questionable practice to adjudicate a novel and difficult statutory issue without first considering whether we have jurisdiction to decide it. Consequently, I address the question of whether respondent may bring suit under Title VI.

A private cause of action under Title VI would, in terms both of the Civil Rights Act as a whole and that title, not be "consistent with the underlying purposes of the legislative scheme" and contrary to the legislative intent. *Cort* v. *Ash,* 422 U. S. 66, 78 (1975). Title II, 42 U. S. C. § 2000a *et seq.*, dealing with public accommodations, and Title VII, 42 U. S. C. § 2000e *et seq.*, dealing with employment, proscribe private discriminatory conduct that as of 1964 neither the Constitution nor other federal statutes had been construed to forbid. Both titles carefully provided for private actions as well as for official participation in enforcement. Title III, 42 U. S. C. § 2000b *et seq.*, and Title IV, 42 U. S. C. § 2000c *et seq.*, dealing with public facilities and public education, respectively, authorize suits by the Attorney General to eliminate racial discrimination in these areas. Because suits to end discrimination in public facilties and publc education were already available under 42 U. S. C. § 1983, it was, of course, unnecessary to provide for private actions under Titles III and IV. But each title carefully provided that

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District, a theory not alleged by the present respondent. *Id.*, at 571 n. 2. Furthermore, the plaintiffs in *Lau* alleged jurisdiction under 42 U. S. C. § 1983 rather than directly under the provisions of Title VI, as does the plaintiff in this case. Although the Court undoubtedly had an obligation to consider the jurisdictional question, this is surely not the first instance in which the Court has bypassed a jurisdictional problem not presented by the parties. Certainly the Court's silence on the jurisdictional question, when considered in the context of the indifference of the litigants to it and the fact that jurisdiction was alleged under § 1983, does not foreclose a reasoned conclusion that Title VI affords no private cause of action.

its provisions for public actions would not adversely affect pre-existing private remedies. §§ 2000b–2 and 2000c–8.

The role of Title VI was to terminate federal financial support for public and private institutions or programs that discriminated on the basis of race. Section 601, 42 U. S. C. § 2000d, imposed the proscription that no person, on the grounds of race, color or national origin, was to be excluded from or discriminated against under any program or activity receiving federal financial assistance. But there is no express provision for private actions to enforce Title VI, and it would be quite incredible if Congress, after so carefully attending to the matter of private actions in other titles of the Act, intended silently to create a private cause of action to enforce Title VI.

It is also evident from the face of § 602, 42 U. S. C. § 2000d–1, that Congress intended the departments and agencies to define and to refine, by rule or regulation, the general proscription of § 601, subject only to judicial review of agency action in accordance with established procedures. Section 602 provides for enforcement: every federal department or agency furnishing financial support is to implement the proscription by appropriate rule or regulation, each of which requires approval by the President. Termination of funding as a sanction for noncompliance is authorized but *only* after a hearing and after the failure of voluntary means to secure compliance. Moreover, termination may not take place until the department or agency involved files with the appropriate committees of the House and Senate a full written report of the circumstances and the grounds for such action and 30 days have elapsed thereafter. Judicial review was provided, at least for actions terminating financial assistance.

Termination of funding was regarded by Congress as a serious enforcement step, and the legislative history is replete with assurances that it would not occur until every possibility for conciliation had been exhausted.[2] To allow a private individual to sue to cut off funds under Title VI would compromise these assurances and short circuit the procedural preconditions provided in Title VI. If the Federal Government may not cut off funds except pursuant to an agency rule, approved by the President, and presented to the appropriate committee of Congress for a layover period, and after voluntary means to achieve compliance have failed, it is inconceivable that Congress intended to permit individuals to circumvent these administrative prerequisites themselves.

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[2] "Yet, before that principle [that 'Federal funds are not to be used to support racial discrimination'] is implemented to the detriment of any person, agency, or State, regulations giving notice of what conduct is required must be drawn up by the agency administering the program. . . . Before such regulations become effective, they must be submitted to and approved by the President.

"Once having become effective, there is still a long road to travel before any sanction whatsoever is imposed. Formal action to compel compliance can only take place after the following has occurred: first, there must be an unsuccessful attempt to obtain voluntary compliance; second, there must be an administrative hearing; third, a written report of the circumstances and the grounds for such action must be filed with the appropriate committees of the House and Senate; and fourth, 30 days must have elapsed between such filing and the action denying benefits under a Federal program. Finally, even that action is by no means final because it is subject to judicial review and can be further postponed by judicial action granting temporary relief pending review in order to avoid irreparable injury. It would be difficult indeed to concoct any additional safeguards to incorporate in such a procedure." 110 Cong. Rec. 6749 (Sen. Moss).

"[T]he authority to cut off funds is hedged about with a number of procedural restrictions. [There follows details of the preliminary steps.] In short, title VI is a reasonable, moderate, cautious, carefully worked out solution to a situation that clearly calls for legislative action." *Id.*, at 6544 (Sen. Humphrey). "Actually, *no action whatsoever* can be taken against anyone until the Federal agency involved has advised the appropriate person of his failure to comply with nondiscrimination requirements and until voluntary efforts to secure compliance have failed." *Id.*, at 1519 (Rep. Celler) (emphasis added). See also remarks of Sen. Ribicoff (*id.*, at 7066–7067); Sen. Proxmire (*id.*, at 8345); Sen. Kuchel (*id.*, at 6562). These safeguards were incorporated into 42 U. S. C. § 2000d–1 (1970).

Furthermore, although Congress intended Title VI to end federal financial support for racially discriminatory policies of not only public but also private institutions and programs, it is extremely unlikely that Congress, without a word indicating that it intended to do so, contemplated creating an independent, private statutory cause of action against all private as well as public agencies that might be in violation of the section. There is no doubt that Congress regarded private litigation as an important tool to attack discriminatory practices. It does not at all follow, however, that Congress anticipated new private actions under Title VI itself. Wherever a discriminatory program was a public undertaking, such as a public school, private remedies were already available under other statutes, and a private remedy under Title VI was unnecessary. Congress was well aware of this fact. Significantly, there was frequent reference to *Simkins* v. *Moses H. Cone Memorial Hospital,* 323 F. 2d 959 (CA4 1963), cert. denied, 376 U. S. 938 (1964), throughout the congressional deliberations. See, *e. g.,* 110 Cong. Rec. 6544 (Sen. Humphrey). *Simkins* held that under appropriate circumstances, the operation of a private hospital with "massive use of public funds and extensive state-federal sharing in the common plan" constituted "state action" for the purposes of the Fourteenth Amendment. *Id.,* at 967. It was unnecessary, of course, to create a Title VI private action against private discriminators where they were already within the reach of existing private remedies. But when they were not—and *Simkins* carefully disclaimed holding that "every subvention by the federal or state government automatically involves the beneficiary in 'state action,'" *ibid* [3]—it is difficult to believe that Congress

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[3] This Court has never held that the mere receipt of federal or state funds is sufficient to make the recipient a federal or state actor. In *Norwood* v. *Harrison,* 413 U. S. 455 (1973), private schools that received

silently created a *private* remedy to terminate conduct that previously had been entirely beyond the reach of federal law.

For those who believe, contrary to my views, that Title VI was intended to create a stricter standard of color blindness than the Constitution itself requires, the result of no private cause of action follows even more readily. In that case Congress must be seen to have banned degrees of discrimination, as well as types of discriminators, not previously reached by law. A Congress careful enough to provide that existing private causes of action would be preserved (in Titles III and IV) would not leave for inference a vast new extension of private enforcement power. And a Congress so exceptionally concerned with the satisfaction of procedural preliminaries before confronting fund recipients with the choice of a cut-off or of stopping discriminating would not

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state aid were held subject to the Fourteenth Amendment's ban on discrimination, but the Court's test required "tangible financial aid" with a "significant tendency to facilitate, reinforce, and support private discrimination." *Id.,* at 466. The mandate of *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, 722 (1961), to sift facts and weigh circumstances of governmental support in each case to determine whether private or state action was involved, has not been abandoned for an automatic rule based on receipt of funds.

Contemporaneous with the congressional debates on the Civil Rights Act was this Court's decision in *Griffin* v. *School Board,* 377 U. S. 218 (1964). Tuition grants and tax concessions were provided for parents of students in private schools, which discriminated racially. The Court found sufficient state action, but carefully limited its holding to the circumstances presented: "closing the Prince Edward schools and meanwhile contributing to the support of the private segregated white school that took their place denied petitioners the equal protection of the laws." *Id.,* at 232.

Hence, neither at the time of the enactment of Title VI, nor at the present time to the extent this Court has spoken, has mere receipt of state funds created state action. Moreover, *Simkins* has not met with universal approval among the circuit courts of appeals. See cases cited in *Greco* v. *Orange Memorial Hospital,* 423 U. S. 1000, 1004 (1975) (WHITE, J., dissenting from denial of certiorari).

permit private parties to pose precisely that same dilemma in a greatly widened category of cases with no procedural requirements whatsoever.

Significantly, in at least three instances legislators who played a major role in the passage of Title VI explicitly stated that a private right of action under Title VI does not exist.[4] As an "indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one," *Cort* v. *Ash,* 422 U. S. 66, 78 (1975), clearer statements cannot be imagined, and under *Cort,* "an explicit purpose to deny such cause of action [is] controlling." *Id.,* at 82. Senator Keating, for example, proposed a private "right to sue" for the "person suffering from discrimination"; but the Department of Justice refused to include it, and the Senator acquiesced.[5] These are not neutral, ambiguous statements. They indicate the absence of a legislative intent to create a private remedy. Nor do any of these statements make nice distinctions between a private cause of action to enjoin discrimination and one to cut off funds, as MR. JUSTICE STEVENS and the three Justices who join his opinion apparently would. See n. 26 of the opinion of MR. JUSTICE STEVENS. Indeed, it would be odd if they did, since the practical effect of either type of private cause of action would be identical. If private suits to enjoin conduct allegedly violative of § 601 were permitted, recipients of federal funds would be presented with the choice of either ending what the court, rather than the agency, determined to be a discriminatory practice within the meaning of Title VI or refusing federal funds and thereby escaping from the statute's jurisdictional predicate.[6] This is precisely the same choice which would confront recipients if suit was brought to cut off funds. Both types of actions would equally jeopardize the administrative processes so carefully structured into the law.

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[4] "Nowhere in this section do you find a comparable right of legal action for a person who feels he has been denied his rights to participate in the benefits of Federal funds. Nowhere. Only those who have been cut off can go to court and present their claim." 110 Cong. Rec. 2467 (Rep. Gill).

"[A] good case could be made that a remedy is provided for the State or local official who is practicing discrimination, but none is provided for the victim of the discrimination." *Id.,* at 6562 (Sen. Kuchel).

"Parenthetically, while we favored the inclusion of the right to sue on the part of the agency, the State, or the facility which was deprived of Federal funds, we also favored the inclusion of a provision granting the right to sue to the person suffering from discrimination. This was not included in the bill. However, both the Senator from Connecticut and I are grateful that our other suggestions were adopted by the Justice Department." *Id.,* at 7065 (Sen. Keating).

[5] *Ibid.*

This Court has always required "that the inference of such a private cause of action not otherwise authorized by statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act." *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U. S. 453, 458 (1974). See also *Securities Investors Protection Corp.* v. *Barbour*, 421 U. S. 412, 418–420 (1975). A private cause of action under Title VI is unable to satisfy either prong of this test.

Because each of my colleagues either has a different view or assumes a private cause of action, however, the merits of the Title VI issue must be addressed. My views in that regard, as well as my views with respect to the equal protection issue, are included in the joint opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.[7]

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[6] As Senator Ribicoff stated, "Sometimes those eligible for Federal assistance may elect to reject such aid, unwilling to agree to a nondiscrimination requirement. If they choose that course, the responsibility is theirs." *Id.*, at 7067.

[7] I also join Parts I, III–A, and V–C of MR. JUSTICE POWELL's opinion.

SUPREME COURT OF THE UNITED STATES

No. 76-811

Regents of the University of California, Petitioner, *v.* Allan Bakke.	On Writ of Certiorari to the Supreme Court of California.

[June 28, 1978]

MR. JUSTICE MARSHALL.

I agree with the judgment of the Court only insofar as it permits a university to consider the race of an applicant in making admissions decisions. I do not agree that petitioner's admissions program violates the Constitution. For it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.

I

A

Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime. The system of slavery brutalized and dehumanized both master and slave.[1]

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[1] The history recounted here is perhaps too well known to require documentation. But I must acknowledge the authorities on which I rely in retelling it. J. H. Franklin, From Slavery to Freedom (4th ed. 1974)

The denial of human rights was etched into the American colonies' first attempts at establishing self-government. When the colonists determined to seek their independence from England, they drafted a unique document cataloguing their grievances against the King and proclaiming as "self-evident" that "all men are created equal" and are endowed "with certain unalienable Rights," including those to "Life, Liberty and the pursuit of Happiness." The self-evident truths and the unalienable rights were intended, however, to apply only to white men. An earlier draft of the Declaration of Independence, submitted by Thomas Jefferson to the Continental Congress, had included among the charges against the King that

> "[h]e has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating and carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither." Franklin 88.

The Southern delegation insisted that the charge be deleted; the colonists themselves were implicated in the slave trade, and inclusion of this claim might have made it more difficult to justify the continuation of slavery once the ties to England were severed. Thus, even as the colonists embarked on a course to secure their own freedom and equality, they ensured perpetuation of the system that deprived a whole race of those rights.

The implicit protection of slavery embodied in the Declaration of Independence was made explicit in the Constitution, which treated a slave as being equivalent to three-fifths of a person for purposes of apportioning representatives and taxes

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(hereinafter Franklin); R. Kluger, Simple Justice (1975) (hereinafter Kluger); C. V. Woodward, The Strange Career of Jim Crow (3rd ed. 1974) (hereinafter Woodward).

among the States. Art. I, § 2. The Constitution also contained a clause ensuring that the "migration or importation" of slaves into the existing States would be legal until at least 1808, Art. I, § 9, and a fugitive slave clause requiring that when a slave escaped to another State, he must be returned on the claim of the master, Art. IV, § 2. In their declaration of the principles that were to provide the cornerstone of the new Nation, therefore, the Framers made it plain that "we the people," for whose protection the Constitution was designed, did not include those whose skins were the wrong color. As Professor John Hope Franklin has observed, Americans "proudly accepted the challenge and responsibility of their new political freedom by establishing the machinery and safeguards that insured the continued enslavement of blacks." Franklin 100.

The individual States likewise established the machinery to protect the system of slavery through the promulgation of the Slave Codes, which were designed primarily to defend the property interest of the owner in his slave. The position of the Negro slave as mere property was confirmed by this Court in *Dred Scott* v. *Sandford,* 19 How. 393 (1857), holding that the Missouri Compromise—which prohibited slavery in the portion of the Louisiana Purchase Territory north of Missouri—was unconstitutional because it deprived slave owners of their property without due process. The Court declared that under the Constitution a slave was property, and "[t]he right to traffic in it, like an ordinary article of merchandise and property, was guarantied to the citizens of the United States . . . ." *Id.,* at 451. The Court further concluded that Negroes were not intended to be included as citizens under the Constitution but were "regarded as beings of an inferior order . . . altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect . . . ." *Id.,* at 407.

B

The status of the Negro as property was officially erased by his emancipation at the end of the Civil War. But the long awaited emancipation, while freeing the Negro from slavery, did not bring him citizenship or equality in any meaningful way. Slavery was replaced by a system of "laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value." *Slaughter-House Cases,* 16 Wall. 36, 70 (1873). Despite the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, the Negro was systematically denied the rights those amendments were supposed to secure. The combined actions and inactions of the State and Federal Government maintained Negroes in a position of legal inferiority for another century after the Civil War.

The Southern States took the first steps to re-enslave the Negroes. Immediately following the end of the Civil War, many of the provisional legislatures passed Black Codes, similar to the Slave Codes, which, among other things, limited the rights of Negroes to own or rent property and permitted imprisonment for breach of employment contracts. Over the next several decades, the South managed to disenfranchise the Negroes in spite of the Fifteenth Amendment by various techniques, including poll taxes, deliberately complicated balloting processes, property and literacy qualifications, and finally the white primary.

Congress responded to the legal disabilities being imposed in the Southern States by passing the Reconstruction Acts and the Civil Rights Acts. Congress also responded to the needs of the Negroes at the end of the Civil War by establishing the Bureau of Refugees, Freedmen, and Abandoned Lands, better known as the Freedmen's Bureau, to supply food, hospitals, land and education to the newly freed slaves. Thus for a time it seemed as if the Negro might be protected from the continued denial of his civil rights and might be relieved of the disabilities that prevented him from taking his place as a free and equal citizen.

That time, however, was short-lived. Reconstruction came to a close, and, with the assistance of this Court, the Negro was rapidly stripped of his new civil rights. In the words of C. Vann Woodward: "By narrow and ingenious interpretation [the Supreme Court's] decisions over a period of years had whittled away a great part of the authority presumably given the government for protection of civil rights." Woodward 139.

The Court began by interpreting the Civil War Amendments in a manner that sharply curtailed their substantive protections. See, *e. g., Slaughter-House Cases, supra; United States* v. *Reese,* 92 U. S. 214 (1876); *United States* v. *Cruikshank,* 92 U. S. 542 (1876). Then in the notorious *Civil Rights Cases,* 109 U. S. 3 (1883), the Court strangled Congress' efforts to use its power to promote racial equality. In those cases the Court invalidated sections of the Civil Rights Act of 1875 that made it a crime to deny equal access to "inns, public conveyances . . . , theatres, and other places of public amusement." According to the Court, the Fourteenth Amendment gave Congress the power to proscribe only discriminatory action by the State. The Court ruled that the Negroes who were excluded from public places suffered only an invasion of their social rights at the hands of private individuals, and Congress had no power to remedy that. *Id.,* at 24–25. "When a man has emerged from slavery, and by the aid of beneficient legislation has shaken off the inseparable concomitants of that state," the Court concluded, "there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws . . . ." *Id.,* at 25. As Justice Harlan noted in dissent, however, the Civil War Amendments and Civil Rights Acts did not make the Negroes the "special favorite" of the laws but instead "sought to accomplish in reference to that race . . .—what had already been done in every State of the Union for the White race—to secure and protect rights belonging to them as freemen and citizens; nothing more." *Id.*, at 61.

The Court's ultimate blow to the Civil War Amendments and to the equality of Negroes came in *Plessy* v. *Ferguson*, 163 U. S. 537 (1896). In upholding a Louisiana law that required railway companies to provide "equal but separate" accommodations for whites and Negroes, the Court held that the Fourteenth Amendment was not intended "to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either." *Id.*, at 544. Ignoring totally the realities of the positions of the two races, the Court remarked:

> "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." *Id.*, at 551.

Mr. Justice Harlan's dissenting opinion recognized the bankruptcy of the Court's reasoning. He noted that the "real meaning" of the legislation was "that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens." *Id.*, at 560. He expressed his fear that if like laws were enacted in other States, "the effect would be in the highest degree mischevious." *Id.*, at 563. Although slavery would have disappeared, the States would retain the power "to interfere with the full enjoyment of the blessings of freedom; to regulate civil rights, common to all citizens, upon the basis of race; and to place in a condition of legal inferiority a large body of American citizens . . . ." *Id.*, at 563.

The fears of Mr. Justice Harlan were soon to be realized.

In the wake of *Plessy,* many States expanded their Jim Crow laws, which had up until that time been limited primarily to passenger trains and schools. The segregation of the races was extended to residential areas, parks, hospitals, theaters, waitig rooms and bathrooms. There were even statutes and ordinances which authorized separate phone booths for Negroes and whites, which required that textbooks used by children of one race be kept separate from those used by the other, and which required that Negro and white prostitutes be kept in separate districts. In 1898, after *Plessy,* the Charlestown News and Courier printed a parody of Jim Crow laws:

> "If there must be Jim Crow cars on the railroads, there should be Jim Crow cars on the street railways. Also on all passenger boats. . . . If there are to be Jim Crow cars, moreover, there should be Jim Crow waiting saloons at all stations, and Jim Crow eating houses. . . . There should be Jim Crow sections of the jury box, and a separate Jim Crow dock and witness stand in every court—and a Jim Crow Bible for colored witnesses to kiss." Woodward 68.

The irony is that before many years had passed, with the exception of the Jim Crow witness stand, "all the improbable applications of the principle suggested by the editor in derision had been put into practice—down to and including the Jim Crow Bible." Woodward 69.

Nor were the laws restricting the rights of Negroes limited solely to the Southern States. In many of the Northern States, the Negro was denied the right to vote, prevented from serving on juries and excluded from theaters, restaurants, hotels, and inns. Under President Wilson, the Federal Government began to require segregation in Government buildings; desks of Negro employees were curtained off; separate bathrooms and separate tables in the cafeterias were provided; and even the galleries of the Congress were segregated. When his segregationist policies were attacked, President Wilson responded that segregation was "not humiliating but a benefit" and that he was "rendering [the Negroes] more safe in their possession of office and less likely to be discriminated against." Kluger 91.

The enforced segregation of the races continued into the middle of the 20th century. In both World Wars, Negroes were for the most part confined to separate military units; it was not until 1948 that an end to segregation in the military was ordered by President Truman. And the history of the exclusion of Negro children from white public schools is too well known and recent to require repeating here. That Negroes were deliberately excluded from public graduate and professional schools—and thereby denied the opportunity to become doctors, lawyers, engineers, and the like—is also well established. It is of course true that some of the Jim Crow laws (which the decisions of this Court had helped to foster) were struck down by this Court in a series of decisions leading up to *Brown* v. *Board of Education of Topeka,* 347 U. S. 483 (1954). See, *e. g., Morgan* v. *Virginia,* 328 U. S. 373 (1946); *Sweatt* v. *Painter,* 339 U. S. 629 (1950); *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637 (1950). Those decisions, however, did not automatically end segregation, nor did they move Negroes from a position of legal inferiority to one of equality. The legacy of years of slavery and of years of second-class citizenship in the wake of emancipation could not be so easily eliminated.

II

The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro.

A Negro child today has a life expectancy which is shorter by more than five years than that of a white child.[2] The

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[2] U. S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States 65 (1977) (table 94).

Negro child's mother is over three times more likely to die of complications in childbirth,[3] and the infant mortality rate for Negroes is nearly twice that for whites.[4] The median income of the Negro family is only 60% that of the median of a white family,[5] and the percentage of Negroes who live in families with incomes below the poverty line is nearly four times greater than that of whites.[6]

When the Negro child reaches working age, he finds that America offers him significantly less than it offers his white counterpart. For Negro adults, the unemployment rate is twice that of whites,[7] and the unemployment rate for Negro teenagers is nearly three times that of white teenagers.[8] A Negro male who completes four years of college can expect a median annual income of merely $110 more than a white male who has only a high school diploma.[9] Although Negroes represent 11.5% of the population,[10] they are only 1.2% of the lawyers and judges, 2% of the physicians, 2.3% of the dentists, 1.1% of the engineers and 2.6% of the college and university professors.[11]

The relationship between those figures and the history of unequal treatment afforded to the Negro cannot be denied. At every point from birth to death the impact of the past is reflected in the still disfavored position of the Negro.

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[3] *Id.*, at 70 (table 102).

[4] *Ibid.*

[5] U. S. Dept. of Commerce, Bureau of the Census, Current Population Reports, Series P-60, No. 107, at 7 (1977) (table 1).

[6] *Id.*, at 20 (table 14).

[7] U. S. Dept. of Labor, Bureau of Labor Statistics, Employment and Earnings, January 1978, at 170 (table 44).

[8] *Ibid.*

[9] U. S. Dept. of Commerce, Bureau of the Census, Current Population Reports, Series P-60, No. 105, at 198 (1977) (table 47).

[10] U. S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States 25 (table 24).

[11] *Id.*, at 407-408 (table 662) (based on 1970 census).

In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society.

III

I do not believe that the Fourteenth Amendment requires us to accept that fate. Neither its history nor our past cases lend any support to the conclusion that a University may not remedy the cumulative effects of society's discrimination by giving consideration to race in an effort to increase the number and percentage of Negro doctors.

A

This Court long ago remarked that

> "in any fair and just construction of any section or phrase of these [Civil War] amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy . . . ." *Slaughter-House Cases*, 16 Wall., at 72.

It is plain that the Fourteenth Amendment was not intended to prohibit measures designed to remedy the effects of the Nation's past treatment of Negroes. The Congress that passed the Fourteenth Amendment is the same Congress that passed the 1866 Freedmen's Bureau Act, an act that provided many of its benefits only to Negroes. Act of July 16, 1866, ch. 200, 14 Stat. 173; see p. 4, *supra*. Although the Freedmen's Bureau legislation provided aid for refugees, thereby including white persons within some of the relief measures, 14 Stat., at 174; see also Act of Mar. 3, 1865, ch. 90, 13 Stat. 507, the bill was regarded, to the dismay of many Congressmen, as "solely and entirely for the freedmen, and to the exclusion of all other persons . . . ." Cong. Globe, 39th Cong., 1st Sess., 544 (1866) (remarks of Rep. Taylor). See also *id.*, at 634–635 (remarks of Rep. Ritter); *id.*, at App. 78, 80–81 (remarks of Rep. Chanler). Indeed, the bill was bitterly opposed on the ground that it "undertakes to make the negro in some respects . . . superior . . . and gives them favors that the poor white boy in the North cannot get." *Id.*, at 401, (remarks of Sen. McDougall). See also *id.*, at 319 (remarks of Sen. Hendricks); *id.*, at 362 (remarks of Sen. Saulsbury); *id.*, at 397 (remarks of Sen. Willey); *id.*, at 544 (remarks of Rep. Taylor). The bill's supporters defended it—not by rebutting the claim of special treatment—but by pointing to the need for such treatment:

> "The very discrimination it makes between 'destitute and suffering' negroes and destitute and suffering white paupers, proceeds upon the distinction that, in the omitted case, civil rights and immunities are already sufficiently protected by the possession of political power, the absence of which in the case provided for necessitates governmental protection." *Id.*, at 75 (remarks of Rep. Phelps).

Despite the objection to the special treatment the bill would provide for Negroes, it was passed by Congress. *Id.*, at 421, 688. President Johnson vetoed this bill and also a subsequent bill that contained some modifications; one of his principal objections to both bills was that they gave special benefits to Negroes. VIII Messages and Papers of the Presidents 3596, 3599, 3620, 3623 (1866). Rejecting the concerns of the President and the bill's opponents, Congress overrode the President's second veto. Cong. Globe, at 3842, 3850.

Since the Congress that considered and rejected the objections to the 1866 Freedman's Bureau Act concerning special relief to Negroes also proposed the Fourteenth Amendment, it is inconceivable that the Fourteenth Amendment was intended to prohibit all race-conscious relief measures. It "would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color," *Railway Mail Association* v. *Corsi,* 326 U. S. 88, 94 (1945), to hold that it barred state action to remedy the effects of that discrimination. Such a result would pervert the intent of the framers by substituting abstract equality for the genuine equality the amendment was intended to achieve.

B

As has been demonstrated in our joint opinion, this Court's past cases establish the constitutionality of race-conscious remedial measures. Beginning with the school desegregation cases, we recognized that even absent a judicial or legislative finding of constitutional violation, a school board constitutionally could consider the race of students in making school assignment decisions. See *Swann* v. *Charlotte-Mecklenberg Board of Education,* 402 U. S. 1, 16 (1971); *McDaniel* v. *Barresi,* 402 U. S. 39, 41 (1971). We noted, moreover, that a

> "flat prohibition against assignment of students for the purpose of creating a racial balance must inevitably conflict with the duty of school authorities to disestablish dual school systems. As we have held in *Swann,* the Constitution does not compel any particular degree of racial balance or mixing, but when past and continuing constitutional violations are found, some ratios are likely to be useful as starting points in shaping a remedy. An absolute prohibition against use of such a device—even as a starting point—contravenes the implicit command of *Green* v. *County School Board,* 391 U. S. 430 (1968), that all reasonable methods be available to formulate an effective remedy." *Board of Education* v. *Swann,* 402 U. S. 43, 46 (1971).

As we have observed, "[a]ny other approach would freeze the status quo that is the very target of all desegregation processes." *McDaniel* v. *Barresi, supra,* at 41.

Only last Term, in *United Jewish Organizations* v. *Carey,* 430 U. S. 144 (1977), we upheld a New York reapportionment plan that was deliberately drawn on the basis of race to enhance the electoral power of Negroes and Puerto Ricans; the plan had the effect of diluting the electoral strength of the Hasidic Jewish Community. We were willing in *UJO* to sanction the remedial use of a racial classification even though it disadvantaged otherwise "innocent" individuals. In another case last Term, *Califano* v. *Webster,* 430 U. S. 313 (1977), the Court upheld a provision in the Social Security laws that discriminated against men because its purpose was " 'the permissible one of redressing our society's long standing disparate treatment of women.' " *Id.,* at 317, quoting *Califano* v. *Goldfarb,* 430 U. S. 199, 209 n. 8 (1977) (plurality opinion). We thus recognized the permissibility of remedying past societal discrimination through the use of otherwise disfavored classifications.

Nothing in those cases suggests that a university cannot similarly act to remedy past discrimination.[12] It is true that in both *UJO* and *Webster* the use of the disfavored classification was predicated on legislative or administrative action, but in neither case had those bodies made findings that there had been constitutional violations or that the specific individuals to be benefited had actually been the victims of discrimination. Rather, the classification in each of those cases was based on a determination that the group was in need of the remedy because of some type of past discrimination. There is thus ample support for the conclusion that a university can employ race-conscious measures to remedy past societal discrimination, without the need for a finding that those benefited were actually victims of that discrimination.

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[12] Indeed, the action of the University finds support in the regulations promulgated under Title VI by the Department of Health, Education, and Welfare and approved by the President, which authorize a federally funded institution to take affirmative steps to overcome past discrimination against groups even where the institution was not guilty of prior discrimination. 45 CFR § 80.3 (b)(6)(ii).

IV

While I applaud the judgment of the Court that a university may consider race in its admissions process, it is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible. In declining to so hold, today's judgment ignores the fact that for several hundred years Negroes have been discriminated against, not as individuals, but rather solely because of the color of their skins. It is unnecessary in 20th century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color he never even made it into the pot.

These differences in the experience of the Negro make it difficult for me to accept that Negroes cannot be afforded greater protection under the Fourteenth Amendment where it is necessary to remedy the effects of past discrimination. In the *Civil Rights Cases, supra,* the Court wrote that the Negro emerging from slavery must cease "to be the special favorite of the laws." 109 U. S., at 25; see p. 5, *supra.* We cannot in light of the history of the last century yield to that view. Had the Court in that case and others been willing to "do for human liberty and the fundamental rights of American citizenship, what it did . . . for the protection of slavery and the rights of the masters of fugitive slaves," *id.*, at 53 (Harlan, J., dissenting), we would not need now to permit the recognition of any "special wards."

Most importantly, had the Court been willing in 1896, in *Plessy* v. *Ferguson*, to hold that the Equal Protection Clause forbids differences in treatment based on race, we would not be faced with this dilemma in 1978. We must remember, however, that the principle that the "Constitution is colorblind" appeared only in the opinion of the lone dissenter. 163 U. S., at 559. The majority of the Court rejected the principle of color blindness, and for the next 60 years, from *Plessy* to *Brown* v. *Board of Education*, ours was a Nation where, *by law*, an individual could be given "special" treatment based on the color of his skin.

It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence and prestige in America. For far too long, the doors to those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors. I do not believe that anyone can truly look into America's past and still find that a remedy for the effects of that past is impermissible.

It has been said that this case involves only the individual, Bakke, and this University. I doubt, however, that there is a computer capable of determining the number of persons and institutions that may be affected by the decision in this case. For example, we are told by the Attorney General of the United States that at least 27 federal agencies have adopted regulations requiring recipients of federal funds to take "*affirmative action* to overcome the effects of conditions which resulted in limiting participation . . . by persons of a particular race, color, or national origin." Supplemental Brief for the

United States as *Amicus Curiae* 16 (emphasis added). I cannot even guess the number of state and local governments that have set up affirmative action programs, which may be affected by today's decision.

I fear that we have come full circle. After the Civil War our government started several "affirmative action" programs. This Court in the *Civil Rights Cases* and *Plessy* v. *Ferguson* destroyed the movement toward complete equality. For almost a century no action was taken, and this nonaction was with the tacit approval of the courts. Then we had *Brown* v. *Board of Education* and the Civil Rights Acts of Congress, followed by numerous affirmative action programs. *Now,* we have this Court again stepping in, this time to stop affirmative action programs of the type used by the University of California.

SUPREME COURT OF THE UNITED STATES

No. 76-811

Regents of the University of California, Petitioner,
v.
Allan Bakke.

On Writ of Certiorari to the Supreme Court of California.

[June 28, 1978]

Mr. Justice Blackmun.

I participate fully, of course, in the opinion, *ante*, p. —, that bears the names of my Brothers Brennan, White, Marshall, and myself. I add only some general observations that hold particular significance for me, and then a few comments on equal protection.

I

At least until the early 1970's, apparently only a very small number, less than 2%, of the physicians, attorneys, and medical and law students in the United States were members of what we now refer to as minority groups. In addition, approximately three-fourths of our Negro physicians were trained at only two medical schools. If ways are not found to remedy that situation, the country can never achieve its professed goal of a society that is not race conscious.

I yield to no one in my earnest hope that the time will come when an "affirmative action" program is unnecessary and is, in truth, only a relic of the past. I would hope that we could reach this stage within a decade at the most. But the story of *Brown* v. *Board of Education,* 347 U. S. 483 (1954), decided almost a quarter of a century ago, suggests that that hope is a slim one. At some time, however, beyond any period of what some would claim is only transitional inequality, the United States must and will reach a stage of maturity where action along this line is no longer necessary. Then persons will be regarded as persons, and discrimination of the type we address today will be an ugly feature of history that is instructive but that is behind us.

The number of qualified, indeed highly qualified, applicants for admission to existing medical schools in the United States far exceeds the number of places available. Wholly apart from racial and ethnic considerations, therefore, the selection process inevitably results in the denial of admission to many *qualified* persons, indeed, to far more than the number of those who are granted admission. Obviously, it is a denial to the deserving. This inescapable fact is brought into sharp focus here because Allan Bakke is not himself charged with discrimination and yet is the one who is disadvantaged, and because the Medical School of the University of California at Davis itself is not charged with historical discrimination.

One theoretical solution to the need for more minority members in higher education would be to enlarge our graduate schools. Then all who desired and were qualified could enter, and talk of discrimination would vanish. Unfortunately, this is neither feasible nor realistic. The vast resources that apparently would be required simply are not available. And the need for more professional graduates, in the strict numerical sense, perhaps has not been demonstrated at all.

There is no particular or real significance in the 84–16 division at Davis. The same theoretical, philosophical, social, legal, and constitutional considerations would necessarily apply to the case if Davis' special admissions program had focused on any lesser number, that is, on 12 or 8 or 4 places or, indeed, on only 1.

It is somewhat ironic to have us so deeply disturbed over a program where race is an element of consciousness, and yet to be aware of the fact, as we are, that institutions of higher learning, albeit more on the undergraduate than the graduate level, have given conceded preferences up to a point to those possessed of athletic skills, to the children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous, and the powerful.

Programs of admission to institutions of higher learning are basically a responsibility for academicians and for administrators and the specialists they employ. The judiciary, in contrast, is ill-equipped and poorly trained for this. The administration and management of educational institutions are beyond the competence of judges and are within the special competence of educators, provided always that the educators perform within legal and constitutional bounds. For me, therefore, interference by the judiciary must be the rare exception and not the rule.

II

I, of course, accept the propositions that (a) Fourteenth Amendment rights are personal; (b) racial and ethnic distinctions where they are stereotypes are inherently suspect and call for exacting judicial scrutiny; (c) academic freedom is a special concern of the First Amendment; and (d) the Fourteenth Amendment has expanded beyond its original 1868 conception and now is recognized to have reached a point where, as MR. JUSTICE POWELL states, *ante*, p. 24, quoting from the Court's opinion in *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U. S. 273, 296 (1976), it embraces a "broader principle."

This enlargement does not mean for me, however, that the Fourteenth Amendment has broken away from its moorings and its original intended purposes. Those original aims persist. And that, in a distinct sense, is what "affirmative action," in the face of proper facts, is all about. If this conflicts with idealistic equality, that tension is original Fourteenth Amendment tension, constitutionally conceived and constitutionally imposed, and it is part of the Amendment's very nature until complete equality is achieved in the area. In this sense, constitutional equal protection is a shield.

I emphasize in particular that the decided cases are not easily to be brushed aside. Many, of course, are not precisely on point, but neither are they off point. Racial factors have been given consideration in the school desegregation cases, in the employment cases, in *Lau* v. *Nichols*, 414 U. S. 563 (1974), and in *United Jewish Organizations* v. *Carey*, 430 U. S. 144 (1977). To be sure, some of these may be "distinguished" on the ground that victimization was directly present. But who is to say that victimization is not present for some members of today's minority groups, although it is of a lesser and perhaps different degree. The petitioners in *United Jewish Organizations* certainly complained bitterly of their reapportionment treatment, and I rather doubt that they regard the "remedy" there imposed as one that was "to improve" the group's ability to participate, as MR. JUSTICE POWELL describes it, *ante*, p. 35. And surely in *Lau* v. *Nichols* we looked to ethnicity.

I am not convinced, as MR. JUSTICE POWELL seems to be, that the difference between the Davis program and the one employed by Harvard is very profound or constitutionally significant. The line between the two is a thin and indistinct one. In each, subjective application is at work. Because of my conviction that admission programs are primarily for the educators, I am willing to accept the representation that the Harvard program is one where good faith in its administration is practiced as well as professed. I agree that such a program, where race or ethnic background is only one of many factors, is a program better formulated than Davis' two-track system. The cynical, of course, may say that under a program such as Harvard's one may accomplish covertly what Davis concedes it does openly. I need not go that far, for despite its two-track aspect, the Davis program, for me, is within constitutional bounds, though perhaps barely so. It is surely free of stigma, and, as in *United Jewish Organizations*, I am not willing to infer a constitutional violation.

It is worth noting, perhaps, that governmental preference has not been a stranger to our legal life. We see it in veterans' preferences. We see it in the aid-to-the-handicapped programs. We see it in the progressive income tax. We see it in the Indian programs. We may excuse some of these on the ground that they have specific constitutional protection or, as with Indians, that those benefited are wards of the Government. Nevertheless, these preferences exist and may not be ignored. And in the admissions field, as I have indicated, educational institutions have always used geography, athletic ability, anticipated financial largess, alumni pressure, and other factors of that kind.

I add these only as additional components on the edges of the central question as to which I join my Brothers BRENNAN, WHITE, and MARSHALL in our more general approach. It is gratifying to know that the Court at least finds it constitutional for an academic institution to take race and ethnic background into consideration as one factor, among many, in the administration of its admissions program. I presume that that factor always has been there, though perhaps not conceded or even admitted. It is a fact of life, however, and a part of the real world of which we are all a part. The sooner we get down the road toward accepting and being a part of the real world, and not shutting it out and away from us, the sooner will these difficulties vanish from the scene.

I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetrate racial supremacy.

So the ultimate question, as it was at the beginning of this litigation, is: Among the qualified, how does one choose?

A long time ago, as time is measured for this Nation, a Chief Justice, both wise and far-sighted, said:

> "In considering this question, then, we must never forget, that it is *a constitution* we are expounding" (emphasis in original). *M'Culloch* v. *Maryland,* 4 Wheat. 316, 407 (1819).

In the same opinion, the Great Chief Justice further observed:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the constitution, are constitutional." *Id.,* at 421.

More recently, one destined to become a Justice of this Court observed:

> "The great generalities of the constitution have a content and a significance that vary from age to age." B. Cardozo, The Nature of the Judicial Process 17 (1921).

And an educator who became a President of the United States said:

> "But the Constitution of the United States is not a mere lawyers' document: it is a vehicle of life, and its spirit is always the spirit of the age." W. Wilson, Constitutional Government in the United States 69 (1911).

These precepts of breadth and flexibility and ever-present modernity are basic to our constitutional law. Today, again, we are expounding a *Constitution.* The same principles that governed M'Culloch's case in 1819 govern Bakke's case in 1978. There can be no other answer.

SUPREME COURT OF THE UNITED STATES

No. 76-811

Regents of the University of California, Petitioner, *v.* Allan Bakke.	On Writ of Certiorari to the Supreme Court of California.

[June 28, 1978]

MR. JUSTICE STEVENS, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST join, concurring in the judgment in part and dissenting in part.

It is always important at the outset to focus precisely on the controversy before the Court.[1] It is particularly important to do so in this case because correct identification of the issues will determine whether it is necessary or appropriate to express any opinion about the legal status of any admissions program other than petitioner's.

I

This is not a class action. The controversy is between two specific litigants. Allan Bakke challenged petitioner's special admissions program, claiming that it denied him a place in medical school because of his race in violation of the Federal and California Constitutions and of Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d *et seq.* The California Supreme Court upheld his challenge and ordered him admitted. If the state court was correct in its view that the University's special program was illegal, and that Bakke was therefore unlawfully excluded from the medical school because of his race, we should affirm its judgment, regardless of our views about the legality of admissions programs that are not now before the Court.

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[1] Four Members of the Court have undertaken to announce the legal and constitutional effect of this Court's judgment. See opinion of JUSTICES BRENNAN, WHITE, MARSHALL, and BLACKMUN, *ante*, at 1-2. It is hardly necessary to state that only a majority can speak for the Court or determine what is the "central meaning" of any judgment of the Court.

The judgment as originally entered by the trial court contained four separate paragraphs, two of which are of critical importance.[2] Paragraph 3 declared that the University's special admissions program violated the Fourteenth Amendment, the State Constitution, and Title VI. The trial court did not order the University to admit Bakke because it concluded that Bakke had not shown that he would have been admitted if there had been no special program. Instead, in paragraph 2 of its judgment it ordered the University to consider Bakke's application for admission without regard to his race or the race of any other applicant. The order did not include any broad prohibition against any use of race in the admissions process; its terms were clearly limited to the University's consideration of *Bakke*'s application.[3] Because the University has since been ordered to admit Bakke, paragraph 2 of the trial court's order no longer has any significance.

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[2] The judgment first entered by the trial court read, in its entirety, as follows:

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

"1. Defendent, the Regents of the University of California, have judgment against plaintiff, Allan Bakke, denying the mandatory injunction requested by plaintiff ordering his admission to the University of California at Davis Medical School;

"2. That plaintiff is entitled to have his application for admission to the medical school considered without regard to his race or the race of any other applicant, and defendants are hereby restrained and enjoined from considering plaintiff's race or the race of any other applicant in passing upon his application for admission;

"3. Cross-defendant Allan Bakke have judgment against cross-complainant, the Regents of the University of California, declaring that the special admissions program at the University of California at Davis Medical School violates the Fourteenth Amendment to the United States Constitution, Article 1, Section 21 of the California Constitution, and the Federal Civil Rights Act [42 U. S. C. § 2000d];

"4. That plaintiff have and recover his court costs incurred herein in the sum of $217.35." Appendix to Petition for Writ of Certiorari, at 120a.

The California Supreme Court, in a holding that is not challenged, ruled that the trial court incorrectly placed the burden on Bakke of showing that he would have been admitted in the absence of discrimination. The University then conceded "that it [could] not meet the burden of proving that the special admission program did not result in Bakke's exclusion."[4] Accordingly, the California Supreme Court directed the trial court to enter judgment ordering Bakke's admission.[5] Whether the judgment of the state court is affirmed or reversed, in whole or in part, there is no outstanding injunction forbidding any consideration of racial criteria in processing applications.

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[3] In paragraph 2 the trial court ordered that "plaintiff [Bakke] is entitled to have *his* application for admission to the medical school considered without regard to *his* race or the race of any other applicant; and defendants are hereby restrained and enjoined from considering *plaintiff's* race or the race of any other applicant in passing upon *his* application for admission." See n. 2, *supra* (emphasis added). The only way in which this order can be broadly read as prohibiting any use of race in the admissions process, apart from Bakke's application, is if the final "his" refers to "any other applicant." But the consistent use of the pronoun throughout the paragraph to refer to Bakke makes such a reading entirely unpersuasive, as does the failure of the trial court to suggest that it was issuing relief to applicants who were not parties to the suit.

[4] Appendix B to Application for Stay, at 19–20.

[5] 18 Cal. 3d 34, 64, 553 P. 2d 1152, 1172 (1976). The judgment of the Supreme Court of the State of California affirms only paragraph 3 of the trial court's judgment. The Supreme Court's judgment reads as follows:

"IT IS ORDERED, ADJUDGED, AND DECREED *by the Court that the*
judgment
"*of the Superior Court* *County of* Yolo
"*in the above-entitled cause,* is *hereby* affirmed insofar as it determines that the special admission program is invalid; the judgment is reversed insofar as it denies Bakke an injunction ordering that he be admitted to the University, and the trial court is directed to enter judgment ordering Bakke to be admitted.

"Bakke shall recover his costs on these appeals."

It is therefore perfectly clear that the question whether race can ever be used as a factor in an admissions decision is not an issue in this case, and that discussion of that issue is inappropriate.[6]

II

Both petitioner and respondent have asked us to determine the legality of the University's special admissions program by reference to the Constitution. Our settled practice, however, is to avoid the decision of a constitutional issue if a case can be fairly decided on a statutory ground. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Co.* v. *McLaughlin,* 323 U. S. 101, 105.[7] The more important the issue, the more force

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[6] "This Court . . . reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories,* 351 U. S. 292, 297.

[7] "From *Hayburn's Case,* 2 Dall. 409, to *Alma Motor Co.* v. *Timken-Detroit Axle Co.* and the Hatch Act case decided this term, this Court has followed a policy of strict necessity in disposing of constitutional issues. The earliest exemplifications, too well known for repeating the history here, arose in the Court's refusal to render advisory opinions and in applications of the related jurisdictional policy drawn from the case and controversy limitation. U. S. Const., Art. III. . . .

"The policy, however, has not been limited to jurisdictional determinations. For, in addition, 'the Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.' Thus, as those rules were listed in support of the statement quoted, constitutional issues affecting legislation will not be determined in friendly, nonadversary proceedings; in advance of the necessity of deciding them; in broader terms than are required by the precise facts to which the ruling is to be applied; if the record presents some other ground upon which the case may be disposed of; at the instance of one who fails to show that he is injured by the statute's operation, or who has availed himself of its benefits; or if a construction of the statute is there is to this doctrine.[8] In this case, we are presented with a constitutional question of undoubted and unusual importance. Since, however, a dispositive statutory claim was raised at the very inception of this case, and squarely decided in the portion of the trial court judgment affirmed by the California Supreme Court, it is our plain duty to confront it. Only if petitioner should prevail on the statutory issue would it be necessary to decide whether the University's admissions program violated the Equal Protection Clause of the Fourteenth Amendment.

III

Section 601 of the Civil Rights Act of 1964 provides:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

The University, through its special admissions policy, excluded Bakke from participation in its program of medical education because of his race. The University also acknowledges that it was, and still is, receiving federal financial assistance.[9] The plain language of the statute therefore requires affirmance of the judgment below. A different result cannot be justified unless that language misstates the actual intent of the Congress that enacted the statute or the statute is not enforceable in a private action. Neither conclusion is warranted.

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fairly possible by which the question may be avoided." *Rescue Army* v. *Municipal Court,* 331 U. S. 549, 568–569 (footnotes omitted). See also *Ashwander* v. *TVA,* 297 U. S. 288, 346–348 (Brandeis, J., concurring).

[8] The doctrine reflects both our respect for the Constitution as an enduring set of principles and the deference we owe to the Legislative and Executive Branches of Government in developing solutions to complex social problems. See A. Bickel, The Least Dangerous Branch, 131.

[9] Record, at 29.

Title VI is an integral part of the far-reaching Civil Rights Act of 1964. No doubt, when this legislation was being debated, Congress was not directly concerned with the legality of "reverse discrimination" or "affirmative action" programs. Its attention was focused on the problem at hand, "the glaring . . . discrimination against Negroes which exists throughout our Nation." [10] and, with respect to Title VI, the federal funding of segregated facilities.[11] The genesis of the legislation, however, did not limit the breadth of the solution adopted. Just as Congress responded to the problem of employment discrimination by enacting a provision that protects all races, see *McDonald* v. *Santa Fe Trail Transportation Co.,* 427 U. S. 273, 279,[12] so too its answer to the problem of federal funding of segregated facilities stands as a broad prohibition against the exclusion of *any* individual from a federally funded program "on the ground of race." In the words of the House Report, Title VI stands for "the general principle that *no person* . . . be excluded from participation . . . on the ground of race, color or national origin under any program or activity receiving Federal financial assistance." H. R. Rep. No. 914, Part I, 88th Cong., 1st Sess., 25 (1963) (emphasis added). This same broad view of Title VI and § 601 was echoed throughout the congressional debate and was stressed by every one of the major spokesmen for the Act.[13]

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[10] H. R. Rep. No. 914, Part I, 88th Cong., 1st Sess., 18 (1963).

[11] It is apparent from the legislative history that the immediate object of Title VI was to prevent federal funding of segregated facilities. See, *e. g.,* 110 Cong. Rec. 1521 (remarks of Rep. Celler); *id.,* at 6544 (remarks of Sen. Humphrey).

[12] In *McDonald* v. *Santa Fe Trail,* the Court held that "Title VII prohibits racial discrimination against . . . white petitioners . . . upon the same standards as would be applicable were they Negroes . . . ." 427 U. S., at 280. Quoting from our earlier decision in *Griggs* v. *Duke Power Co.,* 401 U. S. 424, 431, the Court reaffirmed the principle that the statute "prohibit[s] '[d]iscriminatory preference for *any* [racial] group, *minority* or *majority.*'" 427 U. S., at 279 (emphasis in original).

[13] See, *e. g.,* 110 Cong. Rec. 1520 (remarks of Rep. Celler); *id.,* at 5864

Petitioner contends, however, that exclusion of applicants on the basis of race does not violate Title VI if the exclusion carries with it no racial stigma. No such qualification or limitation of § 601's categorical prohibition of "exclusion" is justified by the statute or its history. The language of the entire section is perfectly clear; the words that follow "excluded from" do not modify or qualify the explicit outlawing of any exclusion on the stated grounds.

The legislative history reinforces this reading. The only suggestion that § 601 would allow exclusion of nonminority applicants came from opponents of the legislation and then only by way of a discussion of the meaning of the word "discrimination."[14] The opponents feared that the term "discrimination" would be read as mandating racial quotas and "racially balanced" colleges and universities, and they pressed for a specific definition of the term in order to avoid this possibility.[15] In response, the proponents of the legislation gave repeated assurances that the Act would be "colorblind"

(remarks of Sen. Humphrey); *id.*, at 6561 (remarks of Sen. Kuchel); *id.*, at 7055 (remarks of Sen. Pastore) (Representative Celler and Senator Humphrey were the House and Senate floor managers for the entire Civil Rights Act, and Senators Kuchel and Pastore were the minority and majority Senate floor managers for Title VI.)

[14] Representative Abernethy's comments were typical:

"Title VI has been aptly described as the most harsh and unprecedented proposal contained in the bill. . . . It is aimed toward eliminating discrimination in federally assisted programs. It contains no guideposts and no yardsticks as to what might constitute discrimination in carrying out federally aided programs and projects. . . . Presumably the college would have to have a 'racially balanced' staff from the dean's office to the cafeteria. . . . The effect of this title, if enacted into law, will interject race as a factor in every decision involving the selection of an individual. . . . The concept of 'racial imbalance' would hover like a black cloud over every transaction. . . ." 110 Cong. Rec. 1619. See also, *e. g., id., at* 5611-5613 (remarks of Sen Ervin); *id.*, at 9083 (remarks of Sen. Gore).

[15] *E. g., id.*, at 5863, 5874 (remarks of Sen. Eastland).

in its application.[16] Senator Humphrey, the Senate floor manager for the Act, expressed this position as follows:

> "[T]he word 'discrimination' has been used in many a court case. What it really means in the bill is a distinction in treatment . . . given to different individuals because of their different race, religion or national origin. . . .
>
> "The answer to this question [what was meant by 'discrimination'] is that if race is not a factor, we do not have to worry about discrimination because of race. . . . The Internal Revenue Code does not provide that colored people do not have to pay taxes, or that they can pay their taxes 6 months later than everybody else." 110 Cong. Rec. 5864.
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> "[I]f we started to treat Americans as Americans, not as fat ones, short ones, tall ones, brown ones, green ones, yellow ones or white ones, but as Americans. If we did that we would not need to worry about discrimination." 110 Cong. Rec. 5866.

In giving answers such as these, it seems clear that the proponents of Title VI assumed that the Constitution itself required a colorblind standard on the part of government,[17] but that does not mean that the legislation only codifies an existing constitutional prohibition. The statutory prohibition against discrimination in federally funded projects contained in § 601 is more than a simple paraphrasing of what the Fifth or Fourteenth Amendment would require. The Act's proponents plainly considered Title VI consistent with their view of the Constitution and they sought to provide an effective weapon to implement that view.[18] As a distillation of what the supporters of the Act believed the Constitution demanded of State and Federal Governments, § 601 has independent force, with language and emphasis in addition to that found in the Constitution.[19]

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[16] See, *e. g.*, 110 Cong. Rec. 8346 (remarks of Sen. Proxmire) ("[t]axes are collected from whites and Negroes, and they should be expended without discrimination"); *id.*, at 7055 (remarks of Sen. Pastore) ("[Title VI] will guarantee that the money collected by colorblind tax collectors will be distributed by Federal and State administrators who are equally colorblind"); and *id.*, at 6543 (remarks of Sen. Hunphrey) ("[s]imple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination") (quoting from President Kennedy's Message to Congress, June 19, 1963).

[17] See, *e. g.*, 110 Cong. Rec. 5253 (remarks of Sen. Hunphrey); and *id.*, at 7102 (remarks of Sen. Javits). The parallel between the prohibitions of Title VI and those of the Constitution was clearest with respect to the

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immediate goal of the Act—an end to federal funding of "separate but equal" facilities.

[18] "As in *Monroe* [v. *Pape*], we have no occasion here to 'reach the constitutional question whether Congress has the power to make municipalities liable for acts of its officers that violate the civil rights of individuals.' 365 U. S., at 191. For in interpreting the statute it is not our task to consider whether Congress was mistaken in 1871 in its view of the limits of its power over municipalities; rather, we must construe the statute in light of the impressions under which Congress did in fact act, see *Ries* v. *Lynskey*, 425 F. 2d, at 175." *Moor* v. *County of Alameda*, 411 U. S. 693, 709.

[19] Both Title VI and Title VII express Congress' belief that, in the long struggle to eliminate social prejudice and the effects of prejudice, the principle of *individual* equality, without regard to race or religion, was one on which there could be a "meeting of the minds" among all races and a common national purpose. See *City of Los Angeles, Dept. of Power & Water* v. *Manhart*, 46 U. S. L. W. 4347, 4349 ("the basic policy of the statute [Title VII] requires that we focus on fairness to individuals rather than fairness to classes"). This same principle of *individual* fairness is embodied in Title VI.

"The basic fairness of Title VI is so clear that I find it difficult to understand why it should create any opposition. . . .

"Private prejudices, to be sure, cannot be eliminated overnight. However, there is one area where no room at all exists for private prejudices. That is the area of governmental conduct. As the first Mr. Justice Harlan

As with other provisions of the Civil Rights Act, Congress' expression of its policy to end racial discrimination may independently proscribe conduct that the Constitution does not.[20] However, we need not decide the congruence—or lack of congruence—of the controlling statute and the Constitution since the meaning of the Title VI ban on exclusion is crystal clear: Race cannot be the basis of excluding anyone from participation in a federally funded program.

In short, nothing in the legislative history justifies the conclusion that the broad language of § 601 should not be given its natural meaning. We are dealing with a distinct statutory prohibition, enacted at a particular time with par-

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said in his prophetic dissenting opinion in *Plessy* v. *Ferguson,* 163 U. S. 537, 559:

"Our Constitution is colorblind.

"So—I say to Senators—must be our government. . . .

"Title VI closes the gap between our purposes as a democracy and our prejudices as individuals. The cuts of prejudice need healing. The costs of prejudice need understanding. We cannot have hostility between two great parts of our people without tragic loss in our human values. . . .

"Title VI offers a place for the meeting of our minds as to Federal money." 110 Cong. Rec. 7063-7064 (remarks of Sen. Pastore).

Of course one of the reasons marshalled in support of the conclusion that Title VI was "non-controversial" was that its prohibition was already reflected in the law. See *id.* (remarks of Sen. Pell and Sen. Pastore).

[20] For example, private employers now under duties imposed by Title VII were wholly free from the restraints imposed by the Fifth and Fourteenth Amendments which are directed only to governmental action.

In *Lau* v. *Nichols,* 414 U. S. 563, the Government's brief stressed that "the applicability of Title VI does not depend upon the outcome of the equal protection analysis . . . . [T]he statute independently proscribes the conduct challenged by petitioners and provides a discrete basis for injunctive relief." Brief of the United States as *Amicus Curiae,* at 15. The Court, in turn, rested its decision on Title VI. MR. JUSTICE POWELL takes pains to distinguish *Lau* from the case at hand because the *Lau* decision "rested solely on the statute." *Ante,* at 33. See also *Washington* v. *Davis,* 426 U. S. 229, 238-239; *Allen* v. *State Board of Elections,* 393 U. S. 544, 588 (Harlan, J., concurring and dissenting).

ticular concerns in mind; neither its language nor any prior interpretation suggests that its place in the Civil Rights Act, won after long debate, is simply that of a constitutional appendage.[21] In unmistakable terms the Act prohibits the exclusion of individuals from federally funded programs because of their race.[22] As succinctly phrased during the Senate debate, under Title VI it is not "permissible to say 'yes' to one person, but to say 'no' to another person, only because of the color of his skin." [23]

Belatedly, however, petitioner argues that Title VI cannot be enforced by a private litigant. The claim is unpersuasive in the context of this case. Bakke requested injunctive and declaratory relief under Title VI; petitioner itself then joined issue on the question of the legality of its program under Title VI by asking for a declaratory judgment that it was in compliance with the statute.[24] Its view during state-court litigation was that a private cause of action does exist under Title VI. Because petitioner questions the availability of a private cause of action for the first time in this Court, the question is not properly before us. See *McGoldrick* v.

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[21] As explained by Senator Humphrey, § 601 expresses a principle imbedded in the constitutional *and* moral understanding of the times.

"The purpose of title VI is to make sure that funds of the United States are not used to support racial discrimination. *In many instances* the practices of segregation or discrimination, which title VI seeks to end, are unconstitutional. . . . *In all cases,* such discrimination is contrary to national policy, and to the moral sense of the Nation. Thus, title VI is simply designed to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation." 110 Cong. Rec. 6544 (emphasis added).

[22] Petitioner's attempt to rely on regulations issued by HEW for a contrary reading of the statute is unpersuasive. Where no discriminatory policy was in effect, HEW's example of permissible "affirmative action" refers to "special recruitment policies." 45 CFR § 80.5 (j). This regulation, which was adopted in 1973, sheds no light on the legality of the admissions program that excluded Bakke in this case.

[23] 110 Cong. Rec. 6047 (remarks of Sen. Pastore).

[24] Record, at 30-31.

Campagnie Generale Transatlantique, 309 U. S. 430, 434. Even if it were, petitioner's original assumption is in accord with the federal courts' consistent interpretation of the Act. To date, the courts, including this Court, have unanimously concluded or assumed that a private action may be maintained under Title VI.[25] The United States has taken the same position; in its *amicus curiae* brief directed to this specific issue, it concluded that such a remedy is clearly available,[26]

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[25] See, *e. g., Lau* v. *Nichols,* 414 U. S. 563; *Bossier Parish School Board* v. *Lemon,* 370 F. 2d 847 (CA5 1967), cert. denied, 388 U. S. 911; *Uzzell* v. *Friday,* 547 F. 2d 801 (CA4 1977), opinion on rehearing en banc, 558 F. 2d 727, cert. filed —; *Serna* v. *Portales,* 499 F. 2d 1147 (CA10 1974); cf. *Chambers* v. *Omaha Public School District,* 536 F. 2d 222, 225 n. 2 (CA8 1976) (indicating doubt over whether a *money judgment* can be obtained under Title VI). Indeed, the government's brief in *Lau* v. *Nichols, supra,* succinctly expressed this common assumption: "It is settled that petitioners . . . have standing to enforce Section 601 . . . ." Brief of the United States as *Amicus Curiae,* at 13 n. 5.

[26] Supplemental Brief for the United States as *Amicus Curiae,* at 24–34. The government's supplemental brief also suggests that there may be a difference between a private cause of action brought to end a particular discriminatory practice and such an action brought to cut off federal funds. *Id.,* at 28–30. Section 601 is specifically addressed to personal rights, while § 602—the fund cut-off provision—establishes "an elaborate mechanism for *governmental* enforcement by federal agencies." *Id.,* at 28 (emphasis added). Arguably, private enforcement of this "elaborate mechanism" would not fit within the congressional scheme, see separate opinion of MR. JUSTICE WHITE, *ante.* But Bakke did not seek to cut off the University's federal funding; he sought admission to medical school. The difference between these two courses of action is clear and significant. As the Government itself states:

"[T]he grant of an injunction or a declaratory judgment in a private action would not be inconsistent with the administrative program established by Section 602 . . . . A declaratory judgment or injunction against future discrimination would not raise the possibility that funds would be terminated, and it would not involve bringing the forces of the Executive Branch to bear on state programs; it therefore would not implicate the concern that led to the limitations contained in Section 602." Supplemental Brief, *supra,* at 30 n. 25.

The notion that a private action seeking injunctive or declaratory judg-

and Congress has repeatedly enacted legislation predicated on the assumption that Title VI may be enforced in a private action.[27] The conclusion that an individual may maintain a private cause of action is amply supported in the legislative history of Title VI itself.[28] In short, a fair consideration of

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ment relief is inconsistent with a federal statute that authorizes termination of funds has clearly been rejected by this Court in prior cases. See *Rosado* v. *Wyman*, 397 U. S. 397, 420.

[27] See 29 U. S. C. § 794 (the Rehabilitation Act of 1973) (in particular, the legislative history discussed in *Lloyd* v. *Regional Transportation Authority*, 548 F. 2d 1277, 1285–1286 (CA7 1977)); 20 U. S. C. § 1617 (attorney fees under the Emergency School Aid Act); and 31 U. S. C. § 1244 (private action under the Financial Assistance Act). Of course, none of these subsequent legislative enactments is necessarily reliable evidence of Congress' intent in 1964 in enacting Title VI, and the legislation was not intended to change the existing status of Title VI.

[28] Framing the analysis in terms of the four-part *Cort* v. *Ash* test, see 422 U. S. 66, 78, it is clear that all four parts of the test are satisfied. (1) Bakke's status as a potential beneficiary of a federally funded program definitely brings him within the "class for whose *especial* benefit the statute was enacted," *ibid.* (emphasis in original). (2) A cause of action based on race discrimination has not been "traditionally relegated to state law." *Ibid.* (3) While a few excerpts from the voluminous legislative history suggest that Congress did not intend to create a private cause of action, see opinion of MR. JUSTICE POWELL, *ante*, at 14 n. 18, an examination of the entire legislative history makes it clear that Congress had no intention to foreclose a private right of action. (4) There is ample evidence that Congress considered private causes of action to be consistent with, if not essential to, the legislative scheme. See, *e. g.*, remarks of Senator Ribicoff:

"We come then to the crux of the dispute—how this right [to participate in federally funded programs without discrimination] should be protected. And even this issue becomes clear upon the most elementary analysis. If Federal funds are to be dispensed on a nondiscriminatory basis, the only possible remedies must fall into one of two categories: First, action to end discrimination; or second, action to end the payment of funds. Obviously action to end discrimination is preferable since that reaches the objective of extending the funds on a nondiscriminatory basis. But if the discrimination persists and cannot be effectively terminated, how else can the principle of nondiscrimination be vindicated except by nonpayment of petitioner's tardy attack on the propriety of Bakke's suit under Title VI requires that it be rejected.

The University's special admissions program violated Title VI of the Civil Rights Act of 1964 by excluding Bakke from the medical school because of his race. It is therefore our duty to affirm the judgment ordering Bakke admitted to the University.

Accordingly, I concur in the Court's judgment insofar as it affirms the judgment of the Supreme Court of California. To the extent that it purports to do anything else, I respectfully dissent.

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funds?" 110 Cong. Rec. 7065. See also *id.*, at 5090, 6543, 6544 (remarks of Sen. Humphrey); *id.*, at 7103, 12719 (remarks of Sen. Javits); *id.*, at 7062, 7063 (remarks of Sen. Pastore).

The congressional debates thus show a clear understanding that the principle embodied in § 601 involves *personal* Federal rights that administrative procedures would not, for the most part, be able to protect. The analogy to the Voting Rights Act of 1965, 79 Stat. 437, is clear. Both that Act and Title VI are broadly phrased in terms of personal rights ("no person shall be denied . . ."); both Acts were drafted with broad remedial purposes in mind; and the effectiveness of both Acts would be "severely hampered" without the existence of a private remedy to supplement administrative procedures. See *Allen* v. *State Board of Elections*, 393 U. S. 544, 556. In *Allen*, of course, this Court implied a private right of action under the Voting Rights Act.

UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC *v.* WEBER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78–432. Argued March 28, 1979—Decided June 27, 1979*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Challenged here is the legality of an affirmative action plan—collectively bargained by an employer and a union—that reserves for black employees 50% of the openings in an in-plant craft-training program until the percentage of black craftworkers in the plant is commensurate with the percentage of blacks in the local labor force. The question for decision is whether Congress, in Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*, left employers and unions in the private sector free to take such race-conscious steps to eliminate manifest racial imbalances in traditionally segregated job categories. We hold that Title VII does not prohibit such race-conscious affirmative action plans.

I

In 1974, petitioner United Steelworkers of America (USWA) and petitioner Kaiser Aluminum & Chemical Corp. (Kaiser) entered into a master collective-bargaining agreement covering terms and conditions of employment at 15 Kaiser plants. The agreement contained, *inter alia,* an affirmative action plan designed to eliminate conspicuous racial imbalances in Kaiser's then almost exclusively white craftwork forces. Black craft-hiring goals were set for each Kaiser plant equal to the percentage of blacks in the respective local labor forces. To enable plants to meet these goals, on-the-job training programs were established to teach unskilled production workers—black and white—the skills necessary to become craftworkers. The plan reserved for black employees 50% of the openings in these newly created in-plant training programs.

This case arose from the operation of the plan at Kaiser's plant in Gramercy, La. Until 1974, Kaiser hired as craftworkers for that plant only persons who had had prior craft experience. Because blacks had long been excluded from craft unions,[1] few were able to present such credentials. As a consequence, prior to 1974 only 1.83% (5 out of 273) of the skilled craftworkers at the Gramercy plant were black, even though the work force in the Gramercy area was approximately 39% black.

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[1] Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice. See, *e. g., United States* v. *Elevator Constructors,* 538 F. 2d 1012 (CA3 1976); *Associated General Contractors of Massachusetts* v. *Altschuler,* 490 F. 2d 9 (CA1 1973); *Southern Illinois Builders Assn.* v. *Ogilvie,* 471 F. 2d 680 (CA7 1972); *Contractors Assn. of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F. 2d 159 (CA3 1971); *Insulators & Asbestos Workers* v. *Vogler,* 407 F. 2d 1047 (CA5 1969); *Buckner* v. *Goodyear Tire & Rubber Co.,* 339 F. Supp. 1108 (ND Ala. 1972), aff'd without opinion, 476 F. 2d 1287 (CA5 1973). See also U. S. Commission on Civil Rights, The Challenge Ahead: Equal Opportunity in Referral Unions 58-94 (1976) (summarizing judicial findings of discrimination by craft unions); G. Myrdal, An American Dilemma 1079-1124 (1944); F. Marshall & V. Briggs, The Negro and Apprenticeship (1967); S. Spero & A. Harris, The Black Worker (1931); U. S. Commission on Civil Rights, Employment 97 (1961); State Advisory Committees, U. S. Commission on Civil Rights, 50 States Report 209 (1961); Marshall, The Negro in Southern Unions, in The Negro and the American Labor Movement 145 (J. Jacobson ed. 1968); App. 63, 104.

Pursuant to the national agreement Kaiser altered its craft-hiring practice in the Gramercy plant. Rather than hiring already trained outsiders, Kaiser established a training program to train its production workers to fill craft openings. Selection of craft trainees was made on the basis of seniority, with the proviso that at least 50% of the new trainees were to be black until the percentage of black skilled craftworkers in the Gramercy plant approximated the percentage of blacks in the local labor force. See 415 F. Supp. 761, 764.

During 1974, the first year of the operation of the Kaiser-USWA affirmative action plan, 13 craft trainees were selected from Gramercy's production work force. Of these, seven were black and six white. The most senior black selected into the program had less seniority than several white production workers whose bids for admission were rejected. Thereafter one of those white production workers, respondent Brian Weber (hereafter respondent), instituted this class action in the United States District Court for the Eastern District of Louisiana.

The complaint alleged that the filling of craft trainee positions at the Gramercy plant pursuant to the affirmative action program had resulted in junior black employees' receiving training in preference to senior white employees, thus discriminating against respondent and other similarly situated white employees in violation of §§ 703 (a)[2] and

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[2] Section 703 (a), 78 Stat. 255, as amended, 86 Stat. 109, 42 U. S. C. § 2000e-2 (a), provides:

"(a) . . . It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individ-

(d)[3] of Title VII. The District Court held that the plan violated Title VII, entered a judgment in favor of the plaintiff class, and granted a permanent injunction prohibiting Kaiser and the USWA "from denying plaintiffs, Brian F. Weber and all other members of the class, access to on-the-job training programs on the basis of race." App. 171. A divided panel of the Court of Appeals for the Fifth Circuit affirmed, holding that all employment preferences based upon race, including those preferences incidental to bona fide affirmative action plans, violated Title VII's prohibition against racial discrimination in employment. 563 F. 2d 216 (1977). We granted certiorari. 439 U. S. 1045 (1978). We reverse.

II

We emphasize at the outset the narrowness of our inquiry. Since the Kaiser-USWA plan does not involve state action, this case does not present an alleged violation of the Equal Protection Clause of the Fourteenth Amendment. Further, since the Kaiser-USWA plan was adopted voluntarily, we are not concerned with what Title VII requires or with what a court might order to remedy a past proved violation of the Act. The only question before us is the narrow statutory issue of whether Title VII *forbids* private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences in the manner and for the purpose provided in the Kaiser-USWA plan. That question was

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ual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

[3] Section 703 (d), 78 Stat. 256, 42 U. S. C. § 2000e-2 (d), provides:

"It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training."

expressly left open in *McDonald* v. *Santa Fe Trail Transp. Co.,* 427 U. S. 273, 281 n. 8 (1976), which held, in a case not involving affirmative action, that Title VII protects whites as well as blacks from certain forms of racial discrimination.

Respondent argues that Congress intended in Title VII to prohibit all race-conscious affirmative action plans. Respondent's argument rests upon a literal interpretation of §§ 703 (a) and (d) of the Act. Those sections make it unlawful to "discriminate . . . because of . . . race" in hiring and in the selection of apprentices for training programs. Since, the argument runs, *McDonald* v. *Santa Fe Trail Transp. Co., supra,* settled that Title VII forbids discrimination against whites as well as blacks, and since the Kaiser-USWA affirmative action plan operates to discriminate against white employees solely because they are white, it follows that the Kaiser-USWA plan violates Title VII.

Respondent's argument is not without force. But it overlooks the significance of the fact that the Kaiser-USWA plan is an affirmative action plan voluntarily adopted by private parties to eliminate traditional patterns of racial segregation. In this context respondent's reliance upon a literal construction of §§ 703 (a) and (d) and upon *McDonald* is misplaced. See *McDonald* v. *Santa Fe Trail Transp. Co., supra,* at 281 n. 8. It is a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Holy Trinity Church* v. *United States,* 143 U. S. 457, 459 (1892). The prohibition against racial discrimination in §§ 703 (a) and (d) of Title VII must therefore be read against the background of the legislative history of Title VII and the historical context from which the Act arose. See *Train* v. *Colorado Public Interest Research Group,* 426 U. S. 1, 10 (1976); *National Woodwork Mfrs. Assn.* v. *NLRB,* 386 U. S. 612, 620 (1967); *United States* v. *American Trucking Assns.,* 310 U. S. 534, 543–544 (1940). Examination of those sources makes clear that an interpretation of the sections that forbade all race-conscious affirmative action would "bring about an end completely at variance with the purpose of the statute" and must be rejected. *United States* v. *Public Utilities Comm'n*, 345 U. S. 295, 315 (1953). See *Johansen* v. *United States*, 343 U. S. 427, 431 (1952); *Longshoremen* v. *Juneau Spruce Corp.*, 342 U. S. 237, 243 (1952); *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907).

Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with "the plight of the Negro in our economy." 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey). Before 1964, blacks were largely relegated to "unskilled and semi-skilled jobs." *Ibid.* (remarks of Sen. Humphrey); *id.*, at 7204 (remarks of Sen. Clark); *id.*, at 7379–7380 (remarks of Sen. Kennedy). Because of automation the number of such jobs was rapidly decreasing. See *id.*, at 6548 (remarks of Sen. Humphrey); *id.*, at 7204 (remarks of Sen. Clark). As a consequence, "the relative position of the Negro worker [was] steadily worsening. In 1947 the nonwhite unemployment rate was only 64 percent higher than the white rate; in 1962 it was 124 percent higher." *Id.*, at 6547 (remarks of Sen. Humphrey). See also *id.*, at 7204 (remarks of Sen. Clark). Congress considered this a serious social problem. As Senator Clark told the Senate:

> "The rate of Negro unemployment has gone up consistently as compared with white unemployment for the past 15 years. This is a social malaise and a social situation which we should not tolerate. That is one of the principal reasons why the bill should pass." *Id.*, at 7220.

Congress feared that the goals of the Civil Rights Act—the integration of blacks into the mainstream of American society—could not be achieved unless this trend were reversed. And Congress recognized that that would not be possible unless blacks were able to secure jobs "which have a future." *Id.*, at 7204 (remarks of Sen. Clark). See also *id.*, at 7379–7380 (remarks of Sen. Kennedy). As Senator Humphrey explained to the Senate:

> "What good does it do a Negro to be able to eat in a fine restaurant if he cannot afford to pay the bill? What good does it do him to be accepted in a hotel that is too expensive for his modest income? How can a Negro child be motivated to take full advantage of integrated educational facilities if he has no hope of getting a job where he can use that education?" *Id.*, at 6547.
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> "Without a job, one cannot afford public convenience and accommodations. Income from employment may be necessary to further a man's education, or that of his children. If his children have no hope of getting a good job, what will motivate them to take advantage of educational opportunities?" *Id.*, at 6552.

These remarks echoed President Kennedy's original message to Congress upon the introduction of the Civil Rights Act in 1963.

> "There is little value in a Negro's obtaining the right to be admitted to hotels and restaurants if he has no cash in his pocket and no job." 109 Cong. Rec. 11159.

Accordingly, it was clear to Congress that "[t]he crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them," 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey), and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed.

It plainly appears from the House Report accompanying the Civil Rights Act that Congress did not intend wholly to prohibit private and voluntary affirmative action efforts as one method of solving this problem. The Report provides:

> "No bill can or should lay claim to eliminating all of

> the causes and consequences of racial and other types of discrimination against minorities. There is reason to believe, however, that national leadership provided by the enactment of Federal legislation dealing with the most troublesome problems *will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination.*" H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1, p. 18 (1963). (Emphasis supplied.)

Given this legislative history, we cannot agree with respondent that Congress intended to prohibit the private sector from taking effective steps to accomplish the goal that Congress designed Title VII to achieve. The very statutory words intended as a spur or catalyst to cause "employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history," *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405, 418 (1975), cannot be interpreted as an absolute prohibition against all private, voluntary, race-conscious affirmative action efforts to hasten the elimination of such vestiges.[4] It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long," 110 Cong. Rec. 6552 (1964) (remarks of Sen. Humphrey), constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

Our conclusion is further reinforced by examination of the language and legislative history of § 703 (j) of Title VII.[5] Opponents of Title VII raised two related arguments against the bill. First, they argued that the Act would be interpreted to *require* employers with racially imbalanced work forces to grant preferential treatment to racial minorities in order to integrate. Second, they argued that employers with racially imbalanced work forces would grant preferential treatment to racial minorities, even if not required to do so by the Act. See 110 Cong. Rec. 8618–8619 (1964) (remarks of Sen. Sparkman). Had Congress meant to prohibit all race-conscious affirmative action, as respondent urges, it easily could have answered both objections by providing that Title VII would not require or *permit* racially preferential integration efforts. But Congress did not choose such a course. Rather Congress added § 703 (j) which addresses only the first objection. The section provides that nothing contained in Title VII "shall be interpreted to *require* any employer . . . to grant preferential treatment . . . to any group because of the race . . . of such . . . group on account of" a *de facto* racial imbalance in the employer's work force. The section does *not* state that "nothing in Title VII shall be interpreted to *permit*" voluntary affirmative efforts to correct racial imbalances. The natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative action.

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[4] The problem that Congress addressed in 1964 remains with us. In 1962, the nonwhite unemployment rate was 124% higher than the white rate. See 110 Cong. Rec. 6547 (1964) (remarks of Sen. Humphrey). In 1978, the black unemployment rate was 129% higher. See Monthly Labor Review, U. S. Department of Labor, Bureau of Labor Statistics 78 (Mar. 1979).

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[5] Section 703 (j) of Title VII, 78 Stat. 257, 42 U. S. C. § 2000e–2 (j), provides:

"Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

Section 703 (j) speaks to substantive liability under Title VII, but it does not preclude courts from considering racial imbalance as evidence of a Title VII violation. See *Teamsters* v. *United States*, 431 U. S. 324, 339–340, n. 20 (1977). Remedies for substantive violations are governed by § 706 (g), 42 U. S. C. § 2000e–5 (g).

The reasons for this choice are evident from the legislative record. Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for their support that "management prerogatives, and union freedoms . . . be left undisturbed to the greatest extent possible." H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 29 (1963). Section 703 (j) was proposed by Senator Dirksen to allay any fears that the Act might be interpreted in such a way as to upset this compromise. The section was designed to prevent § 703 of Title VII from being interpreted in such a way as to lead to undue "Federal Government interference with private businesses because of some Federal employee's ideas about racial balance or racial imbalance." 110 Cong. Rec. 14314 (1964) (remarks of Sen. Miller).[6] See also *id.*, at 9881 (remarks of

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[6] Title VI of the Civil Rights Act of 1964, considered in *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978), contains no provision comparable to § 703 (j). This is because Title VI was an exercise of federal power over a matter in which the Federal Government was already directly involved: the prohibitions against race-based conduct contained in Title VI governed "program[s] or activit[ies] receiving Federal financial assistance." 42 U. S. C. § 2000d. Congress was legislating to assure federal funds would not be used in an improper manner. Title VII, by contrast, was enacted pursuant to the commerce power to regulate purely private decisionmaking and was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments. Title VII and Title VI, therefore, cannot be read *in pari materia*. See 110 Cong. Rec. 8315 (1964) (remarks of Sen. Cooper). See also *id.*, at 11615 (remarks of Sen. Cooper).

Sen. Allott); *id.*, at 10520 (remarks of Sen. Carlson); *id.*, at 11471 (remarks of Sen. Javits); *id.*, at 12817 (remarks of Sen. Dirksen). Clearly, a prohibition against all voluntary, race-conscious, affirmative action efforts would disserve these ends. Such a prohibition would augment the powers of the Federal Government and diminish traditional management prerogatives while at the same time impeding attainment of the ultimate statutory goals. In view of this legislative history and in view of Congress' desire to avoid undue federal regulation of private businesses, use of the word "require" rather than the phrase "require or permit" in § 703 (j) fortifies the conclusion that Congress did not intend to limit traditional business freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action.[7]

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[7] Respondent argues that our construction of § 703 conflicts with various remarks in the legislative record. See, *e. g.*, 110 Cong. Rec. 7213 (1964) (Sens. Clark and Case); *id.*, at 7218 (Sens. Clark and Case); *id.*, at 6549 (Sen. Humphrey); *id.*, at 8921 (Sen. Williams). We do not agree. In Senator Humphrey's words, these comments were intended as assurances that Title VII would not allow establishment of systems "to *maintain* racial balance in employment." *Id.*, at 11848 (emphasis added). They were not addressed to temporary, voluntary, affirmative action measures undertaken to eliminate manifest racial imbalance in traditionally segregated job categories. Moreover, the comments referred to by respondent all preceded the adoption of § 703 (j), 42 U. S. C. § 2000e-2 (j). After § 703 (j) was adopted, congressional comments were all to the effect that employers would not be *required* to institute preferential quotas to avoid Title VII liability, see, *e. g.*, 110 Cong. Rec. 12819 (1964) (remarks of Sen. Dirksen); *id.*, at 13079-13080 (remarks of Sen. Clark); *id.*, at 15876 (remarks of Rep. Lindsay). There was no suggestion after the adoption of § 703 (j) that wholly voluntary, race-conscious, affirmative action efforts would in themselves constitute a violation of Title VII. On the contrary, as Representative MacGregor told the House shortly before the final vote on Title VII:

"Important as the scope and extent of this bill is, it is also vitally important that all Americans understand what this bill does not cover.

"Your mail and mine, your contacts and mine with our constituents, indicates a great degree of misunderstanding about this bill. People com-

We therefore hold that Title VII's prohibition in §§ 703 (a) and (d) against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans.

III

We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans. It suffices to hold that the challenged Kaiser-USWA affirmative action plan falls on the permissible side of the line. The purposes of the plan mirror those of the statute. Both were designed to break down old patterns of racial segregation and hierarchy. Both were structured to "open employment opportunities for Negroes in occupations which have been traditionally closed to them." 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey).[8]

At the same time, the plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hirees. Cf. *McDonald* v. *Santa Fe Trail Transp. Co.,* 427 U. S. 273 (1976). Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance. Preferential selection of craft trainees at the Gramercy plant will end as soon as the percentage of black skilled craftworkers in the Gramercy plant approximates the

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plain about . . . preferential treatment or quotas in employment. There is a mistaken belief that Congress is legislating in these areas in this bill. When we drafted this bill we excluded these issues largely because the problems raised by these controversial questions are more properly handled at a governmental level closer to the American people and by communities and individuals themselves." 110 Cong. Rec. 15893 (1964).

[8] See n. 1, *supra.* This is not to suggest that the freedom of an employer to undertake race-conscious affirmative action efforts depends on whether or not his effort is motivated by fear of liability under Title VII.

percentage of blacks in the local labor force. See 415 F. Supp., at 763.

We conclude, therefore, that the adoption of the Kaiser-USWA plan for the Gramercy plant falls within the area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories.[9] Accordingly, the judgment of the Court of Appeals for the Fifth Circuit is

Reversed.

MR. JUSTICE POWELL and MR. JUSTICE STEVENS took no part in the consideration or decision of these cases.

MR. JUSTICE BLACKMUN, concurring.

While I share some of the misgivings expressed in MR. JUSTICE REHNQUIST's dissent, *post,* p. 219, concerning the extent to which the legislative history of Title VII clearly supports the result the Court reaches today, I believe that additional considerations, practical and equitable, only partially perceived, if perceived at all, by the 88th Congress, support the conclusion reached by the Court today, and I therefore join its opinion as well as its judgment.

I

In his dissent from the decision of the United States Court of Appeals for the Fifth Circuit, Judge Wisdom pointed out that this case arises from a practical problem in the administration of Title VII. The broad prohibition against discrimination places the employer and the union on what he accurately described as a "high tightrope without a net beneath them." 563 F. 2d 216, 230. If Title VII is read literally, on the one hand they face liability for past discrimination against blacks, and on the other they face liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks.

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[9] Our disposition makes unnecessary consideration of petitioners' argument that their plan was justified because they feared that black employees would bring suit under Title VII if they did not adopt an affirmative action plan. Nor need we consider petitioners' contention that their affirmative action plan represented an attempt to comply with Exec. Order No. 11246, 3 CFR 339 (1964-1965 Comp.).

In this case, Kaiser denies prior discrimination but concedes that its past hiring practices may be subject to question. Although the labor force in the Gramercy area was approximately 39% black, Kaiser's work force was less than 15% black, and its craftwork force was less than 2% black. Kaiser had made some effort to recruit black painters, carpenters, insulators, and other craftsmen, but it continued to insist that those hired have five years prior industrial experience, a requirement that arguably was not sufficiently job related to justify under Title VII any discriminatory impact it may have had. See *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F. 2d 1374, 1389 (CA5 1978), cert. denied, 441 U. S. 968 (1979). The parties dispute the extent to which black craftsmen were available in the local labor market. They agree, however, that after critical reviews from the Office of Federal Contract Compliance, Kaiser and the Steelworkers established the training program in question here and modeled it along the lines of a Title VII consent decree later entered for the steel industry. See *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F. 2d 826 (CA5 1975). Yet when they did this, respondent Weber sued, alleging that Title VII prohibited the program because it discriminated against him as a white person and it was not supported by a prior judicial finding of discrimination against blacks.

Respondent Weber's reading of Title VII, endorsed by the Court of Appeals, places voluntary compliance with Title VII in profound jeopardy. The only way for the employer and the union to keep their footing on the "tightrope" it creates would be to eschew all forms of voluntary affirmative action. Even a whisper of emphasis on minority recruiting would be forbidden. Because Congress intended to encourage private efforts to come into compliance with Title VII, see *Alexander* v. *Gardner-Denver Co.,* 415 U. S. 36, 44 (1974), Judge Wisdom concluded that employers and unions who had committed "arguable violations" of Title VII should be free to make reasonable responses without fear of liability to whites. 563 F. 2d, at 230. Preferential hiring along the lines of the Kaiser program is a reasonable response for the employer, whether or not a court, on these facts, could order the same step as a remedy. The company is able to avoid identifying victims of past discrimination, and so avoids claims for backpay that would inevitably follow a response limited to such victims. If past victims should be benefited by the program, however, the company mitigates its liability to those persons. Also, to the extent that Title VII liability is predicated on the "disparate effect" of an employer's past hiring practices, the program makes it less likely that such an effect could be demonstrated. Cf. *County of Los Angeles* v. *Davis,* 440 U. S. 625, 633–634 (1979) (hiring could moot a past Title VII claim). And the Court has recently held that work-force statistics resulting from private affirmative action were probative of benign intent in a "disparate treatment" case. *Furnco Construction Corp.* v. *Waters,* 438 U. S. 567, 579–580 (1978).

The "arguable violation" theory has a number of advantages. It responds to a practical problem in the administration of Title VII not anticipated by Congress. It draws predictability from the outline of present law and closely effectuates the purpose of the Act. Both Kaiser and the United States urge its adoption here. Because I agree that it is the soundest way to approach this case, my preference would be to resolve this litigation by applying it and holding that Kaiser's craft training program meets the requirement that voluntary affirmative action be a reasonable response to an "arguable violation" of Title VII.

II

The Court, however, declines to consider the narrow "arguable violation" approach and adheres instead to an interpretation of Title VII that permits affirmative action by an employer whenever the job category in question is "traditionally segregated." *Ante,* at 209, and n. 9. The sources cited suggest that the Court considers a job category to be "traditionally segregated" when there has been a societal history of purposeful exclusion of blacks from the job category, resulting in a persistent disparity between the proportion of blacks in the labor force and the proportion of blacks among those who hold jobs within the category.*

"Traditionally segregated job categories," where they exist, sweep far more broadly than the class of "arguable violations" of Title VII. The Court's expansive approach is somewhat

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*The jobs in question here include those of carpenter, electrician, general repairman, insulator, machinist, and painter. App. 165. The sources cited, *ante,* at 198 n. 1, establish, for example, that although 11.7% of the United States population in 1970 was black, the percentage of blacks among the membership of carpenters' unions in 1972 was only 3.7%. For painters, the percentage was 4.9, and for electricians, 2.6. U. S. Commission on Civil Rights, The Challenge Ahead: Equal Opportunity in Referral Unions 274, 281 (1976). Kaiser's Director of Equal Opportunity Affairs testified that, as a result of discrimination in employment and training opportunity, blacks were underrepresented in skilled crafts "in every industry in the United States, and in every area of the United States." App. 90. While the parties dispute the cause of the relative underrepresentation of blacks in Kaiser's craftwork force, the Court of Appeals indicated that it thought "the general lack of skills among available blacks" was responsible. 563 F. 2d 216, 224 n. 13. There can be little doubt that any lack of skill has its roots in purposeful discrimination of the past, including segregated and inferior trade schools for blacks in Louisiana, U. S. Commission on Civil Rights, 50 States Report 209 (1961); traditionally all-white craft unions in that State, including the electrical workers and the plumbers, *id.*, at 208; union nepotism, *Asbestos Workers* v. *Vogler,* 407 F. 2d 1047 (CA5 1969); and segregated apprenticeship programs, F. Marshall & V. Briggs, The Negro and Apprenticeship 27 (1967).

disturbing for me because, as MR. JUSTICE REHNQUIST points out, the Congress that passed Title VII probably thought it was adopting a principle of nondiscrimination that would apply to blacks and whites alike. While setting aside that principle can be justified where necessary to advance statutory policy by encouraging reasonable responses as a form of voluntary compliance that mitigates "arguable violations," discarding the principle of nondiscrimination where no countervailing statutory policy exists appears to be at odds with the bargain struck when Title VII was enacted.

A closer look at the problem, however, reveals that in each of the principal ways in which the Court's "traditionally segregated job categories" approach expands on the "arguable violations" theory, still other considerations point in favor of the broad standard adopted by the Court, and make it possible for me to conclude that the Court's reading of the statute is an acceptable one.

A. The first point at which the Court departs from the "arguable violations" approach is that it measures an individual employer's capacity for affirmative action solely in terms of a statistical disparity. The individual employer need not have engaged in discriminatory practices in the past. While, under Title VII, a mere disparity may provide the basis for a prima facie case against an employer, *Dothard* v. *Rawlinson*, 433 U. S. 321, 329–331 (1977), it would not conclusively prove a violation of the Act. *Teamsters* v. *United States*, 431 U. S. 324, 339–340, n. 20 (1977); see § 703 (j), 42 U. S. C. § 2000e–2 (j). As a practical matter, however, this difference may not be that great. While the "arguable violation" standard is conceptually satisfying, in practice the emphasis would be on "arguable" rather than on "violation." The great difficulty in the District Court was that no one had any incentive to prove that Kaiser had violated the Act. Neither Kaiser nor the Steelworkers wanted to establish a past violation, nor did Weber. The blacks harmed had never sued and so had no established representative. The Equal Employment Opportunity Commission declined to intervene, and cannot be expected to intervene in every case of this nature. To make the "arguable violation" standard work, it would have to be set low enough to permit the employer to prove it without obligating himself to pay a damages award. The inevitable tendency would be to avoid hairsplitting litigation by simply concluding that a mere disparity between the racial composition of the employer's work force and the composition of the qualified local labor force would be an "arguable violation," even though actual liability could not be established on that basis alone. See Note, 57 N. C. L. Rev. 695, 714–719 (1979).

B. The Court also departs from the "arguable violation" approach by permitting an employer to redress discrimination that lies wholly outside the bounds of Title VII. For example, Title VII provides no remedy for pre-Act discrimination, *Hazelwood School District* v. *United States,* 433 U. S. 299, 309–310 (1977); yet the purposeful discrimination that creates a "traditionally segregated job category" may have entirely predated the Act. More subtly, in assessing a prima facie case of Title VII liability, the composition of the employer's work force is compared to the composition of the pool of workers who meet valid job qualifications. *Hazelwood,* 433 U. S., at 308 and n. 13; *Teamsters* v. *United States,* 431 U. S., at 339–340, and n. 20. When a "job category" is traditionally segregated, however, that pool will reflect the effects of segregation, and the Court's approach goes further and permits a comparison with the composition of the labor force as a whole, in which minorities are more heavily represented.

Strong considerations of equity support an interpretation of Title VII that would permit private affirmative action to reach where Title VII itself does not. The bargain struck in 1964 with the passage of Title VII guaranteed equal opportunity for white and black alike, but where Title VII provides no remedy for blacks, it should not be construed to foreclose private affirmative action from supplying relief. It seems unfair for respondent Weber to argue, as he does, that the asserted scarcity of black craftsmen in Louisiana, the product of historic discrimination, makes Kaiser's training program illegal because it ostensibly absolves Kaiser of all Title VII liability. Brief for Respondents 60. Absent compelling evidence of legislative intent, I would not interpret Title VII itself as a means of "locking in" the effects of segregation for which Title VII provides no remedy. Such a construction, as the Court points out, *ante,* at 204, would be "ironic," given the broad remedial purposes of Title VII.

MR. JUSTICE REHNQUIST's dissent, while it focuses more on what Title VII does not require than on what Title VII forbids, cites several passages that appear to express an intent to "lock in" minorities. In mining the legislative history anew, however, the dissent, in my view, fails to take proper account of our prior cases that have given that history a much more limited reading than that adopted by the dissent. For example, in *Griggs* v. *Duke Power Co.,* 401 U. S. 424, 434–436, and n. 11 (1971), the Court refused to give controlling weight to the memorandum of Senators Clark and Case which the dissent now finds so persuasive. See *post,* at 239–241. And in quoting a statement from that memorandum that an employer would not be "permitted . . . to prefer Negroes for future vacancies," *post,* at 240, the dissent does not point out that the Court's opinion in *Teamsters* v. *United States,* 431 U. S., at 349–351, implies that that language is limited to the protection of established seniority systems. Here, seniority is not in issue because the craft training program is new and does not involve an abrogation of pre-existing seniority rights. In short, the passages marshaled by the dissent are not so compelling as to merit the whip hand over the obvious equity of permitting employers to ameliorate the effects of past discrimination for which Title VII provides no direct relief.

III

I also think it significant that, while the Court's opinion does not foreclose other forms of affirmative action, the Kaiser program it approves is a moderate one. The opinion notes that the program does not afford an absolute preference for blacks, and that it ends when the racial composition of Kaiser's craftwork force matches the racial composition of the local population. It thus operates as a temporary tool for remedying past discrimination without attempting to "maintain" a previously achieved balance. See *University of California Regents* v. *Bakke,* 438 U. S. 265, 342 n. 17 (1978) (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.). Because the duration of the program is finite, it perhaps will end even before the "stage of maturity when action along this line is no longer necessary." *Id.,* at 403 (opinion of BLACKMUN, J.). And if the Court has misperceived the political will, it has the assurance that because the question is statutory Congress may set a different course if it so chooses.

MR. CHIEF JUSTICE BURGER, dissenting.

The Court reaches a result I would be inclined to vote for were I a Member of Congress considering a proposed amendment of Title VII. I cannot join the Court's judgment, however, because it is contrary to the explicit language of the statute and arrived at by means wholly incompatible with long-established principles of separation of powers. Under the guise of statutory "construction," the Court effectively rewrites Title VII to achieve what it regards as a desirable result. It "amends" the statute to do precisely what both its sponsors and its opponents agreed the statute was *not* intended to do.

When Congress enacted Title VII after long study and searching debate, it produced a statute of extraordinary clarity, which speaks directly to the issue we consider in this case. In § 703 (d) Congress provided:

> "It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or

> retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training." 42 U. S. C. § 2000e-2 (d).

Often we have difficulty interpreting statutes either because of imprecise drafting or because legislative compromises have produced genuine ambiguities. But here there is no lack of clarity, no ambiguity. The quota embodied in the collective-bargaining agreement between Kaiser and the Steelworkers unquestionably discriminates on the basis of race against individual employees seeking admission to on-the-job training programs. And, under the plain language of § 703 (d), that is "an *unlawful* employment practice."

Oddly, the Court seizes upon the very clarity of the statute almost as a justification for evading the unavoidable impact of its language. The Court blandly tells us that Congress could not really have meant what it said, for a "literal construction" would defeat the "purpose" of the statute—at least the congressional "purpose" as five Justices divine it today. But how are judges supposed to ascertain the *purpose* of a statute except through the words Congress used and the legislative history of the statute's evolution? One need not even resort to the legislative history to recognize what is apparent from the face of Title VII—that it is specious to suggest that § 703 (j) contains a negative pregnant that permits employers to do what §§ 703 (a) and (d) unambiguously and unequivocally *forbid* employers from doing. Moreover, as MR. JUSTICE REHNQUIST's opinion—which I join—conclusively demonstrates, the legislative history makes equally clear that the supporters and opponents of Title VII reached an agreement about the statute's intended effect. That agreement, expressed so clearly in the language of the statute that no one should doubt its meaning, forecloses the reading which the Court gives the statute today.

Arguably, Congress may not have gone far enough in correcting the effects of past discrimination when it enacted Title VII. The gross discrimination against minorities to which the Court adverts—particularly against Negroes in the building trades and craft unions—is one of the dark chapters in the otherwise great history of the American labor movement. And, I do not question the importance of encouraging voluntary compliance with the purposes and policies of Title VII. But that statute was conceived and enacted to make discrimination against *any* individual illegal, and I fail to see how "voluntary compliance" with the no-discrimination principle that is the heart and soul of Title VII as currently written will be achieved by permitting employers to discriminate against some individuals to give preferential treatment to others.

Until today, I had thought the Court was of the unanimous view that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed" in Title VII. *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 431 (1971). Had Congress intended otherwise, it very easily could have drafted language allowing what the Court permits today. Far from doing so, Congress expressly *prohibited* in §§ 703 (a) and (d) the very discrimination against Brian Weber which the Court today approves. If "affirmative action" programs such as the one presented in this case are to be permitted, it is for Congress, not this Court, to so direct.

It is often observed that hard cases make bad law. I suspect there is some truth to that adage, for the "hard" cases always tempt judges to exceed the limits of their authority, as the Court does today by totally rewriting a crucial part of Title VII to reach a "desirable" result. Cardozo no doubt had this type of case in mind when he wrote:

> "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of

> beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains." The Nature of the Judicial Process 141 (1921).

What Cardozo tells us is beware the "good result," achieved by judicially unauthorized or intellectually dishonest means on the appealing notion that the desirable ends justify the improper judicial means. For there is always the danger that the seeds of precedent sown by good men for the best of motives will yield a rich harvest of unprincipled acts of others also aiming at "good ends."

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

In a very real sense, the Court's opinion is ahead of its time: it could more appropriately have been handed down five years from now, in 1984, a year coinciding with the title of a book from which the Court's opinion borrows, perhaps subconsciously, at least one idea. Orwell describes in his book a governmental official of Oceania, one of the three great world powers, denouncing the current enemy, Eurasia, to an assembled crowd:

> "It was almost impossible to listen to him without being first convinced and then maddened. . . . The speech had been proceeding for perhaps twenty minutes when a messenger hurried onto the platform and a scrap of paper was slipped into the speaker's hand. He unrolled and read it without pausing in his speech. Nothing altered in his voice or manner, or in the content of what he was saying, but suddenly the names were different. Without words

> said, a wave of understanding rippled through the crowd. Oceania was at war with Eastasia! . . . The banners and posters with which the square was decorated were all wrong! . . .
>
> "[T]he speaker had switched from one line to the other actually in mid-sentence, not only without a pause, but without even breaking the syntax." G. Orwell, Nineteen Eighty-Four 181–182 (1949).

Today's decision represents an equally dramatic and equally unremarked switch in this Court's interpretation of Title VII.

The operative sections of Title VII prohibit racial discrimination in employment *simpliciter*. Taken in its normal meaning, and as understood by all Members of Congress who spoke to the issue during the legislative debates, see *infra*, at 231–251, this language prohibits a covered employer from considering race when making an employment decision, whether the race be black or white. Several years ago, however, a United States District Court held that "the dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged Negro employee does not raise a claim upon which Title VII relief may be granted." *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U. S. 273, 278 (1976). This Court unanimously reversed, concluding from the "uncontradicted legislative history" that "Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes . . . ." *Id.*, at 280.

We have never wavered in our understanding that Title VII "prohibits *all* racial discrimination in employment, without exception for any group of particular employees." *Id.*, at 283 (emphasis in original). In *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 431 (1971), our first occasion to interpret Title VII, a unanimous Court observed that "[d]iscriminatory preference, for any group, minority or majority, is precisely and only what Congress has proscribed." And in our most recent discussion of the issue, we uttered words seemingly dispositive of this case: "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." *Furnco Construction Corp.* v. *Waters,* 438 U. S. 567, 579 (1978) (emphasis in original).[1]

Today, however, the Court behaves much like the Orwellian speaker earlier described, as if it had been handed a note indicating that Title VII would lead to a result unacceptable to the Court if interpreted here as it was in our prior decisions. Accordingly, without even a break in syntax, the Court rejects "a literal construction of § 703 (a)" in favor of newly discovered "legislative history," which leads it to a conclusion directly contrary to that compelled by the "uncontradicted legislative history" unearthed in *McDonald* and our other prior decisions. Now we are told that the legislative history of Title VII shows that employers are free to discriminate on the basis of race: an employer may, in the Court's words, "trammel the interests of the white employees" in favor of black employees in order to eliminate "racial imbalance." *Ante,* at 208. Our earlier interpretations of Title VII, like the banners and posters decorating the square in Oceania, were all wrong.

As if this were not enough to make a reasonable observer question this Court's adherence to the oft-stated principle that our duty is to construe rather than rewrite legislation, *United States* v. *Rutherford,* 442 U. S. 544, 555 (1979), the Court also seizes upon § 703 (j) of Title VII as an independent, or at least partially independent, basis for its holding. Totally ignoring the wording of that section, which is obviously addressed to those charged with the responsibility of interpreting the law rather than those who are subject to its proscriptions, and totally ignoring the months of legislative debates preceding the section's introduction and passage, which demonstrate clearly that it was enacted to prevent precisely what occurred in this case, the Court infers from § 703 (j) that "Congress chose not to forbid all voluntary race-conscious affirmative action." *Ante*, at 206.

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[1] Our statements in *Griggs* and *Furnco Construction,* patently inconsistent with today's holding, are not even mentioned, much less distinguished, by the Court.

Thus, by a *tour de force* reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini, the Court eludes clear statutory language, "uncontradicted" legislative history, and uniform precedent in concluding that employers are, after all, permitted to consider race in making employment decisions. It may be that one or more of the principal sponsors of Title VII would have preferred to see a provision allowing preferential treatment of minorities written into the bill. Such a provision, however, would have to have been expressly or impliedly excepted from Title VII's explicit prohibition on all racial discrimination in employment. There is no such exception in the Act. And a reading of the legislative debates concerning Title VII, in which proponents and opponents alike uniformly denounced discrimination in favor of, as well as discrimination against, Negroes, demonstrates clearly that any legislator harboring an unspoken desire for such a provision could not possibly have succeeded in enacting it into law.

I

Kaiser opened its Gramercy, La., plant in 1958. Because the Gramercy facility had no apprenticeship or in-plant craft training program, Kaiser hired as craftworkers only persons with prior craft experience. Despite Kaiser's efforts to locate and hire trained black craftsmen, few were available in the Gramercy area, and as a consequence, Kaiser's craft positions were manned almost exclusively by whites. In February 1974, under pressure from the Office of Federal Contract Compliance to increase minority representation in craft positions at its various plants,[2] and hoping to deter the filing of employment discrimination claims by minorities, Kaiser entered into a collective-bargaining agreement with the United Steelworkers of America (Steelworkers) which created a new on-the-job craft training program at 15 Kaiser facilities, including the Gramercy plant. The agreement required that no less than one minority applicant be admitted to the training program for every nonminority applicant until the percentage of blacks in craft positions equaled the percentage of blacks in the local work force.[3] Eligibility for the craft training programs was to be determined on the basis of plant seniority, with black and white applicants to be selected on the basis of their relative seniority within their racial group.

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[2] The Office of Federal Contract Compliance (OFCC), subsequently renamed the Office of Federal Contract Compliance Programs (OFCCP), is an arm of the Department of Labor responsible for ensuring compliance by Government contractors with the equal employment opportunity requirements established by Exec. Order No. 11246, 3 CFR 339 (1964–1965 Comp.), as amended by Exec. Order No. 11375, 3 CFR 684 (1966–1970 Comp.), and by Exec. Order No. 12086, 43 Fed. Reg. 46501 (1978).

Executive Order 11246, as amended, requires all applicants for federal contracts to refrain from employment discrimination and to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin." § 202 (1), 3 CFR 685 (1966–1970 Comp.), note following 42 U. S. C. § 2000e. The Executive Order empowers the Secretary of Labor to issue rules and regulations necessary and appropriate to achieve its purpose. He, in turn, has delegated most enforcement duties to the OFCC. See 41 CFR § 60-20.1 *et seq.*, § 60-2.24 (1978).

The affirmative action program mandated by 41 CFR § 60-2 (Revised Order No. 4) for nonconstruction contractors requires a "utilization" study to determine minority representation in the work force. Goals for hiring and promotion must be set to overcome any "underutilization" found to exist.

The OFCC employs the "power of the purse" to coerce acceptance of its affirmative action plans. Indeed, in this case, "the district court found that the 1974 collective bargaining agreement reflected less of a desire on Kaiser's part to train black craft workers than a self-interest in satisfying the OFCC in order to retain lucrative government contracts." 563 F. 2d 216, 226 (CA5 1977).

[3] The pertinent portions of the collective-bargaining agreement provide: "It is further agreed that the Joint Committee will specifically review the minority representation in the existing Trade, Craft and Assigned Main-

Brian Weber is white. He was hired at Kaiser's Gramercy plant in 1968. In April 1974, Kaiser announced that it was offering a total of nine positions in three on-the-job training programs for skilled craft jobs. Weber applied for all three programs, but was not selected. The successful candidates—five black and four white applicants—were chosen in accord-

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tenance classifications, in the plants set forth below, and, where necessary, establish certain goals and time tables in order to achieve a desired minority ratio:

"[Gramercy Works listed, among others]

"As apprentice and craft jobs are to be filled, the contractual selection criteria shall be applied in reaching such goals; at a minimum, not less than one minority employee will enter for every non-minority employee entering until the goal is reached unless at a particular time there are insufficient available qualified minority candidates. . . .

. . . . .

"The term 'minority' as used herein shall be as defined in EEOC Reporting Requirements." 415 F. Supp. 761, 763 (ED La. 1976).

The "Joint Committee" subsequently entered into a "Memorandum of Understanding" establishing a goal of 39% as the percentage of blacks that must be represented in each "craft family" at Kaiser's Gramercy plant. *Id.*, at 764. The goal of 39% minority representation was based on the percentage of minority workers available in the Gramercy area.

Contrary to the Court's assertion, it is not at all clear that Kaiser's admission quota is a "temporary measure . . . not intended to maintain racial balance." *Ante*, at 208. Dennis E. English, industrial relations superintendent at the Gramercy plant, testified at trial:

"Once the goal is reached of 39 percent, or whatever the figure will be down the road, I think it's subject to change, once the goal is reached in each of the craft families, at that time, we will then revert to a ratio of what that percentage is, if it remains at 39 percent and we attain 39 percent someday, we will then continue placing trainees in the program at that percentage. The idea, again, being to have a minority representation in the plant that is equal to that representation in the community work force population." App. 69.

ance with the 50% minority admission quota mandated under the 1974 collective-bargaining agreement. Two of the successful black applicants had less seniority than Weber.[4] Weber brought the instant class action[5] in the United States District Court for the Eastern District of Louisiana, alleging that use of the 50% minority admission quota to fill vacancies in Kaiser's craft training programs violated Title VII's prohibition on racial discrimination in employment. The District Court and the Court of Appeals for the Fifth Circuit agreed, enjoining further use of race as a criterion in admitting applicants to the craft training programs.[6]

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[4] In addition to the April programs, the company offered three more training programs in 1974 with a total of four positions available. Two white and two black employees were selected for the programs, which were for "Air Conditioning Repairman" (one position), "Carpenter-Painter" (two positions), and "Insulator" (one position). Weber sought to bid for the insulator trainee position, but he was not selected because that job was reserved for the most senior qualified black employee. *Id.*, at 46.

[5] The class was defined to include the following employees:

"All persons employed by Kaiser Aluminum & Chemical Corporation at its Gramercy, Louisiana, works who are members of the United Steelworkers of America, AFL-CIO Local 5702, who are not members of a minority group, and who have applied for or were eligible to apply for on-the-job training programs since February 1, 1974." 415 F. Supp., at 763.

[6] In upholding the District Court's injunction, the Court of Appeals affirmed the District Court's finding that Kaiser had not been guilty of any past discriminatory hiring or promotion at its Gramercy plant. The court thus concluded that this finding removed the instant case from this Court's line of "remedy" decisions authorizing fictional seniority in order to place proved victims of discrimination in as good a position as they would have enjoyed absent the discriminatory hiring practices. See *Franks* v. *Bowman Transp. Co.,* 424 U. S. 747 (1976). "In the absence of prior discrimination," the Court of Appeals observed, "a racial quota loses its character as an equitable *remedy* and must be banned as an unlawful racial *preference* prohibited by Title VII, §§ 703 (a) and (d). Title VII outlaws preferences for any group, minority or majority, if based on race or other impermissible classifications, but it does not outlaw preferences favoring victims of discrimination." 563 F. 2d, at 224 (em-

II

Were Congress to act today specifically to prohibit the type of racial discrimination suffered by Weber, it would be hard pressed to draft language better tailored to the task than that found in § 703 (d) of Title VII:

> "It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training." 78 Stat. 256, 42 U. S. C. § 2000e-2 (d).

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phasis in original). Nor was the Court of Appeals moved by the claim that Kaiser's discriminatory admission quota is justified to correct a lack of training of Negroes due to past societal discrimination: "Whatever other effects societal discrimination may have, it has had—by the specific finding of the court below—*no effect* on the seniority of any party here." *Id.*, at 226 (emphasis in original). Finally, the Court of Appeals rejected the argument that Kaiser's admission quota does not violate Title VII because it is sanctioned, indeed compelled, by Exec. Order 11246 and regulations issued by the OFCC mandating affirmative action by all Government contractors. See n. 2, *supra*. Citing *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952), the court concluded that "[i]f Executive Order 11246 mandates a racial quota for admission to on-the-job training by Kaiser, *in the absence of any prior hiring or promotion discrimination*, the Executive Order must fall before this direct congressional prohibition [of § 703 (d)]." 563 F. 2d, at 227 (emphasis in original).

Judge Wisdom, in dissent, argued that "[i]f an affirmative action plan, adopted in a collective bargaining agreement, is a reasonable remedy for an *arguable* violation of Title VII, it should be upheld." *Id.*, at 230. The United States, in its brief before this Court, and MR. JUSTICE BLACKMUN, *ante*, p. 209, largely adopt Judge Wisdom's theory, which apparently rests on the conclusion that an employer is free to correct *arguable* discrimination against his black employees by adopting measures that he *knows* will discriminate against his white employees.

Equally suited to the task would be § 703 (a)(2), which makes it unlawful for an employer to classify his employees "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 78 Stat. 255, 42 U. S. C. § 2000e–2 (a)(2).[7]

Entirely consistent with these two express prohibitions is the language of § 703 (j) of Title VII, which provides that the Act is not to be interpreted "to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group" to correct a racial imbalance in the employer's work force. 42 U. S. C. § 2000e–2 (j).[8] Seizing on the word "require," the Court infers that Congress must have intended to "permit" this type of racial discrimination. Not only is this reading of § 703 (j) outlandish in the light of the flat prohibitions of §§ 703 (a) and (d), but, as explained in Part III, it is totally belied by the Act's legislative history.

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[7] Section 703 (a)(1) provides the third express prohibition in Title VII of Kaiser's discriminatory admission quota:

"It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ." 78 Stat. 255, 42 U. S. C. § 2000e–2 (a)(1).

[8] The full text of § 703 (j), 78 Stat. 257, 42 U. S. C. § 2000e–2 (j), provides as follows:

"(j) . . . Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

Quite simply, Kaiser's racially discriminatory admission quota is flatly prohibited by the plain language of Title VII. This normally dispositive fact,[9] however, gives the Court only momentary pause. An "interpretation" of the statute upholding Weber's claim would, according to the Court, " 'bring about an end completely at variance with the purpose of the statute.' " *Ante,* at 202, quoting *United States* v. *Public Utilities Comm'n,* 345 U. S. 295, 315 (1953). To support this conclusion, the Court calls upon the "spirit" of the Act, which it divines from passages in Title VII's legislative history indicating that enactment of the statute was prompted by Congress' desire " 'to open employment opportunities for Negroes in occupations which [had] been traditionally closed to them.' " *Ante,* at 203, quoting 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey).[10] But the legislative history invoked by the Court to avoid the plain language of §§ 703 (a) and (d) simply misses the point. To be sure, the reality of employment discrimination against Negroes provided the primary impetus for passage of Title VII. But this fact by no means supports the proposition that Congress intended to leave employers free to discriminate against white persons.[11] In most

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[9] "If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning.

". . . [W]hen words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn . . . from any extraneous source." *Caminetti* v. *United States,* 242 U. S. 470, 490 (1917).

[10] In holding that Title VII cannot be interpreted to prohibit use of Kaiser's racially discriminatory admission quota, the Court reasons that it would be "ironic" if a law inspired by the history of racial discrimination in employment against blacks forbade employers from voluntarily discriminating against whites in favor of blacks. I see no irony in a law that prohibits *all* voluntary racial discrimination, even discrimination directed at whites in favor of blacks. The evil inherent in discrimination against Negroes is that it is based on an immutable characteristic, utterly irrelevant to employment decisions. The characteristic becomes no less

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immutable and irrelevant, and discrimination based thereon becomes no less evil, simply because the person excluded is a member of one race rather than another. Far from ironic, I find a prohibition on all preferential treatment based on race as elementary and fundamental as the principle that "two wrongs do not make a right."

[11] The only shred of legislative history cited by the Court in support of the proposition that "Congress did not intend wholly to prohibit private and voluntary affirmative action efforts," *ante,* at 203, is the following excerpt from the Judiciary Committee Report accompanying the civil rights bill reported to the House:

"No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities. There is reason to believe, however, that national leadership provided by the enactment of Federal legislation dealing with the most troublesome problems *will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination.*" H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1, p. 18 (1963) (hereinafter H. R. Rep.), quoted *ante,* at 203–204.

The Court seizes on the italicized language to support its conclusion that Congress did not intend to prohibit voluntary imposition of racially discriminatory employment quotas. The Court, however, stops too short in its reading of the House Report. The words immediately following the material excerpted by the Court are as follows:

"It is, however, possible and necessary for the Congress to enact legislation which prohibits and provides the means of terminating *the most serious types of discrimination.* This H. R. 7152, as amended, would achieve in a number of related areas. It would reduce discriminatory obstacles to the exercise of the right to vote and provide means of expediting the vindication of that right. It would make it possible to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public. It would guarantee that there will be no discrimination upon recipients of Federal financial assistance. It would prohibit discrimination in employment, and cases, "[l]egislative history . . . is more vague than the statute we are called upon to interpret." *United States* v. *Public Utilities Comm'n, supra,* at 320 (Jackson, J., concurring). Here, however, the legislative history of Title VII is as clear as the language of §§ 703 (a) and (d), and it irrefutably demonstrates that Congress meant precisely what it said in §§ 703 (a) and (d)—that *no* racial discrimination in employment is permissible under Title VII, not even preferential treatment of minorities to correct racial imbalance.

III

In undertaking to review the legislative history of Title VII, I am mindful that the topic hardly makes for light reading,

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provide means to expedite termination of discrimination in public education. It would open additional avenues to deal with redress of denials of equal protection of the laws on account of race, color, religion, or national origin by State or local authorities." H. R. Rep., pt. 1, p. 18 (emphasis added).

When thus read in context, the meaning of the italicized language in the Court's excerpt of the House Report becomes clear. By dealing with "the most serious types of discrimination," such as discrimination in voting, public accommodations, employment, etc., H. R. 7152 would hopefully inspire "voluntary or local resolution of other forms of discrimination," that is, forms other than discrimination in voting, public accommodations, employment, etc.

One can also infer from the House Report that the Judiciary Committee hoped that federal legislation would inspire voluntary elimination of discrimination against minority groups other than those protected under the bill, perhaps the aged and handicapped to name just two. In any event, the House Report does not support the Court's proposition that Congress, by banning racial discrimination in employment, intended to permit racial discrimination in employment.

Thus, examination of the House Judiciary Committee's report reveals that the Court's interpretation of Title VII, far from being compelled by the Act's legislative history, is utterly without support in that legislative history. Indeed, as demonstrated in Part III, *infra,* the Court's interpretation of Title VII is totally refuted by the Act's legislative history.

but I am also fearful that nothing short of a thorough examination of the congressional debates will fully expose the magnitude of the Court's misinterpretation of Congress' intent.

A

Introduced on the floor of the House of Representatives on June 20, 1963, the bill—H. R: 7152—that ultimately became the Civil Rights Act of 1964 contained no compulsory provisions directed at private discrimination in employment. The bill was promptly referred to the Committee on the Judiciary, where it was amended to include Title VII. With two exceptions, the bill reported by the House Judiciary Committee contained §§ 703 (a) and (d) as they were ultimately enacted. Amendments subsequently adopted on the House floor added § 703's prohibition against sex discrimination and § 703 (d)'s coverage of "on-the-job training."

After noting that "[t]he purpose of [Title VII] is to eliminate . . . discrimination in employment based on race, color, religion, or national origin," the Judiciary Committee's Report simply paraphrased the provisions of Title VII without elaboration. H. R. Rep., pt. 1, p. 26. In a separate Minority Report, however, opponents of the measure on the Committee advanced a line of attack which was reiterated throughout the debates in both the House and Senate and which ultimately led to passage of § 703 (j). Noting that the word "discrimination" was nowhere defined in H. R. 7152, the Minority Report charged that the absence from Title VII of any reference to "racial imbalance" was a "public relations" ruse and that "the administration intends to rely upon its own construction of 'discrimination' as including the lack of racial balance . . . ." H. R. Rep., pt. 1, pp. 67–68. To demonstrate how the bill would operate in practice, the Minority Report posited a number of hypothetical employment situations, concluding in each example that the employer *"may be forced to hire according to race,* to 'racially balance' those who work for him *in every job classification* or be in violation of Federal law." *Id.*, at 69 (emphasis in original).[12]

When H. R. 7152 reached the House floor, the opening speech in support of its passage was delivered by Representative Celler, Chairman of the House Judiciary Committee and the Congressman responsible for introducing the legislation. A portion of that speech responded to criticism "seriously mis-represent[ing] what the bill would do and grossly distort[ing] its effects":

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[12] One example had particular relevance to the instant case:

"Under the power granted in this bill, if a carpenters' hiring hall, say, had 20 men awaiting call, the first 10 in seniority being white carpenters, the union could be forced to pass them over in favor of carpenters beneath them in seniority but of the stipulated race. And if the union roster did not contain the names of the carpenters of the race needed to 'racially balance' the job, the union agent must, then, go into the street and recruit members of the stipulated race in sufficient number to comply with Federal orders, else his local could be held in violation of Federal law." H. R. Rep., pt. 1, p. 71.

From this and other examples, the Minority Report concluded: "That this is, in fact, a not too subtle system of racism-in-reverse cannot be successfully denied." *Id.*, at 73.

Obviously responding to the Minority Report's charge that federal agencies, particularly the Equal Employment Opportunity Commission would equate "discrimination" with "racial imbalance," the Republican sponsors of the bill on the Judiciary Committee stated in a separate Report:

"It must also be stressed that the Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty. In this regard, nothing in the title permits a person to demand employment. . . . Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices. Its primary task is to make certain that the channels of employment are open to persons regardless of their race and that jobs in companies or membership in unions are strictly filled on the basis of qualification." *Id.*, pt. 2, p. 29.

The Republican supporters of the bill concluded their remarks on Title VII by declaring that "[a]ll vestiges of inequality based solely on race must be removed . . . ." *Id.*, pt. 2, p. 30.

> "[T]he charge has been made that the Equal Employment Opportunity Commission to be established by title VII of the bill would have the power to prevent a business from employing and promoting the people it wished, and that a 'Federal inspector' could then order the hiring and promotion only of employees of certain races or religious groups. This description of the bill is entirely wrong. . . .
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> "Even [a] court could not order that any preference be given to any particular race, religion or other group, but would be limited to ordering an end of discrimination. The statement that a Federal inspector could order the employment and promotion only of members of a specific racial or religious group is therefore patently erroneous.
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> * * * * *
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> ". . . The Bill would do no more than prevent . . . employers from discriminating against *or in favor* of workers because of their race, religion, or national origin.
>
> "It is likewise not true that the Equal Employment Opportunity Commission would have power to rectify existing 'racial or religious imbalance' in employment by requiring the hiring of certain people without regard to their qualifications simply because they are of a given race or religion. Only actual discrimination could be stopped." 110 Cong. Rec. 1518 (1964) (emphasis added).

Representative Celler's construction of Title VII was repeated by several other supporters during the House debate.[13]

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[13] Representative Lindsay had this to say:

"This legislation . . . does not, as has been suggested heretofore both on and off the floor, force acceptance of people in . . . jobs . . . because they are Negro. It does not impose quotas or any special privileges of seniority

Thus, the battle lines were drawn early in the legislative struggle over Title VII, with opponents of the measure charging that agencies of the Federal Government such as the Equal Employment Opportunity Commission (EEOC), by interpreting the word "discrimination" to mean the existence of "racial imbalance," would "require" employers to grant preferential treatment to minorities, and supporters responding that the EEOC would be granted no such power and that, indeed, Title VII prohibits discrimination "in favor of workers because of their race." Supporters of H. R. 7152 in the House ultimately prevailed by a vote of 290 to 130,[14] and the measure was sent to the Senate to begin what became the longest debate in that body's history.

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or acceptance. There is nothing whatever in this bill about racial balance as appears so frequently in the minority report of the Committee.

"What the bill does do is prohibit discrimination because of race . . . ." 110 Cong. Rec. 1540 (1964).

Representative Minish added: "Under title VII, employment will be on the basis of merit, not of race. This means that no quota system will be set up, no one will be forced to hire incompetent help because of race or religion, and no one will be given a vested right to demand employment for a certain job." *Id.*, at 1600. Representative Goodell, answering the charge that Title VII would be interpreted "to requir[e] a racial balance," *id.*, at 2557, responded: "There is nothing here as a matter of legislative history that would require racial balancing. . . . We are not talking about a union having to balance its membership or an employer having to balance the number of employees. There is no quota involved. It is a matter of an individual's rights having been violated, charges having been brought, investigation carried out and conciliation having been attempted and then proof in court that there was discrimination and denial of rights on the basis of race or color." *Id.*, at 2558. After H. R. 7152 had been passed and sent to the Senate, Republican supporters of the bill in the House prepared an interpretative memorandum making clear that "title VII *does not permit* the ordering of racial quotas in businesses or unions and does not permit interferences with seniority rights of employees or union members." *Id.*, at 6566 (emphasis added).

[14] Eleven Members did not vote.

B

The Senate debate was broken into three phases: the debate on sending the bill to Committee, the general debate on the bill prior to invocation of cloture, and the debate following cloture.

1

When debate on the motion to refer the bill to Committee opened, opponents of Title VII in the Senate immediately echoed the fears expressed by their counterparts in the House, as is demonstrated by the following colloquy between Senators Hill and Ervin:

> "Mr. ERVIN. I invite attention to . . . Section [703 (a)] . . . .
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> * * * * *
>
> "I ask the Senator from Alabama if the Commission could not tell an employer that he had too few employees, that he had limited his employment, and enter an order, under [Section 703 (a)], requiring him to hire more persons, not because the employer thought he needed more persons, but because the Commission wanted to compel him to employ persons of a particular race.
>
> "Mr. HILL. The Senator is correct. That power is written into the bill. The employer could be forced to hire additional persons . . . ." 110 Cong. Rec. 4764 (1964).[15]

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[15] Continuing with their exchange, Senators Hill and Ervin broached the subject of racial balance:

"Mr. ERVIN. So if the Commissioner . . . should be joined by another member of the Commission in the finding that the employer had too high a percentage, in the Commission's judgment, of persons of the Caucasian race working in his business, they could make the employer either hire, in addition to his present employees, an extra number of Negro employees, or compel him to fire employees of the Caucasian race in order to make a place for Negro employees?

"Mr. HILL. The Senator is correct, although the employer might not

Senator Humphrey, perhaps the primary moving force behind H. R. 7152 in the Senate, was the first to state the proponents' understanding of Title VII. Responding to a political advertisement charging that federal agencies were at liberty to interpret the word "discrimination" in Title VII to require racial balance, Senator Humphrey stated: "[T]he meaning of racial or religious discrimination is perfectly clear. . . . [I]t means a distinction in treatment given to different individuals because of their different race, religion, or national origin." *Id.*, at 5423.[16] Stressing that Title VII "does not limit the employer's freedom to hire, fire, promote or demote for any reasons—or no reasons—so long as his action is not

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need the additional employees, and although they might bring his business into bankruptcy." 110 Cong. Rec. 4764 (1964).

This view was reiterated by Senator Robertson:

"It is contemplated by this title that the percentage of colored and white population in a community shall be in similar percentages in every business establishment that employs over 25 persons. Thus, if there were 10,000 colored persons in a city and 15,000 whites, an employer with 25 employees would, in order to overcome racial imbalance, be required to have 10 colored personnel and 15 white. And if by chance that employer had 20 colored employees, he would have to fire 10 of them in order to rectify the situation. Of course, this works the other way around where whites would be fired." *Id.*, at 5092.

Senator Humphrey interrupted Senator Robertson's discussion, responding: "The bill does not require that at all. If it did, I would vote against it. . . . There is no percentage quota." *Ibid.*

[16] This view was reiterated two days later in the "Bipartisan Civil Rights Newsletter" distributed to the Senate on March 19 by supporters of H. R. 7152:

"3. Defining discrimination: Critics of the civil rights bill have charged that the word 'discrimination' is left undefined in the bill and therefore the door is open for interpretation of this term according to 'whim or caprice.' . . .

. . . . .

"There is no sound basis for uncertainty about the meaning of discrimination in the context of the civil rights bill. It means a distinction in treatment given to different individuals because of their different race, religion, or national origin." *Id.*, at 7477.

based on race," Senator Humphrey further stated that "nothing in the bill would permit any official or court to require any employer or labor union to give preferential treatment to any minority group." *Ibid.*[17]

After 17 days of debate, the Senate voted to take up the bill directly, without referring it to a committee. *Id.*, at 6455. Consequently, there is no Committee Report in the Senate.

2

Formal debate on the merits of H. R. 7152 began on March 30, 1964. Supporters of the bill in the Senate had made elaborate preparations for this second round. Senator Humphrey, the majority whip, and Senator Kuchel, the minority whip, were selected as the bipartisan floor managers on the entire civil rights bill. Responsibility for explaining and defending each important title of the bill was placed on bipartisan "captains." Senators Clark and Case were selected as the bipartisan captains responsible for Title VII. Vaas, Title VII: Legislative History, 7 B. C. Ind. & Com. L. Rev. 431, 444–445 (1966) (hereinafter Title VII: Legislative History).

In the opening speech of the formal Senate debate on the bill, Senator Humphrey addressed the main concern of Title

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[17] Earlier in the debate, Senator Humphrey had introduced a newspaper article quoting the answers of a Justice Department "expert" to the "10 most commonly expressed objections to [Title VII]." Insofar as is pertinent here, the article stated:

"Objection: The law would empower Federal 'inspectors' to require employers to hire by race. White people would be fired to make room for Negroes. Seniority rights would be destroyed. . . .

"Reply: The bill requires no such thing. The five-member Equal Employment Opportunity Commission that would be created would have no powers to order anything. . . .

". . . The bill would not authorize anyone to order hiring or firing to achieve racial or religious balance. An employer will remain wholly free to hire on the basis of his needs and of the job candidate's qualifications. What is prohibited is the refusal to hire someone because of his race or religion. Similarly, the law will have no effect on union seniority rights." *Id.*, at 5094.

VII's opponents, advising that not only does Title VII not require use of racial quotas, *it does not permit* their use. "The truth," stated the floor leader of the bill, "is that this title forbids discriminating against anyone on account of race. This is the simple and complete truth about title VII." 110 Cong. Rec. 6549 (1964). Senator Humphrey continued:

> "Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial 'quota' or to achieve a certain racial balance.
>
> "That bugaboo has been brought up a dozen times; but it is nonexistent. In fact, *the very opposite is true. Title VII prohibits discrimination.* In effect, it says that race, religion and national origin are not to be used as the basis for hiring and firing. Title VII is designed to encourage hiring on the basis of ability and qualifications, not race or religion." *Ibid.* (emphasis added).

At the close of his speech, Senator Humphrey returned briefly to the subject of employment quotas: "It is claimed that the bill would require racial quotas for all hiring, when in fact it provides that race shall not be a basis for making personnel decisions." *Id.*, at 6553.

Senator Kuchel delivered the second major speech in support of H. R. 7152. In addressing the concerns of the opposition, he observed that "[n]othing could be further from the truth" than the charge that "Federal inspectors" would be empowered under Title VII to dictate racial balance and preferential advancement of minorities. *Id.*, at 6563. Senator Kuchel emphasized that seniority rights would in no way be affected by Title VII: "Employers and labor organizations could not discriminate *in favor of or against* a person because of his race, his religion, or his national origin. In such matters . . . the bill now before us . . . is color-blind." *Id.*, at 6564 (emphasis added).

A few days later the Senate's attention focused exclusively on Title VII, as Senators Clark and Case rose to discuss the title of H. R. 7152 on which they shared floor "captain" responsibilities. In an interpretative memorandum submitted jointly to the Senate, Senators Clark and Case took pains to refute the opposition's charge that Title VII would result in preferential treatment of minorities. Their words were clear and unequivocal:

> "There is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited as to any individual." *Id.*, at 7213.[18]

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[18] In obvious reference to the charge that the word "discrimination" in Title VII would be interpreted by federal agencies to mean the absence of racial balance, the interpretative memorandum stated:

"[Section 703] prohibits discrimination in employment because of race, color, religion, sex, or national origin. It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment *or favor,* and those distinctions or differences in treatment *or favor* which are prohibited by [Section 703] are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin." *Id.*, at 7213 (emphasis added).

Earlier in his speech, Senator Clark introduced a memorandum prepared at his request by the Justice Department with the purpose of responding to criticisms of Title VII leveled by opponents of the measure, particularly Senator Hill. With regard to racial balance, the Justice Department stated:

"Finally, it has been asserted that title VII would impose a requirement for 'racial balance.' This is incorrect. There is no provision . . . in title VII . . . that requires or authorizes any Federal agency or Federal court to require preferential treatment for any individual or any group for the purpose of achieving racial balance. . . . No employer is required to maintain any ratio of Negroes to whites . . . . On the contrary, Of particular relevance to the instant case were their observations regarding seniority rights. As if directing their comments at Brian Weber, the Senators said:

> "Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—*or indeed permitted*—to fire whites in order to hire Negroes, *or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.*" *Ibid.* (emphasis added).[19]

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any deliberate attempt to maintain a given balance would almost certainly run afoul of title VII because it would involve a failure or refusal to hire some individual because of his race, color, religion, sex, or national origin. What title VII seeks to accomplish, what the civil rights bill seeks to accomplish is equal treatment for all." *Id.*, at 7207.

[19] A Justice Department memorandum earlier introduced by Senator Clark, see n. 18, *supra*, expressed the same view regarding Title VII's impact on seniority rights of employees:

"Title VII would have no effect on seniority rights existing at the time it takes effect. . . . This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. . . . [A]ssuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of title VII. Employers and labor organizations would simply be under a duty not to discriminate against Negroes because of their race." 110 Cong. Rec. 7207 (1964).

The interpretation of Title VII contained in the memoranda introduced by Senator Clark totally refutes the Court's implied suggestion that Title VII would prohibit an employer from discriminating on the basis of race in order to *maintain* a racial balance in his work force, but would permit him to do so in order to *achieve* racial balance. See *ante*, at 208, and n. 7.

The maintain-achieve distinction is analytically indefensible in any event.

Thus, with virtual clairvoyance the Senate's leading supporters of Title VII anticipated precisely the circumstances of this case and advised their colleagues that the type of minority preference employed by Kaiser would violate Title VII's ban on racial discrimination. To further accentuate the point, Senator Clark introduced another memorandum dealing with common criticisms of the bill, including the charge that racial quotas would be imposed under Title VII. The answer was simple and to the point: "Quotas are themselves discriminatory." *Id.*, at 7218.

Despite these clear statements from the bill's leading and most knowledgeable proponents, the fears of the opponents

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Apparently, the Court is saying that an employer is free to *achieve* a racially balanced work force by discriminating against whites, but that once he has reached his goal, he is no longer free to discriminate in order to maintain that racial balance. In other words, once Kaiser reaches its goal of 39% minority representation in craft positions at the Gramercy plant, it can no longer consider race in admitting employees into its on-the-job training programs, even if the programs become as "all-white" as they were in April 1974.

Obviously, the Court is driven to this illogical position by the glaring statement, quoted in text, of Senators Clark and Case that "any deliberate attempt to *maintain* a racial balance . . . would involve a violation of title VII because *maintaining* such a balance would require an employer to hire or to refuse to hire on the basis of race." 110 Cong. Rec. 7213 (1964) (emphasis added). Achieving a certain racial balance, however, no less than maintaining such a balance, would require an employer to hire or to refuse to hire on the basis of race. Further, the Court's own conclusion that Title VII's legislative history, coupled with the wording of § 703 (j), evinces a congressional intent to leave employers free to employ "private, voluntary, race-conscious affirmative action plans," *ante*, at 208, is inconsistent with its maintain-achieve distinction. If Congress' primary purpose in enacting Title VII was to open employment opportunities previously closed to Negroes, it would seem to make little difference whether the employer opening those opportunities was achieving or maintaining a certain racial balance in his work force. Likewise, if § 703 (j) evinces Congress' intent to permit imposition of race-conscious affirmative action plans, it would seem to make little difference whether the plan was adopted to achieve or maintain the desired racial balance.

were not put to rest. Senator Robertson reiterated the view that "discrimination" could be interpreted by a federal "bureaucrat" to require hiring quotas. *Id.*, at 7418–7420.[20] Senators Smathers and Sparkman, while conceding that Title VII does not in so many words require the use of hiring quotas, repeated the opposition's view that employers would be coerced to grant preferential hiring treatment to minorities by agencies of the Federal Government.[21] Senator Williams was quick to respond:

> "Those opposed to H. R. 7152 should realize that to hire a Negro solely because he is a Negro is racial discrimination, just as much as a 'white only' employment policy. Both forms of discrimination are prohibited by title VII of this bill. The language of that title simply states that race is not a qualification for employment. . . . Some people charge that H. R. 7152 favors the Negro, at the expense of the white majority. But how can the language of equality favor one race or one religion over another? Equality can have only one meaning, and that meaning is self-evident to reasonable men. Those who say that equality means favoritism do violence to common sense." *Id.*, at 8921.

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[20] Senator Robertson's observations prompted Senator Humphrey to make the following offer: "If the Senator can find in title VII . . . any language which provides that an employer will have to hire on the basis of percentage or quota related to color . . . I will start eating the pages one after another, because it is not in there." 110 Cong. Rec. 7420 (1964).

[21] Referring to the EEOC, Senator Smathers argued that Title VII "would make possible the creation of a Federal bureaucracy which would, in the final analysis, cause a man to hire someone whom he did not want to hire, not on the basis of ability, but on the basis of religion, color, or creed . . . ." *Id.*, at 8500. Senator Sparkman's comments were to the same effect. See n. 23, *infra*. Several other opponents of Title VII expressed similar views. See 110 Cong. Rec. 9034–9035 (1964) (remarks of Sens. Stennis and Tower); *id.*, at 9943–9944 (remarks of Sens. Long and Talmadge); *id.*, at 10513 (remarks of Sen. Robertson).

Senator Williams concluded his remarks by noting that Title VII's only purpose is "the elimination of racial and religious discrimination in employment." *Ibid.*[22] On May 25, Senator Humphrey again took the floor to defend the bill against "the well-financed drive by certain opponents to confuse and mislead the American people." *Id.*, at 11846. Turning once again to the issue of preferential treatment, Senator Humphrey remained faithful to the view that he had repeatedly expressed:

> "The title does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. It does not provide that any quota systems may be established to maintain racial balance in employment. In fact, *the title would prohibit preferential treatment for any particular group*, and any person, whether or not a member of any minority group, would be permitted to file a complaint of discriminatory employment practices." *Id.*, at 11848 (emphasis added).

While the debate in the Senate raged, a bipartisan coalition under the leadership of Senators Dirksen, Mansfield, Humphrey, and Kuchel was working with House leaders and representatives of the Johnson administration on a number of amendments to H. R. 7152 designed to enhance its prospects of passage. The so-called "Dirksen-Mansfield" amendment was introduced on May 26 by Senator Dirksen as a substitute for the entire House-passed bill. The substitute bill, which ultimately became law, left unchanged the basic prohibitory language of §§ 703 (a) and (d), as well as the remedial provisions in § 706 (g). It added, however, several provisions defining and clarifying the scope of Title VII's substantive prohibitions. One of those clarifying amendments, § 703 (j), was specifically directed at the opposition's concerns regarding racial balancing and preferential treatment of minorities, providing in pertinent part: "Nothing contained in [Title VII] shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of" a racial imbalance in the employer's work force. 42 U. S. C. § 2000e-2 (j); quoted in full in n. 8, *supra*.

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[22] Several other proponents of H. R. 7152 commented briefly on Title VII, observing that it did not authorize the imposition of quotas to correct racial imbalance. See *id.*, at 9113 (remarks of Sen. Keating); *id.*, at 9881–9882 (remarks of Sen. Allott); *id.*, at 10520 (remarks of Sen. Carlson); *id.*, at 11768 (remarks of Sen. McGovern).

The Court draws from the language of § 703 (j) primary support for its conclusion that Title VII's blanket prohibition on racial discrimination in employment does not prohibit preferential treatment of blacks to correct racial imbalance. Alleging that opponents of Title VII had argued (1) that the Act would be interpreted to require employers with racially imbalanced work forces to grant preferential treatment to minorities and (2) that "employers with racially imbalanced work forces would grant preferential treatment to racial minorities, even if not required to do so by the Act," *ante*, at 205, the Court concludes that § 703 (j) is responsive only to the opponents' first objection and that Congress therefore must have intended to permit voluntary, private discrimination against whites in order to correct racial imbalance.

Contrary to the Court's analysis, the language of § 703 (j) is precisely tailored to the objection voiced time and again by Title VII's opponents. Not once during the 83 days of debate in the Senate did a speaker, proponent or opponent, suggest that the bill would allow employers *voluntarily* to prefer racial minorities over white persons.[23] In light of Title VII's flat prohibition on discrimination "against any individual . . . because of such individual's race," § 703 (a), 42 U. S. C. § 2000e-2 (a), such a contention would have been, in any event, too preposterous to warrant response. Indeed, speakers on both sides of the issue, as the legislative history makes clear, recognized that Title VII would tolerate no *voluntary* racial preference, whether in favor of blacks or whites. The complaint consistently voiced by the opponents was that Title VII, particularly the word "discrimination," would be *interpreted* by federal agencies such as the EEOC to *require* the

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[23] The Court cites the remarks of Senator Sparkman in support of its suggestion that opponents had argued that employers would take it upon themselves to balance their work forces by granting preferential treatment to racial minorities. In fact, Senator Sparkman's comments accurately reflected the opposition's "party line." He argued that while the language of Title VII does not expressly require imposition of racial quotas (no one, of course, had ever argued to the contrary), the law would be applied by

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federal agencies in such a way that "some kind of quota system will be used." *Id.*, at 8619. Senator Sparkman's view is reflected in the following exchange with Senator Stennis:

"Mr. SPARKMAN. At any rate, when the Government agent came to interview an employer who had 100 persons in his employ, the first question would be, 'How many Negroes are you employing?' Suppose the population of that area was 20 percent Negro. Immediately the agent would say, 'You should have at least 20 Negroes in your employ, and they should be distributed among your supervisory personnel and in all the other categories'; and the agent would *insist* that that be done immediately.

. . . . .

"Mr. STENNIS. . . .

"The Senator from Alabama has made very clear his point about employment on the quota basis. Would not the same basis be applied to promotions?

"Mr. SPARKMAN. Certainly it would. As I have said, when the Federal agents came to check on the situation in a small business which had 100 employees, and when the agents said to the employer, 'You must hire 20 Negroes, and some of them must be employed in supervisory capacities,' and so forth, and so on, the agent would also say, 'And you must promote the Negroes, too, in order to distribute them evenly among the various ranks of your employees.'" *Id.*, at 8618 (emphasis added).

Later in his remarks, Senator Sparkman stated: "Certainly the suggestion will be made to a small business that may have a small Government contract . . . that if it does not carry out the suggestion that has been made to the company by an inspector, its Government contract will not be renewed." *Ibid.* Except for the size of the business, Senator Sparkman has seen his prophecy fulfilled in this case.

correction of racial imbalance through the granting of preferential treatment to minorities. Verbal assurances that Title VII would not require—indeed, would not permit—preferential treatment of blacks having failed, supporters of H. R. 7152 responded by proposing an amendment carefully worded to meet, and put to rest, the opposition's charge. Indeed, unlike §§ 703 (a) and (d), which are by their terms directed at entities—*e. g.*, employers, labor unions—whose actions are restricted by Title VII's prohibitions, the language of § 703 (j) is specifically directed at entities—federal agencies and courts—charged with the responsibility of interpreting Title VII's provisions.[24]

In light of the background and purpose of § 703 (j), the irony of invoking the section to justify the result in this case is obvious. The Court's frequent references to the "voluntary" nature of Kaiser's racially discriminatory admission quota bear no relationship to the facts of this case. Kaiser and the Steelworkers acted under pressure from an agency of the Federal Government, the Office of Federal Contract Compliance, which found that minorities were being "underutilized" at Kaiser's plants. See n. 2, *supra*. That is, Kaiser's work force was racially imbalanced. Bowing to that pressure, Kaiser instituted an admissions quota preferring blacks over whites, thus confirming that the fears of Title VII's opponents were well founded. Today, § 703 (j), adopted to allay those fears, is invoked by the Court to uphold imposition of a racial quota under the very circumstances that the section was intended to prevent.[25]

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[24] Compare § 703 (a), 42 U. S. C. § 2000e-2 (a) ("It shall be an unlawful employment practice for an employer . . ."), with § 703 (j), 42 U. S. C. § 2000e-2 (j) ("Nothing contained in this subchapter shall be interpreted . . .").

[25] In support of its reading of § 703 (j), the Court argues that "a prohibition against all voluntary, race-conscious, affirmative action efforts would disserve" the important policy, expressed in the House Report on H. R. 7152, that Title VII leave "management prerogatives, and union

Section 703 (j) apparently calmed the fears of most of the opponents; after its introduction, complaints concerning racial balance and preferential treatment died down considerably.[26] Proponents of the bill, however, continued to reassure the opposition that its concerns were unfounded. In a lengthy defense of the entire civil rights bill, Senator Muskie emphasized that the opposition's "torrent of words . . . cannot obscure this basic, simple truth: Every American citizen has the right to equal treatment—not favored treatment, not complete

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freedoms . . . undisturbed to the greatest extent possible." H. R. Rep., pt. 2, p. 29, quoted *ante,* at 206. The Court thus concludes that "Congress did not intend to limit traditional business freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action." *Ante,* at 207.

The sentences in the House Report immediately following the statement quoted by the Court, however, belie the Court's conclusion:

"Internal affairs of employers and labor organizations must not be interfered with *except to the limited extent that correction is required in discrimination practices.* Its primary task is to make certain that the channels of employment are open to persons *regardless of their race* and that jobs in companies or membership in unions are strictly filled on the basis of qualification." H. R. Rep., pt. 2, p. 29 (emphasis added).

Thus, the House Report invoked by the Court is perfectly consistent with the countless observations elsewhere in Title VII's voluminous legislative history that employers are free to make employment decisions without governmental interference, so long as those decisions are made *without regard to race.* The whole purpose of Title VII was to deprive employers of their "traditional business freedom" to discriminate on the basis of race. In this case, the "channels of employment" at Kaiser were hardly "open" to Brian Weber.

[26] Some of the opponents still were not satisfied. For example, Senator Ervin of North Carolina continued to maintain that Title VII "would give the Federal Government the power to go into any business or industry in the United States . . . and tell the operator of that business whom he had to hire." 110 Cong. Rec. 13077 (1964). Senators Russell and Byrd remained of the view that pressures exerted by federal agencies would compel employers "to give priority definitely and almost completely, in most instances, to the members of the minority group." *Id.,* at 13150 (remarks of Sen. Russell).

individual equality—just equal treatment." 110 Cong. Rec. 12614 (1964). With particular reference to Title VII, Senator Muskie noted that the measure "seeks to afford to all Americans equal opportunity in employment without discrimination. Not equal pay. Not 'racial balance.' Only equal opportunity." *Id.*, at 12617.[27]

Senator Saltonstall, Chairman of the Republican Conference of Senators participating in the drafting of the Dirksen-Mansfield amendment, spoke at length on the substitute bill. He advised the Senate that the Dirksen-Mansfield substitute, which included § 703 (j), "provides no preferential treatment for any group of citizens. In fact, *it specifically prohibits such treatment.*" 110 Cong. Rec. 12691 (1964) (emphasis added).[28]

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[27] Senator Muskie also addressed the charge that federal agencies would equate "discrimination," as that word is used in Title VII, with "racial balance":

". . . [S]ome of the opposition to this title has been based upon its alleged vagueness [and] its failure to define just what is meant by discrimination . . . . I submit that, on either count, the opposition is not well taken. Discrimination in this bill means just what it means anywhere: a distinction in treatment given to different individuals because of their race . . . [a]nd, as a practical matter, we all know what constitutes racial discrimination." *Id.*, at 12617.

Senator Muskie then reviewed the various provisions of § 703, concluding that they "provide a clear and definitive indication of the type of practice which this title seeks to eliminate. Any serious doubts concerning [Title VII's] application would, it seems to me, stem at least partially from the predisposition of the person expressing such doubt." 110 Cong. Rec. 12618 (1964).

[28] The Court states that congressional comments regarding § 703 (j) "were all to the effect that employers would not be *required* to institute preferential quotas to avoid Title VII liability." *Ante*, at 207 n. 7 (emphasis in original). Senator Saltonstall's statement that Title VII of the Dirksen-Mansfield substitute, which contained § 703 (j), "specifically prohibits" preferential treatment for any racial group disproves the Court's observation. Further, in a major statement explaining the purpose of the Dirksen-Mansfield substitute amendments, Senator Humphrey said of

On June 9, Senator Ervin offered an amendment that would entirely delete Title VII from the bill. In answer to Senator Ervin's contention that Title VII "would make the members of a particular race special favorites of the laws," *id.*, at 13079, Senator Clark retorted:

> "The bill does not make anyone higher than anyone else. It establishes no quotas. It leaves an employer free to select whomever he wishes to employ. . . .
>
> "All this is subject to one qualification, and that qualification, is to state: 'In your activity as an employer . . . you must not discriminate because of the color of a man's skin. . . .'
>
> "That is all this provision does. . . .
>
> "It merely says, 'When you deal in interstate commerce, you must not discriminate on the basis of race . . . .'" *Id.*, at 13080.

The Ervin amendment was defeated, and the Senate turned its attention to an amendment proposed by Senator Cotton to limit application of Title VII to employers of at least 100 employees. During the course of the Senate's deliberations on the amendment, Senator Cotton had a revealing discussion with Senator Curtis, also an opponent of Title VII. Both men expressed dismay that Title VII would prohibit preferential hiring of "members of a minority race in order to enhance their opportunity":

> "MR. CURTIS. Is it not the opinion of the Senator that any individuals who provide jobs for a class of people who have perhaps not had sufficient opportunity for jobs should be commended rather than outlawed?

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§ 703 (j): "This subsection does not represent any change in the substance of the title. It does state clearly and accurately what we have maintained all along about the bill's intent and meaning." 110 Cong. Rec. 12723 (1964). What Senator Humphrey had "maintained all along about the bill's intent and meaning," was that it neither required *nor permitted* imposition of preferential quotas to eliminate racial imbalances.

"Mr. COTTON. Indeed it is." *Id.*, at 13086.[29]

Thus, in the only exchange on the Senate floor raising the possibility that an employer might wish to reserve jobs for minorities in order to assist them in overcoming their employment disadvantage, both speakers concluded that Title VII prohibits such, in the words of the Court, "voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy." *Ante,* at 204. Immediately after this discussion, both Senator Dirksen and Senator Humphrey took the floor in defense of the 25-employee limit contained in the Dirksen-Mansfield substitute bill, and neither Senator disputed the conclusions of Senators Cotton and Curtis. The Cotton amendment was defeated.

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[29] The complete exchange between Senators Cotton and Curtis, insofar as is pertinent here, is as follows:

"Mr. COTTON. . . .

. . . . .

"I would assume that anyone who will administer the laws in future years will not discriminate between the races. If I were a Negro, and by dint of education, training, and hard work I had amassed enough property as a Negro so that I had a business of my own—and there are many of them in this country—and I felt that, having made a success of it myself, I wanted to help people of my own race to step up as I had stepped up, I think I should have the right to do so. I think I should have the right to employ Negroes in my own establishment and put out a helping hand to them if I so desired. I do not believe that anyone in Washington should be permitted to come in and say, 'You cannot employ all Negroes. You must have some Poles. You must have some Yankees.' . . .

. . . . .

"Mr. CURTIS. . . .

"The Senator made reference to the fact that a member of a minority race might become an employer and should have a right to employ members of his race in order to give them opportunity. Would not the same thing follow, that a member of a majority race might wish to employ almost entirely, or entirely, members of a minority race in order to enhance their opportunity? And is it not true that under title VII as written, that would constitute discrimination?

"Mr. COTTON. It certainly would, if someone complained about it and felt that he had been deprived of a job, and that it had been given to a member of a minority race because of his race and not because of some other reason." *Id.*, at 13086.

This colloquy refutes the Court's statement that "[t]here was no suggestion after the adoption of § 703 (j) that wholly voluntary, race-conscious, affirmative action efforts would in themselves constitute a violation of Title VII." *Ante*, at 207 n. 7.

3

On June 10, the Senate, for the second time in its history, imposed cloture on its members. The limited debate that followed centered on proposed amendments to the Dirksen-Mansfield substitute. Of some 24 proposed amendments, only 5 were adopted.

As the civil rights bill approached its final vote, several supporters rose to urge its passage. Senator Muskie adverted briefly to the issue of preferential treatment: "It has been said that the bill discriminates in favor of the Negro at the expense of the rest of us. It seeks to do nothing more than to lift the Negro from the status of inequality to one of *equality* of treatment." 110 Cong. Rec. 14328 (1964) (emphasis added). Senator Moss, in a speech delivered on the day that the civil rights bill was finally passed, had this to say about quotas:

> "The bill does not accord to any citizen advantage or preference—it does not fix quotas of employment or school population—it does not force personal association. What it does is to prohibit public officials and those who invite the public generally to patronize their businesses or to apply for employment, to utilize the offensive, humiliating, and cruel practice of discrimination on the basis of race. In short, the bill does not accord special consideration; it establishes *equality.*" *Id.,* at 14484 (emphasis added).

Later that day, June 19, the issue was put to a vote, and the Dirksen-Mansfield substitute bill was passed.

C

The Act's return engagement in the House was brief. The House Committee on Rules reported the Senate version without amendments on June 30, 1964. By a vote of 289 to 126, the House adopted H. Res. 789, thus agreeing to the Senate's amendments of H. R. 7152.[30] Later that same day, July 2, the President signed the bill and the Civil Rights Act of 1964 became law.

IV

Reading the language of Title VII, as the Court purports to do, "against the background of [its] legislative history . . . and the historical context from which the Act arose," *ante*, at 201, one is led inescapably to the conclusion that Congress fully understood what it was saying and meant precisely what it said. Opponents of the civil rights bill did not argue that employers would be permitted under Title VII voluntarily to grant preferential treatment to minorities to correct racial imbalance. The plain language of the statute too clearly prohibited such racial discrimination to admit of any doubt. They argued, tirelessly, that Title VII would be interpreted by federal agencies and their agents to require unwilling employers to racially balance their work forces by granting preferential treatment to minorities. Supporters of H. R. 7152 responded, equally tirelessly, that the Act would not be so interpreted because not only does it not require preferential treatment of minorities, it does not *permit* preferential treatment of any race for any reason. It cannot be doubted that the proponents of Title VII understood the meaning of their words, for "[s]eldom has similar legislation been debated with greater consciousness of the need for 'legislative history,' or with greater care in the making thereof, to guide the courts in interpreting and applying the law." Title VII: Legislative History, at 444.

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[30] Only three Congressmen spoke to the issue of racial quotas during the House's debate on the Senate amendments. Representative Lindsay stated: "[W]e wish to emphasize also that this bill does not require quotas, racial balance, or any of the other things that the opponents have been saying about it." 110 Cong. Rec. 15876 (1964). Representative McCulloch echoed this understanding, remarking that "[t]he bill does not permit the Federal Government to require an employer or union to hire or accept for membership a quota of persons from any particular minority group." *Id.*, at 15893. The remarks of Representative MacGregor, quoted by the Court, *ante*, at 207-208, n. 7, are singularly unhelpful. He merely noted that by adding § 703 (j) to Title VII of the House bill, "[t]he Senate . . . spelled out [the House's] intentions more specifically." 110 Cong. Rec. 15893 (1964).

To put an end to the dispute, supporters of the civil rights bill drafted and introduced § 703 (j). Specifically addressed to the opposition's charge, § 703 (j) simply enjoins federal agencies and courts from interpreting Title VII to require an employer to prefer certain racial groups to correct imbalances in his work force. The section says nothing about voluntary preferential treatment of minorities because such racial discrimination is plainly proscribed by §§ 703 (a) and (d). Indeed, had Congress intended to except voluntary, race-conscious preferential treatment from the blanket prohibition of racial discrimination in §§ 703 (a) and (d), it surely could have drafted language better suited to the task than § 703 (j). It knew how. Section 703 (i) provides:

> "Nothing contained in [Title VII] shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation." 78 Stat. 257, 42 U. S. C. § 2000e-2 (i).

V

Our task in this case, like any other case involving the construction of a statute, is to give effect to the intent of Congress. To divine that intent, we traditionally look first to the words of the statute and, if they are unclear, then to the statute's legislative history. Finding the desired result hopelessly foreclosed by these conventional sources, the Court turns to a third source—the "spirit" of the Act. But close examination of what the Court proffers as the spirit of the Act reveals it as the spirit animating the present majority, not the 88th Congress. For if the spirit of the Act eludes the cold words of the statute itself, it rings out with unmistakable clarity in the words of the elected representatives who made the Act law. It is *equality*. Senator Dirksen, I think, captured that spirit in a speech delivered on the floor of the Senate just moments before the bill was passed:

> ". . . [T]oday we come to grips finally with a bill that advances the enjoyment of living; but, more than that, it advances the equality of opportunity.
>
> "I do not emphasize the word 'equality' standing by itself. It means equality of opportunity in the field of education. It means equality of opportunity in the field of employment. It means equality of opportunity in the field of participation in the affairs of government . . . .
>
> "That is it.
>
> "Equality of opportunity, if we are going to talk about conscience, is the mass conscience of mankind that speaks in every generation, and it will continue to speak long after we are dead and gone." 110 Cong. Rec. 14510 (1964).

There is perhaps no device more destructive to the notion of equality than the *numerus clausus*—the quota. Whether described as "benign discrimination" or "affirmative action," the racial quota is nonetheless a creator of castes, a two-edged sword that must demean one in order to prefer another. In passing Title VII, Congress outlawed *all* racial discrimination, recognizing that no discrimination based on race is benign, that no action disadvantaging a person because of his color is affirmative. With today's holding, the Court introduces into

Title VII a tolerance for the very evil that the law was intended to eradicate, without offering even a clue as to what the limits on that tolerance may be. We are told simply that Kaiser's racially discriminatory admission quota "falls on the permissible side of the line." *Ante,* at 208. By going not merely *beyond,* but directly *against* Title VII's language and legislative history, the Court has sown the wind. Later courts will face the impossible task of reaping the whirlwind.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 78-1007

H. Earl Fullilove et al., Petitioners,
v.
Philip M. Klutznick, Secretary of Commerce of the United States, et al.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[July 2, 1980]

Mr. Chief Justice Burger announced the judgment of the Court and delivered an opinion in which Mr. Justice White and Mr. Justice Powell joined.

We granted certiorari to consider a facial constitutional challenge to a requirement in a congressional spending program that, absent an administrative waiver, 10% of the federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned and controlled by members of statutorily identified minority groups. 441 U. S. 960.

I

In May 1977, Congress enacted the Public Works Employment Act of 1977, Pub. L. 95-28, 91 Stat. 116, which amended the Local Public Works Capital Development and Investment Act of 1976, Pub. L. 94-369, 90 Stat. 999. The 1977 amendments authorized an additional $4 billion appropriation for federal grants to be made by the Secretary of Commerce, acting through the Economic Development Administration (EDA), to state and local governmental entities for use in local public works projects. Among the changes made was the addition of the provision that has become the focus of this litigation. Section 103 (f)(2) of the 1977 Act, referred to as the "minority business enterprise" or "MBE" provision, requires that: [1]

> "Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term "minority business enterprise" means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."

In late May 1977, the Secretary promulgated regulations governing administration of the grant program which were amended two months later.[2] In August 1977, the EDA issued guidelines supplementing the statute and regulations with respect to minority business participation in local public works grants,[3] and in October 1977, the EDA issued a technical bulletin promulgating detailed instructions and information to assist grantees and their contractors in meeting the 10% MBE requirement.[4]

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[1] 91 Stat. 116, 42 U. S. C. (1976 ed., Supp. II) § 6705 (f)(2).

[2] 42 Fed. Reg. 27432 (1977), as amended by 42 Fed. Reg. 35822 (1977); 13 CFR part 317 (1978).

[3] U. S. Department of Commerce, Economic Development Administration, Local Public Works Program, Round II, Guidelines For 10% Minority Business Participation In LPW Grants (1977); App. 156a–167a.

[4] U. S. Department of Commerce, Economic Development Administration, EDA Minority Enterprise (MBE) Technical Bulletin (Additional Assistance and Information Available to Grantees and Their Contractors In Meeting The 10% MBE Requirement) (1977); App. 129a–155a.

On November 30, 1977, petitioners filed a complaint in the United States District Court for the Southern District of New York seeking declaratory and injunctive relief to enjoin enforcement of the MBE provision. Named as defendants were the Secretary of Commerce, as the program administrator, and the State and City of New York, as actual and potential project grantees. Petitioners are several associations of construction contractors and subcontractors, and a firm engaged in heating, ventilation and air conditioning work. Their complaint alleged that they had sustained economic injury due to enforcement of the 10% MBE requirement and that the MBE provision on its face violated the Equal Protection Clause of the Fourteenth Amendment, the equal protection component of the Due Process Clause of the Fifth Amendment, and various statutory antidiscrimination provisions.[5]

After a hearing held the day the complaint was filed, the District Court denied a requested temporary restraining order and scheduled the matter for an expedited hearing on the merits. On December 19, 1977, the District Court issued a memorandum opinion upholding the validity of the MBE program and denying the injunctive relief sought. *Fullilove* v. *Kreps,* 443 F. Supp. 253 (SDNY 1977).

The United States Court of Appeals for the Second Circuit affirmed, 584 F. 2d 600 (CA2 1978), holding that "even under the most exacting standard of review the MBE provision passes constitutional muster." *Id.,* at 603. Considered in the context of many years of governmental efforts to remedy past racial and ethnic discrimination, the court found it "difficult to imagine" any purpose for the program other than to remedy such discrimination. *Id.,* at 605. In its view, a number of factors contributed to the legitimacy of the MBE provision, most significant of which was the narrowed focus and limited extent of the statutory and administrative program, in size, impact and duration, *id.*, at 607–608; the court looked also to the holdings of other courts of appeals and district courts that the MBE program was constitutional, *id.*, at 608–609.[6] It expressly rejected petitioners' contention that the 10% MBE requirement violated the equal protection guarantees of the Constitution.[7] 584 F. 2d, at 609.

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[5] 16 Stat. 144, 42 U. S. C. § 1981; 17 Stat. 13, 42 U. S. C. § 1983; 12 Stat. 284, 17 Stat. 13, 42 U. S. C. § 1985; Title VI, § 601 of the Civil Rights Act of 1964, 78 Stat. 252, 42 U. S. C. § 2000d; Title VII, § 701 *et seq.* of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*

II

A

The MBE provision was enacted as part of the Public Works Employment Act of 1977, which made various amendments to Title I of the Local Public Works Capital Development and Investment Act of 1976. The 1976 Act was intended as a short-term measure to alleviate the problem of national unemployment and to stimulate the national economy by assisting state and local governments to build needed public facilities.[8] To accomplish these objectives, the Congress authorized the Secretary of Commerce, acting through the Economic Development Administration, to make grants to state and local governments for construction, renovation, repair or other improvement of local public works projects.[9] The 1976 Act placed a number of restrictions on project eligibility designed to assure that federal monies were targeted to accomplish the legislative purposes.[10] It established criteria to determine grant priorities and to apportion federal funds among political jurisdictions.[11] Those criteria directed grant funds toward areas of high unemployment.[12] The statute authorized the appropriation of up to $2 billion for a period ending in September 1977; [13] this appropriation was soon consumed by grants made under the program.

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[6] *Ohio Contractors Association* v. *Economic Development Administration*, 580 F. 2d 213 (CA6 1978); *Constructors Association* v. *Kreps*, 573 F. 2d 811 (CA3 1978); *Rhode Island Chapter, Associated General Contractors* v. *Kreps*, 450 F. Supp. 338 (RI 1978); *Associated General Contractors* v. *Secretary of Commerce*, No. 77–4218 (Kan. Dec. 19, 1977); *Carolinas Branch, Associated General Contractors* v. *Kreps*, 442 F. Supp. 392 (SC 1977); *Ohio Contractors Assoc.* v. *Economic Development Administration*, 452 F. Supp. 1013 (SD Ohio 1977); *Montana Contractors' Association* v. *Secretary of Commerce*, 439 F. Supp. 1331 (Mont. 1977); *Florida East Coast Chapter* v. *Secretary of Commerce*, No. 77–8351 (SD Fla. Nov. 3, 1977); but see *Associated General Contractors* v. *Secretary of Commerce*, 441 F. Supp. 955 (CD Cal. 1977), vacated and remanded for consideration of mootness, 438 U. S. 909 (1978), on remand 459 F. Supp. 766 (CD Cal.), appeal docketed *sub nom. Armistead* v. *Associated General Contractors of California*, No. 78–1107.

[7] Both the Court of Appeals and the District Court rejected petitioners' various statutory arguments without extended discussion. 584 F. 2d, at 608, n. 15; 443 F. Supp., at 262.

Early in 1977, Congress began consideration of expanded appropriations and amendments to the grant program. Under administration of the 1976 appropriation, referred to as "Round I" of the local public works program, applicants seeking some $25 billion in grants had competed for the $2 billion in available funds; of nearly 25,000 applications, only some 2,000 were granted.[14] The results provoked widespread concern for the fairness of the allocation process.[15] Because the 1977 Act would authorize the appropriation of an additional $4 billion to fund "Round II" of the grant program,[16] the congressional hearings and debates concerning the amendments focused primarily on the politically sensitive problems of priority and geographic distribution of grants under the supplemental appropriation.[17] The result of this attention was inclusion in the 1977 Act of provisions revising the allocation criteria of the 1976 legislation. Those provisions, however, retained the underlying objective to direct funds into areas of high unemployment.[18] The 1977 Act also added new restrictions on applicants seeking to qualify for federal grants; [19] among these was the MBE provision.

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[8] H. R. Rep. No. 94-1077, p. 2 (1976). The bill discussed in this report was accepted by the Conference Committee in preference to the Senate version. S. Conf. Rep. No. 94-939, p. 1 (1976); H. R. Conf. Rep. No. 94-1260, p. 1 (1976).

[9] 90 Stat. 999, 42 U. S. C. § 6702.

[10] 90 Stat. 1000, 42 U. S. C. § 6705.

[11] 90 Stat. 1000, 42 U. S. C. § 6707.

[12] 90 Stat. 1001, 42 U. S. C. § 6707 (c).

[13] 90 Stat. 1002, 42 U. S. C. § 6710. The actual appropriation of the full amount authorized was made several weeks later. Pub. L. 94-447, 90 Stat. 1497.

[14] 123 Cong. Rec. S1355 (Jan. 25, 1977) (remarks of Sen. Randolph).

[15] See, *e. g.*, Hearings on H. R. 11 and related bills before the Subcommittee on Economic Development of the House Committee on Public

The origin of the provision was an amendment to the House version of the 1977 Act, H. R. 11, offered on the floor of the House on Feb. 23, 1977 by Representative Mitchell of Maryland.[20] As offered, the amendment provided: [21]

> "Notwithstanding any other provision of law, no grant shall be made under this Act for any local public works project unless at least 10 per centum of the articles, materials, and supplies which will be used in such project are procured from minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 percent of which is owned by minority group members or, in case of

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Works and Transportation, 95th Cong., 1st Sess. (1977); H. R. Rep. No. 95-20 (1977); S. Rep. No. 95-38 (1977).

[16] 91 Stat. 119, 42 U. S. C. (1976 ed., Supp. II) § 6710. The actual appropriation of the full authorized amount was made the same day. Pub. L. 95-29, 91 Stat. 123.

[17] *E. g.*, Hearings, cited, at n. 15, *supra;* 123 Cong. Rec. H1401-H1462 (Feb. 24, 1977); 123 Cong. Rec. S3851-S3930 (Mar. 10, 1977).

[18] 91 Stat. 117, 42 U. S. C. (1976 ed. Supp. II) § 6707.

[19] 91 Stat. 116, 42 U. S. C. (1976 ed. Supp. II) § 6705.

[20] 123 Cong. Rec. H1388 (Feb. 23, 1977) (remarks of Rep. Mitchell).

[21] *Id.*, at H1389.

> publicly owned businesses, at least 51 percent of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."

The sponsor stated that the objective of the amendment was to direct funds into the minority business community, a sector of the economy sorely in need of economic stimulus but which, on the basis of past experience with government procurement programs, could not be expected to benefit significantly from the public works program as then formulated.[22] He cited the marked statistical disparity that in fiscal year 1976 less than 1% of all federal procurement was concluded with minority business enterprises, although minorities comprised 15–18% of the population.[23] When the amendment was put forward during debate on H. R. 11,[24] Rep. Mitchell reiterated the need to ensure that minority firms would obtain a fair opportunity to share in the benefits of this government program.[25]

The amendment was put forward not as a new concept, but rather one building upon prior administrative practice. In his introductory remarks, the sponsor rested his proposal squarely on the ongoing program under § 8 (a) of the Small

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[22] *Id.*, at H1388–H1389.

[23] *Id.*, at H1389.

[24] *Id.*, at H1436 (Feb. 24, 1977). As reintroduced, the first sentence of the amendment was modified to provide:

"Notwithstanding any other provision of law, no grant shall be made under this Act for any local public works project unless at least 10 per centum of the dollar volume of each contract shall be set aside for minority business enterprise and, or, unless at least 10 per centum of the articles, materials, and supplies which will be used in such project are procured from minority business enterprises."

[25] *Id.*, at H1436–H1437.

Business Act of 1958, Pub. L. 85–536, § 2 (8), 72 Stat. 389, which, as will become evident, served as a model for the administrative program developed to enforce the MBE provision:[26]

> "The first point in opposition will be that you cannot have a set-aside. Well, Madam Chairman, we have been doing this for the last 10 years in Government. The 8–A set-aside under SBA has been tested in the courts more than 30 times and has been found to be legitimate and bona fide. We are doing it in this bill."

Although the proposed MBE provision on its face appeared mandatory, requiring compliance with the 10% minority participation requirement "[n]otwithstanding any other provision of law," its sponsor gave assurances that existing administrative practice would ensure flexibility in administration if, with respect to a particular project, compliance with the 10% requirement proved infeasible.[27]

Representative Roe of New Jersey then suggested a change of language expressing the twin intentions (1) that the federal administrator would have discretion to waive the 10% requirement where its application was not feasible, and (2) that the grantee would be mandated to achieve at least 10% participation by minority businesses unless infeasibility was demonstrated.[28] He proposed as a substitute for the first sentence of the amendment the language that eventually was enacted:[29]

> "Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per-

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[26] *Id.*, at H1437.

[27] *Id.*, at H1437–H1438.

[28] *Id.*, at H1438 (remarks of Rep. Roe).

[29] *Ibid.*

> cent of the amount of each grant shall be expended for minority business enterprises."

The sponsor fully accepted the suggested clarification because it retained the directive that the initial burden of compliance would fall on the grantee. That allocation of burden was necessary because, as he put it, "every agency of the Government has tried to figure out a way to avoid doing this very thing. Believe me, these bureaucracies can come up with 10,000 ways to avoid doing it."[30]

Other supporters of the MBE amendment echoed the sponsor's concern that a number of factors, difficult to isolate or quantify, seemed to impair access by minority businesses to public contracting opportunities. Representative Conyers of Michigan spoke of the frustration of the existing situation, in which, due to the intricacies of the bidding process and through no fault of their own, minority contractors and businessmen were unable to gain access to government contracting opportunities.[31]

Representative Biaggi of New York then spoke to the need for the amendment to "promote a sense of economic equality in the Nation." He expressed the view that without the amendment, "this legislation may be potentially inequitable to minority businesses and workers" in that it would perpetuate the historic practices that have precluded minority businesses from effective participation in public contracting opportunities.[32] The amendment was accepted by the House.[33]

Two weeks later, the Senate considered S. 427, its package of amendments to the Local Public Works Capital Development and Investment Act of 1976. At that time Senator

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[30] *Id.* (remarks of Rep. Mitchell).

[31] *Id.*, at H1440 (remarks of Rep. Conyers).

[32] *Id.*, at H1440-H1441 (remarks of Rep. Biaggi).

[33] *Id.*, at H1441.

Brooke of Massachusetts introduced an MBE amendment, worded somewhat differently than the House version, but aimed at achieving the same objectives.[34] His statement in support of the 10% requirement reiterated and summarized the various expressions on the House side that the amendment was necessary to ensure that minority businesses were not deprived of access to the government contracting opportunities generated by the public works program.[35]

The Senate adopted the amendment without debate.[36] The Conference Committee, called to resolve differences between the House and Senate versions of the Public Works Employment Act of 1977, adopted the language approved by the House for the MBE provision.[37] The Conference Reports added only the comment, "This provision shall be dependent on the availability of minority business enterprises located in the project area." [38]

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[34] *Id.*, at S3909–S3910 (Mar. 10, 1977) (remarks of Sen. Brooke). The first paragraph of Senator Brooke's formulation was identical to the version originally offered by Representative Mitchell, quoted in the text at pp. 6–7, *supra*. A second paragraph of Senator Brooke's amendment provided:

"This section shall not be interpreted to defund projects with less than 10 percent minority participation in areas with minority population of less than 5 percent. In that event, the correct level of minority participation will be predetermined by the Secretary in consultation with EDA and based upon its lists of qualified minority contractors and its solicitation of competitive bids from all minority firms on those lists." 123 Cong. Rec. S3910 (Mar. 10, 1977).

[35] *Id.*, at S3910.

[36] *Ibid.*

[37] S. Conf. Rep. No. 95–110, p. 11 (1977); H. R. Conf. Rep. No. 95–230, p. 11 (1977).

[38] *Ibid.* The Conference Committee bill was agreed to by the Senate, 123 Cong. Rec. S6755–S6757 (Apr. 29, 1977), and by the House, 123 Cong. Rec. H3920–H3935 (May 3, 1977), and was signed into law on May 3, 1977.

The device of a 10% MBE participation requirement, subject to administrative waiver, was thought to be required to assure minority business participation; otherwise it was thought that repetition of the prior experience could be expected, with participation by minority business accounting for an inordinately small percentage of government contracting. The causes of this disparity were perceived as involving the longstanding existence and maintenance of barriers impairing access by minority enterprises to public contracting opportunities, or sometimes as involving more direct discrimination, but not as relating to lack—as Senator Brooke put it—"of capable and qualified minority enterprises who are ready and willing to work."[39] In the words of its sponsor, the MBE provision was "designed to begin to redress this grievance that has been extant for so long."[40]

B

The legislative objectives of the MBE provision must be considered against the background of ongoing efforts directed toward deliverance of the century-old promise of equality of economic opportunity. The sponsors of the MBE provision in the House and the Senate expressly linked the provision to the existing administrative programs promoting minority opportunity in government procurement, particularly those related to § 8 (a) of the Small Business Act of 1958.[41] Section 8 (a) delegates to the SBA an authority and an obligation "whenever it determines such action is necessary" to enter into contracts with any procurement agency of the Federal Government to furnish required goods or services, and, in turn, to enter into subcontracts with small businesses for the performance of such contracts. This authority lay dormant for a decade. Commencing in 1968, however, the SBA was directed by the President[42] to develop a program pursuant to its § 8 (a) authority to assist small business concerns owned and controlled by "socially or economically disadvantaged" persons to achieve a competitive position in the economy.

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[39] 123 Cong. Rec. S3910 (Mar. 10, 1977) (remarks of Sen. Brooke).

[40] *Id.*, at H1440 (Feb. 24, 1977) (remarks of Rep. Mitchell).

[41] *Id.*, at H1437; *Id.*, at S3910 (Mar. 10, 1977) (remarks of Sen. Brooke).

At the time the MBE provision was enacted, the regulations governing the § 8 (a) program defined "social or economic disadvantage" as follows:[43]

> "An applicant concern must be owned and controlled by one or more persons who have been deprived of the opportunity to develop and maintain a competitive position in the economy because of social or economic disadvantage. Such disadvantage may arise from cultural, social, chronic economic circumstances or background, or other similar cause. Such persons include, but are not limited to, black Americans, American Indians, Spanish-Americans, oriental Americans, Eskimos, and Aleuts. . . ."

The guidelines accompanying these regulations provided that a minority business could not be maintained in the program, even when owned and controlled by members of the identified minority groups, if it appeared that the business had not been deprived of the opportunity to develop and maintain a competitive position in the economy because of social or economic disadvantage.[44]

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[42] Exec. Order No. 11375, 3 CFR 684 (1966–1970 Comp.); Exec. Order No. 11518, 3 CFR 907 (1966–1970 Comp.).

[43] 13 CFR § 124.8-1 (c)(1) (1977).

[44] U. S. Small Business Administration, Office of Business Development, Section 8 (a) Program, Small Business Administration Standard Operatin Procedure 15-16 (1976); see H. R. Rep. No. 94-468, p. 30 (1975) ("[T]he relevant rules and regulations require such applicant to identify with the disadvantages of his or her racial group generally, and that such disadvantages must have personally affected the applicant's ability to enter into the mainstream of the business community."); U. S. Small Business Administration, Office of Minority Small Business and Capital Own-

As the Congress began consideration of the Public Works Employment Act of 1977, the House Committee on Small Business issued a lengthy report summarizing its activities, including its evaluation of the ongoing § 8 (a) program.[45] One chapter of the report, entitled "Minority Enterprise and Allied Problems of Small Business," summarized a 1975 committee report of the same title dealing with this subject matter.[46] The original report, prepared by the House Subcommittee on SBA Oversight and Minority Enterprise, observed:[47]

> "The subcommittee is acutely aware that the economic policies of this Nation must function within and be guided by our constitutional system which guarantees 'equal protection of the laws.' *The effects of past inequities stemming from racial prejudice have not remained in the past. The Congress has recognized the reality that past discriminatory practices have, to some degree, adversely affected our present economic system.*
>
> "While minority persons comprise about 16 percent of the Nation's population, of the 13 million businesses in the United States, only 382,000, or approximately 3.0 percent, are owned by minority individuals. The most recent data from the Department of Commerce also indicates that the gross receipts of all businesses in this country totals about $2,540.8 billion, and of this amount only $16.6 billion, or about 0.65 percent was realized by minority business concerns.

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ership Development, MSB & COD Programs, Small Business Administration Standard Operating Procedure 20 (1979) ("[T]he social disadvantage of individuals, including those within the above-named [racial and ethnic] groups, shall be determined by SBA on a case-by-case basis. Membership alone in any group is not conclusive that an individual is socially disadvantaged.").

[45] H. R. Rep. No. 94-1791 (1977).

[46] *Id.*, at 124-149.

[47] H. R. Rep. No. 94-468, pp. 1-2 (1975).

> "These statistics are not the result of random chance. The presumption must be made that past discriminatory systems have resulted in present economic inequities. In order to right this situation, the Congress has formulated certain remedial programs designed to uplift those socially or economically disadvantaged persons to a level where they may effectively participate in the business mainstream of our economy.*
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> "*For the purposes of this report the term 'minority' shall include only such minority individuals as are considered to be economically or socially disadvantaged." [48] (Emphasis added.)

The 1975 report gave particular attention to the § 8 (a) program, expressing disappointment with its limited effectiveness.[49] With specific reference to government construction contracting, the report concluded, "there are substantial § 8 (a) opportunities in the area of Federal construction, but . . . the practices of some agencies preclude the realization of that potential." [50] The subcommittee took "full notice . . . as evidence for its consideration" of reports submitted to the Congress by the General Accounting Office and by the U. S.

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[48] Another chapter of the 1977 Report of the House Committee on Small Business summarized a review of the SBA's Security Bond Guarantee Program, making specific reference to minority business participation in the construction industry:

"The very basic problem disclosed by the testimony is that, over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities. Minorities, until recently, have not participated to any measurable extent, in our total business system generally, or in the construction industry, in particular." H. R. Rep. No. 94-1791, p. 182 (1977), quoting from H. R. Rep. No. 94-840, p. 17 (1976).

[49] H. R. Rep. No. 94-468, pp. 28-30 (1975).

[50] *Id.*, at 29.

Commission on Civil Rights, which reflected a similar dissatisfaction with the effectiveness of the § 8 (a) program.[51] The Civil Rights Commission report discussed at some length the barriers encountered by minority businesses in gaining access to government contracting opportunities at the federal, state and local levels.[52] Among the major difficulties confronting minority businesses were deficiencies in working capital, inability to meet bonding requirements, disabilities caused by an inadequate "track record," lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, preselection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses.[53]

The subcommittee report also gave consideration to the operations of the Office of Minority Business Enterprise (OMBE), an agency of the Department of Commerce organized pursuant to Executive Orders[54] to formulate and coordinate federal efforts to assist the development of minority businesses. The report concluded that OMBE efforts were "totally inadequate" to achieve its policy of increasing opportunities for subcontracting by minority businesses on public contracts. OMBE efforts were hampered by a "glaring lack of specific objectives which each prime contractor should be required to achieve," by a "lack of enforcement provisions," and by a "lack of any meaningful monitoring system."[55]

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[51] *Id.*, at 11; U. S. General Accounting Office, "Questionable Effectiveness of the § 8 (a) Procurement Program" (1975); U. S. Commission on Civil Rights, "Minorities and Women as Government Contractors" (1975).

[52] U. S. Commission on Civil Rights, "Minorities and Women as Government Contractors" 16–28, 86–88 (1975).

[53] *Ibid.*

[54] Exec. Order No. 11458, 3 CFR 779 (1966–1970 Comp.); Exec. Order No. 11625, 3 CFR 616 (1971–1975 Comp.).

[55] H. R. Rep. No. 94–468, p. 32 (1975). For other congressional observations with respect to the effect of past discrimination on current business opportunities for minorities, see, *e. g.*, H. R. Rep. No. 92–1615, p. 3 (1972); H. R. Rep. No. 95–949, p. 8 (1978); S. Rep. No. 95–1070, pp. 14–

Against this backdrop of legislative and administrative programs, it is inconceivable that Members of both Houses were not fully aware of the objectives of the MBE provision and of the reasons prompting its enactment.

C

Although the statutory MBE provision itself outlines only the bare bones of the federal program, it makes a number of critical determinations: the decision to initiate a limited racial and ethnic preference; the specification of a minimum level for minority business participation; the identification of the minority groups that are to be encompassed by the program; and the provision for an administrative waiver where application of the program is not feasible. Congress relied on the administrative agency to flesh out this skeleton, pursuant to delegated rulemaking authority, and to develop an administrative operation consistent with legislative intentions and objectives.

As required by the Public Works Employment Act of 1977, the Secretary of Commerce promulgated regulations to set into motion "Round II" of the federal grant program.[56] The regulations require that construction projects funded under the legislation must be performed under contracts awarded by competitive bidding, unless the federal administrator has made a determination that in the circumstances relating to a particular project some other method is in the public interest. Where competitive bidding is employed, the regulations echo the statute's requirement that contracts are to be awarded on the basis of the "lowest responsive bid submitted by a bidder meeting established criteria of responsibility," and they also restate the MBE requirement.[57]

15, (1978); S. Rep. No. 96-31, pp. 107, 123-124 (1979); see also, *e. g.*, H. R. Doc. No. 92-169, p. 4 (1971); H. R. Doc. No. 92-194, p. 1 (1972).

[56] 91 Stat. 117, 42 U. S. C. (1976 ed. Supp. II) § 6706; 13 CFR part 317 (1978).

[57] 91 Stat. 116, 42 U. S. C. (1976 ed. Supp. II) § 6705 (e)(1); 13 CFR § 317.19 (1978).

EDA also has published guidelines devoted entirely to the administration of the MBE provision. The guidelines outline the obligations of the grantee to seek out all available, qualified, bona fide MBE's, to provide technical assistance as needed, to lower or waive bonding requirements where feasible, to solicit the aid of the Office of Minority Business Enterprise, the Small Business Administration or other sources for assisting MBE's in obtaining required working capital, and to give guidance through the intricacies of the bidding process.[58]

EDA regulations contemplate that, as anticipated by Congress, most local public works projects will entail the award of a predominant prime contract, with the prime contractor assuming the above grantee obligations for fulfilling the 10% MBE requirement.[59] The EDA guidelines specify that when prime contractors are selected through competitive bidding, bids for the prime contract "shall be considered by the Grantee to be responsive only if at least 10 percent of the contract funds are to be expended for MBE's."[60] The administrative program envisions that competitive incentive will motivate aspirant prime contractors to perform their obligations under the MBE provision so as to qualify as "responsive" bidders. And, since the contract is to be awarded to the lowest responsive bidder, the same incentive is expected to motivate prime contractors to seek out the most competitive of the available, qualified, bona fide minority firms. This too is consistent with the legislative intention.[61]

The EDA guidelines also outline the projected administration of applications for waiver of the 10% MBE requirement, which may be sought by the grantee either before or during the bidding process.[62] The technical bulletin issued by EDA discusses in greater detail the processing of waiver requests, clarifying certain issues left open by the guidelines. It specifies that waivers may be total or partial, depending on the circumstances,[63] and it illustrates the projected operation of the waiver procedure by posing hypothetical questions with projected administrative responses. One such hypothetical is of particular interest, for it indicates the limitations on the scope of the racial or ethnic preference contemplated by the federal program when a grantee or its prime contractor is confronted with an available, qualified, bona fide minority business enterprise who is not the lowest competitive bidder. The hypothetical provides: [64]

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[58] Guidelines, n. 3, *supra,* at 2–7; App. 157a–160a. The relevant portions of the guidelines are set out in the Appendix to this opinion, ¶ 1.

[59] *Id.,* at 2; App. 157a; see 123 Cong. Rec. H1437–H1438 (Feb. 24, 1977) (remarks of Rep. Mitchell and Rep. Roe).

[60] Guidelines, n. 3, *supra,* at 8; App. 161a.

[61] See 123 Cong. Rec. H1437–H1438 (Feb. 24, 1977) (remarks of Rep. Mitchell and Rep. Roe).

> "*Question:* Should a request for waiver of the 10% requirement based on an unreasonable price asked by an MBE ever be granted?
>
> "*Answer:* It is possible to imagine situations where an MBE might ask a price for its product or services that is unreasonable and where, therefore, a waiver is justified. However, before a waiver request will be honored, the following determinations will be made:
>
> "a) The MBE's quote is unreasonably priced. This determination should be based on the nature of the product or service of the subcontractor, the geographic location of the site and of the subcontractor, prices of similar products or services in the relevant market area, and general business conditions in the market area. Furthermore, a subcontractor's price should not be considered unreasonable if he is merely trying to cover his costs because the price results from disadvantage which affects

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[62] Guidelines, n. 3, *supra*, at 13–16; App. 165a–167a. The relevant portions of the guidelines are set out in the Appendix to this opinion, ¶ 2.

[63] Technical Bulletin, n. 4, *supra*, at 5; App. 136a.

[64] *Id.*, at 9–10; App. 143a.

> the MBE's cost of doing business or results from discrimination.
>
> "b) The contractor has contacted other MBEs and has no meaningful choice but to accept an unreasonably high price."

This announced policy makes clear the administrative understanding that a waiver or partial waiver is justified (and will be granted) to avoid subcontracting with a minority business enterprise at an "unreasonable" price, *i. e.*, a price above competitive levels which cannot be attributed to the minority firm's attempt to cover costs inflated by the present effects of disadvantage or discrimination.

This administrative approach is consistent with the legislative intention. It will be recalled that in the report of the House Subcommittee on SBA Oversight and Minority Enterprise the subcommittee took special care to note that when using the term "minority" it intended to include "only such minority individuals as are considered to be economically or socially disadvantaged."[65] The subcommittee also was cognizant of existing administrative regulations designed to ensure that firms maintained on the lists of bona fide minority business enterprises be those whose competitive position is impaired by the effects of disadvantage and discrimination. In its report, the subcommittee expressed its intention that these criteria continue to govern administration of the SBA's § 8 (a) program.[66] The sponsors of the MBE provision, in their reliance on prior administrative practice, intended that the term "minority business enterprise" would be given that same limited application; this even found expression in the legislative debates, where Representative Roe made the point:[67]

> ". . . when we are talking about companies held by

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[65] Text accompanying n. 48, *supra*.

[66] H. R. Rep. No. 94-468, p. 30 (1975).

[67] 123 Cong. Rec. H1439 (Feb. 24, 1977) (remarks of Rep. Roe).

> minority groups . . . [c]ertainly people of a variety of backgrounds are included in that. That is not really a measurement. They are talking about people in the minority and deprived."

The EDA technical bulletin provides other elaboration of the MBE provision. It clarifies the definition of "minority group members."[68] It also indicates EDA's intention "to allow credit for utilization of MBE's only for those contracts in which involvement constitutes a basis for strengthening the long-term and continuing participation of the MBE in the construction and related industries."[69] Finally, the bulletin outlines a procedure for the processing of complaints of "unjust participation by an enterprise or individuals in the MBE program," or of improper administration of the MBE requirement.[70]

III

When we are required to pass on the constitutionality of an Act of Congress, we assume "the gravest and most delicate duty that this Court is called on to perform." *Blodgett* v. *Holden,* 275 U. S. 142, 148 (1927) (opinion of Holmes, J.). A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to "provide for the . . . general Welfare of the United States" and "to enforce by appropriate legislation" the equal protection guarantees of the Fourteenth Amendment. Art. I, § 8, cl. 1; Amdt. 14, § 5. In *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U. S. 94, 102 (1973), we accorded

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[68] Technical Bulletin, n. 4, *supra,* at 1; App. 131a–132a. These definitions are set out in the Appendix to this opinion, ¶ 3.

[69] *Id.,* at 3; App. 135a.

[70] *Id.,* at 19; App. 155a. The relevant portions of the technical bulletin are set out in the Appendix to this opinion, ¶ 4.

"great weight to the decisions of Congress" even though the legislation implicated fundamental constitutional rights guaranteed by the First Amendment. The rule is not different when a congressional program raises equal protection concerns. See, *e. g., Cleland* v. *National College of Business,* 435 U. S. 213 (1978); *Mathews* v. *De Castro,* 429 U. S. 181 (1976).

Here we pass, not on a choice made by a single judge or a school board but on a considered decision of the Congress and the President. However, in no sense does that render it immune from judicial scrutiny and it "is not to say we 'defer' to the judgment of the Congress . . . on a constitutional question," or that we would hesitate to invoke the Constitution should we determine that Congress has overstepped the bounds of its constitutional power. *Columbia Broadcasting, supra,* 412 U. S., at 103.

The clear objective of the MBE provision is disclosed by our necessarily extended review of its legislative and administrative background. The program was designed to ensure that, to the extent federal funds were granted under the Public Works Employment Act of 1977, grantees who elect to participate would not employ procurement practices that Congress had decided might result in perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority businesses to public contracting opportunities. The MBE program does not mandate the allocation of federal funds according to inflexible percentages solely based on race or ethnicity.

Our analysis proceeds in two steps. At the outset, we must inquire whether the *objectives* of this legislation are within the power of Congress. If so, we must go on to decide whether the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible *means* for achieving the congressional objectives and does not violate the equal protection component of the Due Process Clause of the Fifth Amendment.

A

(1)

In enacting the MBE provision, it is clear that Congress employed an amalgam of its specifically delegated powers. The Public Works Employment Act of 1977, by its very nature, is primarily an exercise of the Spending Power. U. S. Const., Art. I, § 8, cl. 1. This Court has recognized that the power to "provide for the . . . general Welfare" is an independent grant of legislative authority, distinct from other broad congressional powers. *Buckley* v. *Valeo,* 424 U. S. 1, 90–91 (1976); *United States* v. *Butler,* 297 U. S. 1, 65–66 (1936). Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal monies upon compliance by the recipient with federal statutory and administrative directives. This Court has repeatedly upheld against constitutional challenge the use of this technique to induce governments and private parties to cooperate voluntarily with federal policy. *E. g., California Bankers Assn.* v. *Shultz,* 416 U. S. 21 (1974); *Lau* v. *Nichols,* 414 U. S. 563 (1974); *Oklahoma* v. *United States Civil Service Comm'n,* 330 U. S. 127 (1947); *Helvering* v. *Davis,* 301 U. S. 619 (1937); *Steward Machine Co.* v. *Davis,* 301 U. S. 548 (1937).

The MBE program is structured within this familiar legislative pattern. The program conditions receipt of public works grants upon agreement by the state or local governmental grantee that at least 10% of the federal funds will be devoted to contracts with minority businesses, to the extent this can be accomplished by overcoming barriers to access and by awarding contracts to bona fide MBE's. It is further conditioned to require that MBE bids on these contracts are competitively priced, or might have been competitively priced but for the present effects of prior discrimination. Admittedly, the problems of administering this program with respect to these conditions may be formidable. Although the primary responsibility for ensuring minority participation falls upon the grantee, when the procurement practices of the grantee involve the award of a prime contract to a general or prime contractor, the obligations to assure minority participation devolve upon the private contracting party; this is a contractual condition of eligibility for award of the prime contract.

Here we need not explore the outermost limitations on the objectives attainable through such an application of the Spending Power. The reach of the Spending Power, within its sphere, is at least as broad as the regulatory powers of Congress. If, pursuant to its regulatory powers, Congress could have achieved the objectives of the MBE program, then it may do so under the Spending Power. And we have no difficulty perceiving a basis for accomplishing the objectives of the MBE program through the Commerce Power insofar as the program objectives pertain to the action of private contracting parties, and through the power to enforce the equal protection guarantees of the Fourteenth Amendment insofar as the program objectives pertain to the action of state and local grantees.

(2)

We turn first to the Commerce Power. U. S. Const., Art. I, § 8, cl. 3. Had Congress chosen to do so, it could have drawn on the Commerce Clause to regulate the practices of prime contractors on federally funded public works projects. *Katzenbach* v. *McClung,* 379 U. S. 294 (1964); *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U. S. 241 (1964). The legislative history of the MBE provision shows that there was a rational basis for Congress to conclude that the subcontracting practices of prime contractors could perpetuate the prevailing impaired access by minority businesses to public contracting opportunities, and that this inequity has an effect on interstate commerce. Thus Congress could take necessary and proper action to remedy the situation. *Ibid.*

It is not necessary that these prime contractors be shown responsible for any violation of antidiscrimination laws. Our cases dealing with application of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, express no doubt of the congressional authority to prohibit practices "challenged as perpetuating the effects of [not unlawful] discrimination occurring prior to the effective date of the Act." *Franks* v. *Bowman Transporation Co.,* 424 U. S. 747, 761 (1976); see *California Brewers Assn.* v. *Bryant,* — U. S. —, No. 78-1548 (Feb. 20, 1980); *International Brotherhood of Teamsters* v. *United States,* 431 U. S. 324 (1977); *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405 (1975); *Griggs* v. *Duke Power Co.,* 401 U. S. 424 (1971). Insofar as the MBE program pertains to the actions of private prime contractors, the Congress could have achieved its objectives under the Commerce Clause. We conclude that in this respect the objectives of the MBE provision are within the scope of the Spending Power.

(3)

In certain contexts, there are limitations on the reach of the Commerce Power to regulate the actions of state and local governments. *National League of Cities* v. *Usery,* 426 U. S. 833 (1976). To avoid such complications, we look to § 5 of the Fourteenth Amendment for the power to regulate the procurement practices of state and local grantees of federal funds. *Fitzpatrick* v. *Bitzer,* 427 U. S. 445 (1976). A review of our cases persuades us that the objectives of the MBE program are within the power of Congress under § 5 "to enforce by appropriate legislation" the equal protection guarantees of the Fourteenth Amendment.

In *Katzenbach* v. *Morgan,* 384 U. S. 641 (1966), we equated the scope of this authority with the broad powers expressed in the Necessary and Proper Clause, U. S. Const., Art. I, § 8, cl. 18. "Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." 384 U. S., at 651. In *Katzenbach,* the Court upheld § 4 (e) of the Voting Rights Act of 1965, 79 Stat. 439, which prohibited application of state English-language literacy requirements to otherwise qualified voters who had completed the sixth grade in an accredited American school in which a language other than English was the predominant medium of instruction. To uphold this exercise of congressional authority, the Court found no prerequisite that application of a literacy requirement violate the Equal Protection Clause. 384 U. S., at 648–649. It was enough that the Court could perceive a basis upon which Congress could reasonably predicate a judgment that application of literacy qualifications within the compass of § 4 (e) would discriminate in terms of access to the ballot and consequently in terms of access to the provision or administration of governmental programs. *Id.,* at 652–653.

Four years later, in *Oregon* v. *Mitchell,* 400 U. S. 112 (1970), we upheld § 201 of the Voting Rights Act Amendments of 1970, 84 Stat. 315, which imposed a five-year nationwide prohibition on the use of various voter-qualification tests and devices in federal, state and local elections. The Court was unanimous, albeit in separate opinions, in concluding that Congress was within its authority to prohibit the use of such voter qualifications; Congress could reasonably determine that its legislation was an appropriate method of attacking the perpetuation of prior purposeful discrimination, even though the use of these tests or devices might have discriminatory effects only. See *City of Rome* v. *United States,* — U. S. —, No. 78–1840, slip op., at 18–19 (Apr. 22, 1980). Our cases reviewing the parallel power of Congress to enforce the provisions of the Fifteenth Amendment, U. S. Const., Amdt. 15, § 2, confirm that congressional authority extends beyond the prohibition of purposeful discrimination to encompass state action that has discriminatory impact perpetuating the effects of past discrimination. *South*

Carolina v. *Katzenbach,* 383 U. S. 301 (1966); cf. *City of Rome, supra.*

With respect to the MBE provision, Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination. Congress, of course, may legislate without compiling the kind of "record" appropriate with respect to judicial or administrative proceedings. Congress had before it, among other data, evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises. This disparity was considered to result not from any lack of capable and qualified minority businesses, but from the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, even absent any intentional discrimination or other unlawful conduct. Although much of this history related to the experience of minority businesses in the area of federal procurement, there was direct evidence before the Congress that this pattern of disadvantage and discrimination existed with respect to state and local construction contracting as well. In relation to the MBE provision, Congress acted within its competence to determine that the problem was national in scope.

Although the Act recites no preambulary "findings" on the subject, we are satisfied that Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination. Accordingly, Congress reasonably determined that the prospective elimination of these barriers to minority firm access to public contracting opportunities generated by the 1977 Act was appropriate to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection of the laws. Insofar as the MBE program pertains to the actions of state and local grantees, Congress could have achieved its objectives by use of its power under § 5 of the Fourteenth Amendment. We conclude that in this respect the objectives of the MBE provision are within the scope of the Spending Power.

(4)

There are revelant similarities between the MBE program and the federal spending program reviewed in *Lau* v. *Nichols,* 414 U. S. 563 (1974). In *Lau,* a language barrier "effectively foreclosed" non-English-speaking Chinese pupils from access to the educational opportunities offered by the San Francisco public school system. *Id.,* at 564–566. It had not been shown that this had resulted from any discrimination, purposeful or otherwise, or from other unlawful acts. Nevertheless, we upheld the constitutionality of a federal regulation applicable to public school systems receiving federal funds that prohibited the utilization of "criteria or methods of administration *which have the effect* . . . of defeating or substantially impairing accomplishment of the objectives of the [educational] program as respect individuals of a particular race, color, or national origin." *Id.,* at 568 (emphasis added). Moreover, we upheld application to the San Francisco school system, as a recipient of federal funds, of a requirement that "[w]here inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students." *Ibid.*

It is true that the MBE provision differs from the program approved in *Lau* in that the MBE program directly employs racial and ethnic criteria as a means to accomplish congressional objectives; however, these objectives are essentially the same as those approved in *Lau.* Our holding in *Lau* is instructive on the exercise of congressional authority by way of the MBE provision. The MBE program, like the federal regulations reviewed in *Lau,* primarily regulates state action in the use of federal funds voluntarily sought and accepted by the grantees subject to statutory and administrative conditions. The MBE participation requirement is directed at the utilization of criteria, methods or practices thought by Congress to have the effect of defeating, or substantially impairing, access by the minority business community to public funds made available by congressional appropriations.

B

We now turn to the question whether, as a *means* to accomplish these plainly constitutional objectives, Congress may use racial and ethnic criteria, in this limited way, as a condition attached to a federal grant. We are mindful that "[i]n no matter should we pay more deference to the opinion of Congress than in its choice of instrumentalities to perform a function that is within its power," *National Mutual Insurance Co.* v. *Tidewater Transfer Co.,* 337 U. S. 582, 603 (1949) (opinion of Jackson, J.). However, Congress may employ racial or ethnic classifications in exercising its Spending or other legislative Powers only if those classifications do not violate the equal protection component of the Due Process Clause of the Fifth Amendment. We recognize the need for careful judicial evaluation to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal.

Again, we stress the limited scope of our inquiry. Here we are not dealing with a remedial decree of a court but with the legislative authority of Congress. Furthermore, petitioners have challenged the constitutionality of the MBE provision on its face; they have not sought damages or other specific relief for injury allegedly flowing from specific applications of the program; nor have they attempted to show that as applied in identified situations the MBE provision violated the constitutional or statutory rights of any party to this case.[71] In these circumstances, given a reasonable construction and in light of its projected administration, if we find the MBE program on its face to be free of constitutional defects, it must be upheld as within congressional power. *Parker* v. *Levy*, 417 U. S. 733, 760 (1974); *Fortson* v. *Secretary of State of Georgia*, 379 U. S. 433, 438–439 (1965); *Aptheker* v. *Secretary of State*, 378 U. S. 500, 515 (1964); see *United States* v. *Raines*, 362 U. S. 17, 20–24 (1960).

Our review of the regulations and guidelines governing administration of the MBE provision reveals that Congress enacted the program as a strictly remedial measure; moreover, it is a remedy that functions prospectively, in the manner of an injunctive decree. Pursuant to the administrative program, grantees and their prime contractors are required to seek out all available, qualified, bona fide MBE's; they are required to provide technical assistance as needed, to lower or waive bonding requirements where feasible, to solicit the aid of the Office of Minority Business Enterprise, the Small Business Administration or other sources for assisting MBE's to obtain required working capital, and to give guidance through the intricacies of the bidding process. *Supra*, at 17. The program assumes that grantees who undertake these efforts in good faith will obtain at least 10% participation by minority business enterprises. It is recognized that, to achieve this target, contracts will be awarded to available, qualified, bona fide MBE's even though they are not the lowest competitive bidders, so long as their higher bids, when challenged, are found to reflect merely attempts to cover costs inflated by the present effects of prior disadvantage and discrimination. *Supra,* at 18–19. There is available to the grantee a provision authorized by Congress for administrative waiver on a case-by-case basis should there be a demonstration that, despite affirmative efforts, this level of participation cannot be achieved without departing from the objectives of the program. *Supra,* at 17–18. There is also an administrative mechanism, including a complaint procedure, to ensure that only bona fide MBE's are encompassed by the remedial program, and to prevent unjust participation in the program by those minority firms whose access to public contracting opportunities is not impaired by the effects of prior discrimination. *Supra,* at 19–20.

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[71] In their complaint, in order to establish standing to challenge the validity of the program, petitioners alleged as "[s]pecific examples" of economic injury three instances where one of their number assertedly would have been awarded a public works contract but for enforcement of the MBE provision. Petitioners requested only declaratory and injunctive relief against continued enforcement of the MBE provision; they did not seek any remedy for these specific instances of assertedly unlawful discrimination. App. 12a–13a, 17a–19a.

(1)

As a threshold matter, we reject the contention that in the remedial context the Congress must act in a wholly "color-blind" fashion. In *Swann* v. *Charlotte-Mecklenberg Board of Education,* 402 U. S. 1, 18–21 1971), we rejected this argument in considering a court-formulated school desegration remedy on the basis that examination of the racial composition of student bodies was an unavoidable starting point and that racially based attendance assignments were permissible so long as no absolute racial balance of each school was required. In *McDaniel* v. *Barresi,* 402 U. S. 39, 41 (1971), citing *Swann,* we observed that "[i]n this remedial process, steps will almost invariably require that students be assigned 'differently because of their race.' . . . Any other approach would freeze the status quo that is the very target of all desegregation processes." (Citations omitted.) And in *North Carolina Board of Education* v. *Swann,* 402 U. S. 43 (1971), we invalidated a state law that absolutely forbade assignment of any student on account of race because it foreclosed implementation of desegregation plans that were designed to remedy constitutional violations. We held that "[j]ust as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy." 402 U. S., at 46.

In these school desegregation cases we dealt with the authority of a federal court to formulate a remedy for unconstitutional racial discrimination. However, the authority of a court to incorporate racial criteria into a remedial decree also extends to statutory violations. Where federal antidiscrimination laws have been violated, an equitable remedy may in the appropriate case include a racial or ethnic factor. *Franks* v. *Bowman Transportation Co.,* 424 U. S. 747 (1976); see *International Brotherhood of Teamsters* v. *United States,* 431 U. S. 324 (1977); *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405 (1975). In another setting, we have held that a state may employ racial criteria that are reasonably necessary to assure compliance with federal voting rights legislation, even though the state action does not entail the remedy of a constitutional violation. *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey,* 430 U. S. 144, 147–165 (1977) (opinion of WHITE, J., joined by BRENNAN, BLACKMUN, and STEVENS, JJ.); *id.,* at 180–187 (BURGER, C. J., dissenting on other grounds).

When we have discussed the remedial powers of a federal court, we have been alert to the limitation that "[t]he power of the federal courts to restructure the operation of local and state governmental entities is not plenary. . . . [A] federal court is required to tailor the scope of the remedy to fit the nature and extent of the . . . violation." *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406, 419–420 (1977) (quoting *Milliken* v. *Bradley*, 418 U. S. 717, 738 (1974), and *Swann* v. *Charlotte-Mecklenburg Board of Education*, *supra*, 402 U. S., at 16).

Here we deal, as we noted earlier, not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees. Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state action to avoid such conduct. *Supra*, at 22–28.

(2)

A more specific challenge to the MBE program is the charge that it impermissibly deprives nonminority businesses of access to at least some portion of the government contracting opportunities generated by the Act. It must be conceded that by its objective of remedying the historical impairment of access, the MBE provision can have the effect of awarding some contracts to MBE's which otherwise might be awarded to other businesses, who may themselves be innocent of any prior discriminatory actions. Failure of nonminority firms to receive certain contracts is, of course, an incidental consequence of the program, not part of its objective; similarly, past impairment of minority-firm access to public contracting opportunities may have been an incidental consequence of "business-as-usual" by public contracting agencies and among prime contractors.

It is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such "a sharing of the burden" by innocent parties is not impermissible. *Franks, supra,* at 777; see *Albemarle Paper Co., supra; United Jewish Organization, supra.* The actual "burden" shouldered by nonminority firms is relatively light in this connection when we consider the scope of this public works program as compared with overall construction contracting opportunities.[72] Moreover, although we may assume that the complaining parties are innocent of any discriminatory conduct, it was within congressional power to act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities.

(3)

Another challenge to the validity of the MBE program is the assertion that it is underinclusive—that it limits its benefit to specified minority groups rather than extending its remedial objectives to all businesses whose access to government contracting is impaired by the effects of disadvantage or discrimination. Such an extention would, of course, be appropriate for Congress to provide; it is not a function for the courts.

Even in this context, the well-established concept that a legislature may take one step at a time to remedy only part of a broader problem is not without relevance. See *Dandridge* v. *Williams,* 397 U. S. 471 (1970); *Williamson* v. *Lee Optical Co.,* 348 U. S. 483 (1955). We are not reviewing a federal program that seeks to confer a preferred status upon a nondisadvantaged minority or to give special assistance to only one of several groups established to be similarly disadvantaged minorities. Even in such a setting, the Congress is not without a certain authority. See, *e. g., Personnel Administrator of Massachusetts* v. *Feeney,* 442 U. S. 256 (1979); *Califano* v. *Webster,* 430 U. S. 313 (1977); *Morton* v. *Mancari,* 417 U. S. 535 (1974).

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[72] The Court of Appeals relied upon Department of Commerce statistics to calculate that the $4.2 billion in federal grants conditioned upon compliance with the MBE provision amounted to about 2.5% of the total of nearly $170 billion spent on construction in the United States during 1977. Thus, the 10% minimum minority business participation contemplated by this program would account for only 0.25% of the annual expenditure for construction work in the United States. *Fullilove* v. *Kreps,* 584 F. 2d 600, 607 (CA2 1978).

The Congress has not sought to give select minority groups a preferred standing in the construction industry, but has embarked on a remedial program to place them on a more equitable footing with respect to public contracting opportunities. There has been no showing in this case that Congress has inadvertently effected an invidious discrimination by excluding from coverage an identifiable minority group that has been the victim of a degree of disadvantage and discrimination equal to or greater than that suffered by the groups encompassed by the MBE program. It is not inconceivable that on very special facts a case might be made to challenge the congressional decision to limit MBE eligibility to the particular minority groups identified in the Act. See *Vance* v. *Bradley,* 440 U. S. 93, 109–112 (1979); *Oregon* v. *Mitchell,* 400 U. S. 112, 240 (1970) (opinion of BRENNAN, WHITE, and MARSHALL, JJ.). But on this record we find no basis to hold that Congress is without authority to undertake the kind of limited remedial effort represented by the MBE program. Congress, not the courts, has the heavy burden of dealing with a host of intractable economic and social problems.

(4)

It is also contended that the MBE program is overinclusive—that it bestows a benefit on businesses identified by racial or ethnic criteria which cannot be justified on the basis of competitive criteria or as a remedy for the present effects of identified prior discrimination. It is conceivable that a particular application of the program may have this effect; however, the peculiarities of specific applications are not before us in this case. We are not presented here with a challenge involving a specific award of a construction contract or the denial of a waiver request; such questions of specific application must await future cases.

This does not mean that the claim of overinclusiveness is entitled to no consideration in the present case. The history of governmental tolerance of practices using racial or ethnic criteria for the purpose or with the effect of imposing an invidious discrimination must alert us to the deleterious effects of even benign racial or ethnic classifications when they stray from narrow remedial justifications. Even in the context of a facial challenge such as is presented in this case, the MBE provision cannot pass muster unless, with due account for its administrative program, it provides a reasonable assurance that application of racial or ethnic criteria will be limited to accomplishing the remedial objectives of Congress and that misapplications of the program will be promptly and adequately remedied administratively.

It is significant that the administrative scheme provides for waiver and exemption. Two fundamental congressional assumptions underlie the MBE program: (1) that the present effects of past discrimination have impaired the competitive position of businesses owned and controlled by members of minority groups; and (2) that affirmative efforts to eliminate barriers to minority-firm access, and to evaluate bids with adjustment for the present effects of past discrimination, would assure that at least 10% of the federal funds granted under the Public Works Employment Act of 1977 would be accounted for by contracts with available, qualified, bona fide minority business enterprises. Each of these assumptions may be rebutted in the administrative process.

The administrative program contains measures to effectuate the congressional objective of assuring legitimate participation by disadvantaged MBE's. Administrative definition has tightened some less definite aspects of the statutory identification of the minority groups encompassed by the program.[73] There is administrative scrutiny to identify and eliminate from participation in the program MBE's who are not "bona-fide" within the regulations and guidelines; for example, spurious minority-front entities can be exposed. A significant aspect of this surveillance is the complaint procedure available for reporting "unjust participation by an enterprise or individuals in the MBE program." *Supra*, at 20. And even as to specific contract awards, waiver is available to avoid dealing with an MBE who is attempting to exploit the remedial aspects of the program by charging an unreasonable price, *i. e.*, a price not attributable to the present effects of past discrimination. *Supra,* at 17–19. We must assume that Congress intended close scrutiny of false claims and prompt action on them.

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[73] The MBE provision, 42 U. S. C. § 6705 (f)(2) (1976 ed. Supp. II), classifies as a minority business enterprise any "business at least 50 per centum of which is owned by minority group members or, in the case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members." Minority group members are defined as "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts." The administrative definitions are set out in the Appendix to this opinion, ¶ 3. These categories also are classified as minorities in the regulations implementing the nondiscrimination requirements of the Railroad Revitalization and Regulatory Reform Act of 1976, 45 U. S. C. § 803, see 42 Fed. Reg. 4285, 4288 (1977), on which Congress relied as precedent for the MBE provision. See 123 Cong. Rec. S3910 (Mar. 10, 1977) (remarks of Sen. Brooke). The House Subcommittee on SBA Oversight and Minority Enterprise, whose activities played a significant part in the legislative history of the MBE provision, also recognized that these categories were included within the Federal Government's definition of "minority business enterprise." H. R. Rep. No. 94-468, pp. 20-21 (1975). The specific inclusion of these groups in the MBE provision demonstrates that Congress concluded they were victims of discrimination. Petitioners did not press any challenge to Congress' classification categories in the Court of Appeals; there is no reason for this Court to pass upon the issue at this time.

Grantees are given the opportunity to demonstrate that their best efforts will not succeed or have not succeeded in achieving the statutory 10% target for minority firm participation within the limitations of the program's remedial objectives. In these circumstances a waiver or partial waiver is available once compliance has been demonstrated. A waiver may be sought and granted at any time during the contracting process, or even prior to letting contracts if the facts warrant.

Nor is the program defective because a waiver may be sought only by the grantee and not by prime contractors who may experience difficulty in fulfilling contract obligations to assure minority participation. It may be administratively cumbersome, but the wisdom of concentrating responsibility at the grantee level is not for us to evaluate; the purpose is to allow the Economic Development Administration to maintain close supervision of the operation of the MBE provision. The administrative complaint mechanism allows for grievances of prime contractors who assert that a grantee has failed to seek a waiver in an appropriate case. Finally, we note that where private parties, as opposed to governmental entities, transgress the limitations inherent in the MBE program, the possibility of constitutional violation is more removed. See *United Steelworkers of America* v. *Weber,* 443 U. S. 193, 200 (1979).

That the use of racial and ethnic criteria is premised on assumptions rebuttable in the administrative process gives reasonable assurance that application of the MBE program will be limited to accomplishing the remedial objectives contemplated by Congress and that misapplications of the racial and ethnic criteria can be remedied. In dealing with this facial challenge to the statute, doubts must be resolved in support of the congressional judgment that this limited program is a necessary step to effectuate the constitutional mandate for equality of economic opportunity. The MBE provision may be viewed as a pilot project, appropriately limited in extent and duration, and subject to reassessment and reevaluation by the Congress prior to any extension or re-enactment.[74] Miscarriages of administration could have only a transitory economic impact on businesses not encompassed by the program, and would not be irremediable.

IV

Congress, after due consideration, perceived a pressing need to move forward with new approaches in the continuing effort to achieve the goal of equality of economic opportunity. In this effort, Congress has necessary latitude to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives; this especially so in programs where voluntary cooperation with remedial measures is induced by placing conditions on federal expenditures. That the program may press the outer limits of congressional authority affords no basis for striking it down.

Petitioners have mounted a facial challenge to a program developed by the politically responsive branches of Government. For its part, the Congress must proceed only with programs narrowly tailored to achieve its objectives, subject to continuing evaluation and reassessment; administration of the programs must be vigiliant and flexible; and, when such a program comes under judicial review, courts must be satisfied that the legislative objectives and projected administration give reasonable assurance that the program will function within constitutional limitations. But as Justice Jackson admonished in a different context in 1941: [75]

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[74] Cf. GAO Report to the Congress, Minority Firms on Local Public Works Projects—Mixed Results, CED-79-9 (Jan. 16, 1979); U. S. Dept. of Commerce, Economic Development Administration, Local Public Works Program Interim Report on 10 Percent Minority Business Enterprise Requirement (Sept. 1978).

> "The Supreme Court can maintain itself and succeed in its tasks only if the counsels of self-restraint urged most earnestly by members of the Court itself are humbly and faithfully heeded. After the forces of conservatism and liberalism, of radicalism and reaction, of emotion and of self-interest are all caught up in the legislative process and averaged and come to rest in some compromise measure such as the Missouri Compromise, the N. R. A., the A. A. A., a minimum-wage law, or some other legislative policy, a decision striking it down closes an area of compromise in which conflicts have actually, if only temporarily, been composed. Each such decision takes away from our democratic federalism another of its defenses against domestic disorder and violence. The vice of judicial supremacy, as exerted for ninety years in the field of policy, has been its progressive closing of the avenues to peaceful and democratic conciliation of our social and economic conflicts."

Justice Jackson reiterated these thoughts shortly before his death in what was to be the last of his Godkin Lectures: [76]

> "I have said that in these matters the Court must respect the limitations on its own powers because judicial usurpation is to me no more justifiable and no more promising of permanent good to the country than any other kind. So I presuppose a Court that will not depart from the judicial process, will not go beyond resolving cases and controversies brought to it in conventional

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[75] R. H. Jackson, The Struggle for Judicial Supermacy 321 (1941).

[76] R. H. Jackson, The Supreme Court in the American System of Government 61-62 (1955).

form, and will not consciously encroach upon the functions of its coordinate branches."

In a different context to be sure, that is, in discussing the latitude which should be allowed to states in trying to meet social and economic problems, Mr. Justice Brandeis had this to say:

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation." *New State Ice Co.* v. *Liebmann,* 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting).

Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees. This case is one which requires, and which has received, that kind of examination. This opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as *University of California Regents* v. *Bakke,* 438 U. S. 265 (1978). However, our analysis demonstrates that the MBE provision would survive judicial review under either "test" articulated in the several *Bakke* opinions. The MBE provision of the Public Works Employment Act of 1977 does not violate the Constitution.[77]

Affirmed.

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[77] Although the complaint alleged that the MBE program violated several federal statutes, *supra,* n. 5, the only statutory argument urged upon us is that the MBE provision is inconsistent with Title VI of the Civil Righs Act of 1964. We perceive no inconsistency between the requirements of Title VI and those of the MBE provision. To the extent any statutory inconsistencies might be asserted, the MBE provision—the later, more specific enactment—must be deemed to control. See, *e. g.*; *Morton* v. *Mancari,* 417 U. S. 535, 550-551 (1974). *Preiser* v. *Rodriguez,* 411 U. S. 475, 489-490 (1973); *Bulova Watch Co.* v. *United States,* 365 U. S. 753, 758 (1961); *United States* v. *Borden Co.,* 308 U. S. 188-189 (1939).

APPENDIX

¶ 1. The EDA guidelines, at 2–7, provide in relevant part:

> "The primary obligation for carrying out the 10% MBE participation requirement rests with EDA Grantees. . . . The Grantee and those of its contractors which will make subcontracts or purchase substantial supplies from other firms (hereinafter referred to as 'prime contractors') must seek out all available *bona fide* MBE's and make every effort to use as many of them as possible on the project.
>
> "An MBE is *bona fide* if the minority group ownership interests are real and continuing and not created solely to meet 10% MBE requirements. For example, the minority group owners or stockholders should possess control over management, interest in capital and interest in earnings commensurate with the percentage of ownership on which the claim of minority ownership status is based. . . .
>
> "An MBE is available if the project is located in the market area of the MBE and the MBE can perform project services or supply project materials at the time they are needed. The relevant market area depends on the kind of services or supplies which are needed. . . . EDA will require that Grantees and prime contractors engage MBE's from as wide a market area as is economically feasible.
>
> "An MBE is qualified if it can perform the services or supply the materials that are needed. Grantees and prime contractors will be expected to use MBE's with less experience than available nonminority enterprises and should expect to provide technical assistance to MBE's as needed. Inability to obtain bonding will ordinarily not disqualify an MBE. Grantees and prime contractors are expected to help MBE's obtain bonding, to include MBE's in any overall bond or to waive bonding where feasible. The Small Business Administration (SBA) is

prepared to provide a 90% guarantee for the bond of any MBE participating in an LPW [local public works] project. Lack of working capital will not ordinarily disqualify an MBE. SBA is prepared to provide working capital assistance to any MBE participating in an LPW project. Grantees and prime contractors are expected to assist MBE's in obtaining working capital through SBA or otherwise.

". . . [E]very Grantee should make sure that it knows the names, addresses and qualifications of all relevant MBE's which would include the project location in their market areas. . . . Grantees should also hold prebid conferences to which they invite interested contractors and representatives of . . . MBE support organizations.

"Arrangements have been made through the Office of Minority Business Enterprise . . . to provide assistance to Grantees and prime contractors in fulfilling the 10% MBE requirement. . . .

"Grantees and prime contractors should also be aware of other support which is available from the Small Business Administration. . . .

". . . [T]he Grantee must monitor the performance of its prime contractors to make sure that their commitments to expend funds for MBE's are being fulfilled. . . . Grantees should administer every project tightly. . . ."

¶ 2. The EDA guidelines, at 13–15, provide in relevant part:

"Although a provision for waiver is included under this section of the Act, EDA will only approve a waiver under exceptional circumstances. The Grantee must demonstrate that there are not sufficient, relevant, qualified minority business enterprises whose market areas include the project location to justify a waiver. The Grantee must detail in its waiver request the efforts the Grantee and potential contractors have exerted to locate and enlist MBE's. The request must indicate the specific

MBE's which were contacted and the reason each MBE was not used. . . .

"Only the Grantee can request a waiver. . . . Such a waiver request would ordinarily be made after the initial bidding or negotiation procedures proved unsuccessful. . . .

"[A] Grantee situated in an area where the minority population is very small may apply for a waiver before requesting bids on its project or projects. . . ."

¶ 3. The EDA technical bulletin, at 1, provides the following definitions:

"a) Negro—An individual of the black race of African origin.

"b) Spanish-speaking—An individual of a Spanish-speaking culture and origin or parentage.

"c) Oriental—An individual of a culture, origin or parentage traceable to the areas south of the Soviet Union, East of Iran, inclusive of islands adjacent thereto, and out to the Pacific including but not limited to Indonesia, Indochina, Malaysia, Hawaii and the Philippines.

"d) Indian—An individual having origins in any of the original people of North America and who is recognized as an Indian by either a tribe, tribal organization or a suitable authority in the community. (A suitable authority in the community may be: educational institutions, religious organizations, or state agencies.)

"e) Eskimo—An individual having origins in any of the original peoples of Alaska.

"f) Aleut—An individual having origins in any of the original peoples of the Aleutian Islands."

¶ 4. The EDA technical bulletin, at 19, provides in relevant part:

"Any person or organization with information indicating unjust participation by an enterprise or individuals in the MBE program or who believes that the MBE participation requirement is being improperly applied should contact the appropriate EDA grantee and provide a detailed statement of the basis for the complaint.

"Upon receipt of a complaint, the grantee should attempt to resolve the issues in dispute. In the event the grantee requires assistance in reaching a determination, the grantee should contact the Civil Rights Specialist in the appropriate Regional Office.

"If the complainant believes that the grantee has not satisfactorily resolved the issues raised in his complaint, he may personally contact the EDA Regional Office."

SUPREME COURT OF THE UNITED STATES

No. 78–1007

H. Earl Fullilove et al.,
Petitioners,
v.
Philip M. Klutznick, Secretary
of Commerce of the United
States, et al.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[July 2, 1980]

Mr. Justice Powell, concurring.

Although I would place greater emphasis than The Chief Justice on the need to articulate judicial standards of review in conventional terms, I view his opinion announcing the judgment as substantially in accord with my own views. Accordingly, I join that opinion and write separately to apply the analysis set forth by my opinion in *University of California* v. *Bakke,* 438 U. S. 265 (1978) (hereinafter *Bakke*).

The question in this case is whether Congress may enact the requirement in § 103 (f)(2) of the Public Works Employment Act of 1977 (PWEA), that 10% of federal grants for local public work projects funded by the Act be set aside for minority business enterprises. Section 103 (f)(2) employs a racial classification that is constitutionally prohibited unless it is a necessary means of advancing a compelling governmental interest. *Bakke,* at 299, 305; see *In re Griffiths,* 413 U. S. 717, 721–722 (1973); *Loving* v. *Virginia,* 388 U. S. 1, 11 (1967); *McLaughlin* v. *Florida,* 379 U. S. 184, 196 (1964). For the reasons stated in my *Bakke* opinion, I consider adherence to this standard as important and consistent with precedent.

The Equal Protection Clause, and the equal protection component of the Due Process Clause of the Fifth Amendment, demand that any governmental distinction among groups must be justifiable. Different standards of review applied to different sorts of classifications simply illustrate the principle that some classifications are less likely to be legitimate than others. Racial classifications must be assessed under the most stringent level of review because immutable characteristics, which bear no relation to individual merit or need, are irrelevant to almost every governmental decision. See, *e. g., Anderson* v. *Martin,* 375 U. S. 399, 402–404 (1964). In this case, however, I believe that § 103 (f) (2) is justified as a remedy that serves the compelling governmental interest in eradicating the continuing effects of past discrimination identified by Congress.[1]

I

Racial preference never can constitute a compelling state interest. "'Distinctions between citizens solely because of their ancestory' [are] 'odious to a free people whose institutions are founded upon the doctrine of equality.'" *Loving* v. *Virginia,* 388 U. S., at 11, quoting *Hirabayashi* v. *United States,* 320 U. S. 81, 100 (1943). Thus, if the set-aside merely expresses a congressional desire to prefer one racial or ethnic group over another, § 103 (f)(2) violates the equal protection component in the Due Process Clause of the Fifth Amendment. See *Bolling* v. *Sharpe,* 347 U. S. 497, 499 (1954).

The Government does have a legitimate interest in ameliorating the disabling effects of identified discrimination. *Bakke,* 438 U. S., at 307; see, *e. g., Keyes* v. *School District*

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[1] Although racial classifications require strict judicial scrutiny, I do not agree that the Constitution prohibits all racial classification. MR. JUSTICE STEWART recognizes the principle that I believe is applicable: "Under our Constitution, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid." *Post,* at 2. But, in narrowly defined circumstances, that presumption may be rebutted. Cf. *Lee* v. *Washington,* 390 U. S. 333, 334 (1968) (Black, Harlan, and STEWART, JJ., concurring).

No. 1, 413 U. S. 189, 236 (1973) (POWELL, J., concurring in part and dissenting in part); *McDaniel* v. *Barresi*, 402 U. S. 39, 41 (1971); *Board of Education* v. *Swann*, 402 U. S. 43, 45–46 (1971); *Green* v. *County School Board*, 391 U. S. 430, 437–438 (1968). The existence of illegal discrimination justifies the imposition of a remedy that will "make persons whole for injuries suffered on account of unlawful . . . discrimination." *Albermarle Paper Co.* v. *Moody*, 422 U. S. 405, 418 (1975). A critical inquiry, therefore, is whether § 103 (f)(2) was enacted as a means of redressing such discrimination. But this Court has never approved race-conscious remedies absent judicial, administrative, or legislative findings of constitutional or statutory violations. *Bakke*, 438 U. S., at 307; see, *e. g.*, *Teamsters* v. *United States*, 431 U. S. 324, 367–376 (1977); *United Jewish Organizations* v. *Carey*, 430 U. S. 144, 155–159 (1977) (opinion of WHITE, J.); *South Carolina* v. *Katzenbach*, 383 U. S. 301, 308–315 (1966).

Because the distinction between permissible remedial action and impermissible racial preference rests on the existence of a constitutional or statutory violation, the legitimate interest in creating a race-conscious remedy is not compelling unless an appropriate governmental authority has found that such a violation has occurred. In other words, two requirements must be met. First, the governmental body that attempts to impose a race-conscious remedy must have the authority to act in response to identified discrimination. Cf. *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 103 (1976). Second, the governmental body must make findings that demonstrate the existence of illegal discrimination. In *Bakke*, the Regents failed both requirements. They were entrusted only with educational functions, and they made no findings of past discrimination. Thus, no compelling governmental interest was present to justify the use of a racial quota in medical school admissions. *Bakke*, 438 U. S., at 309–310.

Our past cases also establish that even if the government proffers a compelling interest to support reliance upon a suspect classification, the means selected must be narrowly drawn to fulfill the governmental purpose. *In re Griffiths*, 413 U. S., at 721–722. In *Bakke*, for example, the state university did have a compelling interest in the attainment of a diverse student body. But the method selected to achieve that end, the use of a fixed admissions quota, was not appropriate. The Regent's quota system eliminated some nonminority applicants from all consideration for a specified number of seats in the entering class, although it allowed minority applicants to compete for all available seats. 438 U. S., at 275–276. In contrast, an admissions program that recognizes race as a factor, but not the sole factor, in assessing an applicant's qualifications serves the University's interest in diversity while ensuring that each applicant receives fair and competitive consideration. *Id.*, at 317–318.

In reviewing the constitutionality of § 103 (f)(2), we must decide: (i) whether Congress is competent to make findings of unlawful discrimination; (ii) if so, whether sufficient findings have been made to establish that unlawful discrimination has affected adversely minority business enterprises, and (iii) whether the 10% set-aside is a permissible means for redressing identifiable past discrimination. None of these questions may be answered without explicit recognition that we are reviewing an Act of Congress.

II

The history of this Court's review of congressional action demonstrates beyond question that the National Legislature is competent to find constitutional and statutory violations. Unlike the Regents of the University of California, Congress properly may—and indeed must—address directly the problems of discrimination in our society. See *Heart of Atlanta Motel* v. *United States*, 379 U. S. 241, 257 (1964). In *Katzenbach* v. *McClung*, 379 U. S. 294, 304 (1964), for example, this Court held that Congress had the power under the Commerce

Clause to prohibit racial discrimination in public restaurants on the basis of its "findings that [such discrimination] had a direct and adverse effect on the free flow of interstate commerce."

Similarly, after hearing "overwhelming" evidence of private employment discrimination, see H. R. Rep. No. 88–914, pt. 2, 88th Cong., 1st Sess., 26 (1963), Congress enacted Title VII of the Civil Rights Act of 1964 in order "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp.* v. *Green,* 411 U. S. 792, 800 (1973). Acting to further the purposes of Title VII, Congress vested in the federal courts broad equitable discretion to ensure that " 'persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.' " *Franks* v. *Bowman Transportation Co.,* 424 U. S. 747, 764 (1976), quoting Section-by-Section Analysis of H. R. 1746, accompanying the Equal Employment Opportunity Act of 1972—Conference Report, 118 Cong. Rec. 7166, 7168 (1972).

In addition, Congress has been given the unique constitutional power of legislating to enforce the provisions of the Thirteenth, Fourteenth, and Fifteenth Amendments.[2] At an early date, the Court stated that "[i]t is the power of Congress which has been enlarged" by the enforcement provisions of the post-Civil War Amendments. *Ex parte Virginia,* 100 U. S. 339, 345 (1879). In *Jones* v. *Alfred H. Mayer & Co.,* 392 U. S. 409, 441–443 (1968), the Court recognized Congress' competence to determine that private action inhibiting the right to acquire and convey real property was racial discrimination forbidden by the Thirteenth Amendment. Subsequently, we held that Congress' enactment of 42 U. S. C. § 1981 pursuant to its powers under the Thirteenth Amendment, see *Runyon* v. *McCrary,* 427 U. S. 160, 168–170, 179 (1976), provides to all persons a federal remedy for racial discrimination in private employment. See *McDonald* v. *Sante Fe Transportation Co.,* 427 U. S. 273, 295–296 (1976); *Johnson* v. *Railway Express Agency,* 421 U. S. 454, 459–460 (1975).

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[2] Section 2 of the Thirteenth Amendment, which abolished slavery, provides that "Congress shall have power to enforce this article by appropriate legislation." In virtually identical language, § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment give Congress the power to enforce the provisions of those Amendments.

In *Katzenbach* v. *Morgan,* 384 U. S. 641 (1966), the Court considered whether § 5 of the Fourteenth Amendment gave Congress the power to enact § 4 (e) of the Voting Rights Act of 1965, 42 U. S. C. § 1973 (b)(e). Section 4 (e) provides that no person educated in Puerto Rico may be denied the right to vote in any election for failure to read or write the English language. The Court held that Congress was empowered to enact § 4 (e) as a remedy for discrimination against the Puerto Rican community. *Id.,* at 652–653. Implicit in its holding was the Court's belief that Congress had the authority to find, and had found, that members of this minority group had suffered governmental discrimination.

Congress' authority to find and provide for the redress of constitutional violations also has been confirmed in cases construing the enforcement clause of the Fifteenth Amendment. In *South Carolina* v. *Katzenbach,* 383 U. S. 301, 308 (1966), for example, the Court upheld the Voting Rights Act of 1965, 42 U. S. C. § 1973 *et seq.,* as an appropriate remedy for violations of the Fifteenth Amendment. It noted that Congress had found "insidious and pervasive" discrimination demanding "ster[n] and . . . elaborate" measures. *Id.,* at 309. Most relevant to our present inquiry was the Court's express approval of Congress' decision to "prescrib[e] remedies for voting discrimination which go into effect without the need for prior adjudication." *Id.,* at 328.[3]

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[3] Among the remedies approved in *South Carolina* v. *Katzenbach,* 383

It is beyond question, therefore, that Congress has the authority to identify unlawful discriminatory practices, to prohibit those practices, and to prescribe remedies to eradicate their continuing effects. The next inquiry is whether Congress has made findings adequate to support its determination that minority contractors have suffered extensive discrimination.

III

A

The petitioners contend that the legislative history of § 103 (f)(2) reflects no congressional finding of statutory or constitutional violations. Crucial to that contention is the assertion that a reviewing court may not look beyond the legislative history of the PWEA itself for evidence that Congress believed it was combatting invidious discrimination. But petitioners' theory would erect an artificial barrier to full understanding of the legislative process.

Congress is not an adjudicatory body called upon to resolve specific disputes between competing adversaries. Its constitutional role is to be representative rather than impartial, to

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U. S. 301 (1966), was the temporary suspension of literacy tests in some jurisdictions. The Voting Rights Act of 1970, 42 U. S. C. § 1973aa *et seq.*, temporarily banned the use of literacy tests in all jurisdictions. In *Oregon* v. *Mitchell,* 400 U. S. 112 (1970), this Court, speaking through five separate opinions, unanimously upheld the action as a proper exercise of Congress' authority under the post-Civil War Amendments. See *id.,* at 117 (Black, J.); *id.,* at 135 (Douglas, J.); *id.,* at 152 (Harlan, J.); *id.,* at 229 (BRENNAN, WHITE, and MARSHALL, JJ.); *id.,* at 281 (STEWART, J., with whom BURGER, C. J., and BLACKMUN, J., concurred). MR. JUSTICE STEWART said that:

"Congress was not required to make state-by-state findings concerning . . . actual impact of literacy requirements on the Negro citizen's access to the ballot box. In the interests of uniformity, Congress may paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records. . . . The findings that Congress made when it enacted the Voting Rights Act of 1965 would have supported a nationwide ban on literacy tests." *Id.,* at 284 (citation omitted).

make policy rather than to apply settled principles of law. The petitioners' contention that this Court should treat the debates on § 103 (f)(2) as the complete "record" of congressional decisionmaking underlying that statute is essentially a plea that we treat Congress as if it were a lower federal court. But Congress is not expected to act as though it were duty bound to find facts and make conclusions of law. The creation of national rules for the governance of our society simply does not entail the same concept of recordmaking that is appropriate to a judicial or administrative proceeding. Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead, its special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.

Acceptance of petitioners' argument would force Congress to make specific factual findings with respect to each legislative action. Such a requirement would mark an unprecedented imposition of adjudicatory procedures upon a coordinate branch of Government. Neither the Constitution nor our democratic tradition warrants such a constraint on the legislative process. I therefore conclude that we are not confined in this case to an examination of the legislative history of § 103 (f)(2) alone. Rather, we properly may examine the total contemporary record of congressional action dealing with the problems of racial discrimination against minority business enterprises.

B

In my view, the legislative history of § 103 (f)(2) demonstrates that Congress reasonably concluded that private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors.[4] The opinion of THE CHIEF JUSTICE provides a careful overview of the relevant legislative history, see *ante,* at 4–16, to which only a few words need be added.

Section 103 (f)(2) originated in an amendment introduced on the floor of the House of Representatives by Representative Mitchell. Congressman Mitchell noted that the Federal Government was already operating a set-aside program under § 8 (a) of the Small Business Administration Act of 1958, 15 U. S. C. § 637 (a). He described his proposal as "the only sensible way for us to begin to develop a viable economic system for minorities in this country, with the ultimate result being that we are going to eventually be able to . . . end certain programs which are merely support survival programs for people which do not contribute to the economy." 123 Cong. Rec. H1436–H1437 (daily ed. Feb. 24, 1977).[5] Senator Brooke, who introduced a similar measure in the Senate, reminded the Senate of the special provisions previously enacted into

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[4] I cannot accept the suggestion of the Court of Appeals that § 103 (f) (2) must be viewed as serving a compelling state interest if the reviewing court can "perceive a basis" for legislative action. 588 F. 2d 600, 604–605 (CA2 1978), quoting *Katzenbach* v. *Morgan,* 384 U. S., at 656. The "perceive a basis" standard refers to congressional authority to act, not to the distinct question whether that action violates the Due Process Clause of the Fifth Amendment.

In my view, a court should uphold a reasonable congressional finding of discrimination. A more stringent standard of review would impinge upon Congress' ability to address problems of discrimination, see pp. 5–8, *supra;* a standard requiring a court to "perceive a basis" is essentially meaningless in this context. Such a test might allow a court to justify legislative action even in the absence of affirmative evidence of congressional findings.

[5] During subsequent debate in the House, Representative Conyers emphasized that minority businesses "through no fault of their own simply have not been able to get their foot in the door." 123 Cong. Rec. H1440 (daily ed. Feb. 24, 1977); see *ibid.* (remarks of Rep. Biaggi).

§ 8 (a) of the SBA Act and the Railroad Revitalization Act of 1976, 49 U. S. C. § 1657a, which, he stated, demonstrated the validity of his amendment. 123 Cong. Rec. S3909–10 (daily ed. March 10, 1977).

Section 8 (a) of the SBA Act provides that the Small Business Administration may enter into contracts with the Federal Government and subcontract them out to small businesses. The Small Business Administration has been directed by Executive Order to employ § 8 (a) to aid socially and economically disadvantaged persons. *Ante,* at 12.[6] The operation of the § 8 (a) program was reviewed by congressional committees between 1972 and 1977. In 1972, the House Subcommittee on Minority Small Business Enterprise found that minority businessmen face economic difficulties that "are the result of past social standards which linger as characteristics of minorities as a group." H. R. Rep. No. 92–1615, 92d Cong., 2d Sess., 3 (1972). In 1975, the House Subcommittee on SBA Oversight and Minority Enterprise concluded that "[t]he effect of past inequities stemming from racial prejudice have not remained in the past," and that low participation by minorities in the economy was the result of "past discriminatory systems." H. R. Rep. No. 94–468, 94th Cong., 1st Sess.,

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[6] In 1969, 1970, and 1971, the President issued Executive Orders directing federal aid for minority business enterprises. See Exec. Order 11458, 34 Fed. Reg. 4937 (1969); Exec. Order 11518, 35 Fed. Reg. 4939 (1970); Exec. Order 11625, 36 Fed. Reg. 19967 (1971). The President noted that "members of certain minority groups through no fault of their own have been denied the full opportunity to participate in the free enterprise system," Exec. Order 11518, *supra,* at 4940, and that the "opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic justice." Exec. Order 11625, *supra,* at 19967. Assistance to minority business enterprises through the § 8 (a) program has been designed to promote the goals of these Executive Orders. *Ray Baillie Trash Hauling, Inc.* v. *Kleppe,* 447 F. 2d 696, 706 (CA5 1973), cert. denied, 415 U. S. 914 (1974).

1–2 (1975). In 1977, the House Committee on Small Business found that

> "over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities." H. R. Rep. No. 94–1791, 94th Cong., 2d Sess., 124. (1977).

The Committee's report was issued on January 3, 1977, less than two months before Representative Mitchell introduced § 103 (f)(2) into the House of Representatives.[7]

In light of these legislative materials and the discussion of legislative history contained in THE CHIEF JUSTICE's opinion, I believe that a court must accept as established the conclusion that purposeful discrimination contributed significantly to the small percentage of federal contracting funds that minority business enterprises have received. Refusals to subcontract work to minority contractors may, depending upon the identity of the discriminating party, violate Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d, or 42 U. S. C. § 1981, or the Fourteenth Amendment. Although the discriminatory activities were not identified with the exactitude expected in judicial or administrative adjudication, it must be remembered that "Congress may paint with a much broader brush than may this Court. . . ." *Oregon* v. *Mitchell,* 400 U. S. 112, 284 (1970) (STEWART, J., concurring in part and dissenting in part).[8]

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[7] Two sections of the Railroad Revitalization Act also reflect Congress' recognition of the need for remedial steps on behalf of minority businesses. Section 803, 45 U. S. C. § 803 prohibits discrimination in any activity funded by the Act, and § 906, 49 U. S. C. § 1657a establishes a Minority Resource Center to assist minority businessmen to obtain contracts and business opportunities related to the maintenance and rehabilitation of railroads. The provisions were enacted by a Congress that recognized the "established national policy, since at least the passage of the Civil Rights Act of 1964, to encourage and assist in the development of minority business enterprise." S. Rep. No. 94–499, 94th Conf., 1st Sess., 44 (1975) (Commerce Committee). In January 1977, the Department of Transportation issued regulations pursuant to 45 U. S. C. § 403 that require contractors to formulate affirmative action programs to ensure that minority businesses receive a fair proportion of contract opportunities. See 42 Fed. Reg. 4290–4291 (1977) (codified at 49 CFR Part 265). See also pp. 17–18, nn. 11 and 12, *infra*.

IV

Under this Court's established doctrine, a racial classification is suspect and subject to strict judicial scrutiny. As noted in Part I, the Government may employ such a classification only when necessary to accomplish a compelling governmental purpose. See *Bakke,* 438 U. S., at 305. The conclusion that Congress found a compelling governmental interest in redressing identified discrimination against minority contractors therefore leads to the inquiry whether use of a 10% set-aside is a constitutionally appropriate means of serving that interest. In the past, this "means" test has been virtually impossible to satisfy. Only two of this Court's modern cases have held the use of racial classifications to be constitutional.

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[8] Although this record suffices to support the congressional judgment that minority contractors suffered identifiable discrimination, Congress need not be content with findings that merely meet constitutional standards. Race-conscious remedies, popularly referred to as affirmative action programs, almost invariably affect some innocent persons. See *infra,* at 16–18. Respect and support for the law, especially in an area as sensitive as this, depend in large measure upon the public's perception of fairness. See *Bakke,* 438 U. S., at 319, n. 53; J. H. Wilkinson III, From *Brown* to *Bakke,* 264–266 (1979); M. Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 Colum. L. Rev. 1023, 1048–1049 (1979). It therefore is important that the legislative record supporting race-conscious remedies contain evidence that satisfies fair minded people that the congressional action is just.

See *Korematsu* v. *United States,* 323 U. S. 214 (1944); *Hirabayshi* v. *United States,* 320 U. S. 81 (1943). Indeed, the failure of legislative action to survive strict scrutiny has lead some to wonder whether our review of racial classifications has been strict in theory, but fatal in fact. See Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972).

A

Application of the "means" test necessarily demands an understanding of the type of congressional action at issue. This is not a case in which Congress has employed a racial classification solely as a means to confer a racial preference. Such a purpose plainly would be unconstitutional. *Supra,* at 2. Nor has Congress sought to employ a racially conscious means to further a nonracial goal. In such instances, a nonracial means should be available to further the legitimate governmental purpose. See *Bakke,* 438 U. S., at 310–311.

Enactment of the set-aside is designed to serve the compelling governmental interest in redressing racial discrimination. As this Court has recognized, the implementation of any affirmative remedy for redress of racial discrimination is likely to affect persons differently depending upon their race. See, *e. g., Board of Education* v. *Swann,* 402 U. S., at 45–46. Although federal courts may not order or approve remedies that exceed the scope of a constitutional violation, see *Milliken* v. *Bradley,* 433 U. S. 267, 280–281 (1977); *Dayton* v. *Brinkman,* 433 U. S. 406 (1977); *Austin Independent School District* v. *United States,* 429 U. S. 991 (1976) (POWELL, J., concurring), this Court has not required remedial plans to be limited to the least restrictive means of implementation. We have recognized that the choice of remedies to redress racial discrimination is "a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court." *Frank* v. *Bowman Transportation Co.,* 424

U. S., at 794 (1976) (POWELL, J., concurring in part and dissenting in part).

I believe that the enforcement clauses of the Thirteenth and Fourteenth Amendments give Congress a similar measure of discretion to choose a suitable remedy for the redress of racial discrimination. The legislative history of § 5 of the Fourteenth Amendment is particularly instructive. Senator Howard, the member of the Joint Committee on Reconstruction who introduced the Amendment into the Senate, described § 5 as "a direct affirmative delegation of power to Congress to carry out all the principles of all [the] guarantees" of § 1 of the Amendment. Cong. Globe, 39th Cong., 1st Sess., 2766 (1866). Furthermore, he stated that § 5

> "casts upon the Congress the responsibility of seeing to it, for the future, that all sections of the amendment are carried out in good faith, and that no State infringes the rights of persons or property. I look upon this clause as indespensable for the reason that it thus imposes upon the Congress this power and this duty." *Id.*, at 2768.

Senator Howard's emphasis on the importance of congressional action to effectuate the goals of the Fourteenth Amendment was echoed by other Members of Congress. Representative Stevens, also a member of the Reconstruction Committee, said that the Fourteenth Amendment "allows Congress to correct the unjust legislation of the States," *id.*, at 2459, and Senator Poland wished to leave no doubt "as to the power of Congress to enforce principles lying at the very foundation of all republican government. . . ." *Id.*, at 2961. See *id.*, at 2512–2513 (remarks of Rep. Raymond); *id.*, at 2511 (Rep. Eliot); *Ex parte Virginia*, 100 U. S., at 345.[9]

Although the Framers of the Fourteenth Amendment may have contemplated that Congress, rather than the federal courts, would be the prime force behind enforcement of the Fourteenth Amendment, see C. Fairman, History of the Supreme Court of the United States: Reconstruction and Reunion, pt. 1, 1295, 1296 (1971), they did not believe that congressional action would be unreviewable by this Court. Several Members of Congress emphasized that a primary purpose of the Fourteenth Amendment was to place the provisions of the Civil Rights of 1866 "in the eternal firmament of the Constitution." Cong. Globe, 39th Cong., 1st Sess., 2462 (1866) (remarks of Rep. Garfield). See *id.*, at 2459 (remarks of Rep. Stephens); *id.*, at 2462 (remarks of Rep. Thayer); *id.*, at 2498 (remarks of Rep. Broomall). By 1866, Members of Congress fully understood that judicial review was the means by which action of the Legislative and Executive Branches would be required to conform to the Constitution. See, *e. g.*, *Marbury* v. *Madison,* 7 Cranch (5 U. S.) 737 (1803).

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[9] See also *Jones* v. *Alfred Mayer & Co.*, 392 U. S., at 440–441, quoting Cong. Globe, 39th Cong., 1st Sess., 322 (1866) (remarks of Sen. Trumbull on Congress' authority under the Thirteenth Amendment).

I conclude, therefore, that the enforcement clauses of the Thirteenth and Fourteenth Amendments confer upon Congress the authority to select reasonable remedies to advance the compelling state interest in repairing the effects of discrimination. But that authority must be exercised in a manner that does not erode the guarantees of these Amendments. The Judicial Branch has the special responsibility to make a searching inquiry into the justification for employing a race-conscious remedy. Courts must be sensitive to the possibility that less intrusive means might serve the compelling state interest equally as well. I believe that Congress' choice of a remedy should be upheld, however, if the means selected are equitable and reasonably necessary to the redress of identified discrimination. Such a test allows the Congress to exercise necessary discretion but preserves the essential safeguard of judicial review of racial classifications.

B

When reviewing the selection by Congress of a race-conscious remedy, it is instructive to note the factors upon which the Courts of Appeals have relied in a closely analogous area. Courts reviewing the proper scope of race-conscious hiring remedies have considered (i) the efficacy of alternative remedies, *NAACP* v. *Allen,* 493 F. 2d 614, 619 (CA5 1974); *Vulcan Society Inc.* v. *Civil Service Comm'n,* 490 F. 2d 387, 398 (CA2 1973), (ii) the planned duration of the remedy. *Vulcan Society Inc.* v. *Civil Service Comm'n,* 490 F. 2d, at 399; *United States* v. *Wood, Wire, & Metal Lathers Local 46,* 471 F. 2d 408, 414, n. 12 (CA2), cert. denied, 412 U. S. 939 (1973), (iii) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force, *Association Against Discrimination* v. *Bridgeport,* 594 F. 2d 306, 311 (CA2 1979); *Boston Chapter NAACP* v. *Beecher,* 504 F. 2d 1017, 1026–1027 (CA1 1974), cert. denied, 421 U. S. 910 (1975); *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Comm'n,* 482 F. 2d 1333, 1341 (CA2 1972), cert. denied, 421 U. S. 991 (1975); *Carter* v. *Gallagher,* 452 F. 2d 315, 331 (CA8) (en banc), cert. denied, 406 U. S. 950 (1972), and (iv) the availability of waiver provisions if the hiring plan could not be met, *Associated General Contractors Inc.* v. *Altshuler,* 490 F. 2d 9, 18–19 (CA1 1973), cert. denied, 416 U. S. 957 (1974).

By the time Congress enacted § 103 (f)(2) in 1977, it knew that other remedies had failed to ameliorate the effects of racial discrimination in the construction industry. Although the problem had been addressed by antidiscrimination legislation, executive action to remedy employment discrimination in the construction industry, and federal aid to minority businesses, the fact remained that minority contractors were receiving less than 1% of federal contracts. See 123 Cong. Rec. S3910 (daily ed. Mar. 10, 1977) (remarks of Sen. Brooke). Congress also knew that economic recession threatened the construction industry as a whole. Section 103 (f) (2) was enacted as part of a bill designed to stimulate the economy by appropriating $4 billion in federal funds for new public construction. Since the emergency public construction funds were to be distributed quickly,[10] any remedial provision designed to prevent those funds from perpetuating past discrimination also had to be effective promptly. Moreover, Congress understood that any effective remedial program had to provide minority contractors the experience necessary for continued success without federal assistance.[11] And Congress knew that the ability of minority group members to gain experience had been frustrated by the difficulty of entering the construction trades.[12] The set-aside program adopted as part of this emergency legislation serves each of these concerns because it takes effect as soon as funds are expended under PWEA and because it provides minority contractors with experience that could enable them to compete without governmental assistance.

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[10] The Public Works Employment Act of 1977 (PWEA) provides that federal monies be committed to state and local grantees by September 30, 1977. 42 U. S. C. A. § 6707 (h)(1) (Supp. 1978). Action on applications for funds was to be taken within 60 days after receipt of the application, *id.*, § 6706 (1978 Supp.), and onsite work was to begin within 90 days of project approval, *id.*, § 6705 (d).

[11] In 1972, a congressional oversight committee addressed the "complex problem—how to achieve economic prosperity despite a long history of racial bias." See H. R. Rep. No. 92-1615, 92d Cong., 2d Sess., 3 (Select Committee on Small Business). The committee explained how the effects of discrimination translate into economic barriers:

"In attempting to increase their participation as entrepeneurs in our economy, the minority businessman usually encounters several major problems. These problems, which are economic in nature, are the result of past social standards which linger as characteristics of minorities as a group.

"The minority entrepeneur is faced initially with a lack of capital, the most serious problem of all beginning minorities or other entrepeneurs. Because minorities as a group are not traditionally holders of large amounts of capital, the entrepeneur must go outside his community in order to obtain the needed capital. Lending firms require substantial security and a track record in order to lend funds, security which the minority businessmen usually cannot provide. Because he cannot produce either, he is often turned down.

. . . . .

"Functional expertise is a necessity for the successful operation of any enterprise. Minorities have traditionally assumed the role of the labor force in business with few gaining access to positions whereby they could learn not only the physical operation of the enterprise, but also the internal functions of management." *Id.*, at 3-4.

The § 103 (f)(2) set-aside is not a permanent part of federal contracting requirements. As soon as the PWEA program concludes, this set-aside program ends. The temporary nature of this remedy ensures that a race-conscious program will not last longer than the discriminatory effects it is designed to eliminate. It will be necessary for Congress to re-examine the need for a race-conscious remedy before it extends or re-enacts § 103 (f)(2).

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[12] When Senator Brooke introduced the PWEA set-aside in the Senate, he stated that aid to minority businesses also would help to alleviate problems of minority unemployment. 123 Cong. Rec. S3910 (daily ed. Mar. 10, 1977) Congress had considered the need to remedy employment discrimination in the construction industry when it refused to override the "Philadelphia Plan." The "Philadelphia Plan," promulgated by the Department of Labor in 1969, required all federal contractors to use hiring goals in order to redress past discrimination. See *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F. 2d 159, 163 (CA3), cert. denied, 404 U. S. 854 (1971). Later that year, the House of Representatives refused to adopt an amendment to an appropriations bill that would have had the effect of overruling the Labor Department's order. 115 Cong. Rec. 40921 (1969). The Senate, which had approved such an amendment, then voted to recede from its position. 115 Cong. Rec. 40749 (1969).

During the Senate debate, several legislators argued that implementation of the Philadelphia Plan was necessary to ensure equal opportunity. See 115 Cong. Rec. 40740 (remarks of Sen. Scott); *id.*, at 40741 (remarks of Sen. Griffith); *id.*, at 40744 (remarks of Sen. Bayh). Senator Percy argued that the Plan was needed to redress discrimination against blacks in the construction industry. *Id.*, at 40742–40743. The day following the Senate vote to recede from its earlier position, Senator Kennedy noted "exceptionally blatant" racial discrimination in the construction trades. He commended the Senate's decision that "the Philadelphia Plan should be a useful and necessary tool for insuring equitable employment of minorities." *Id.*, at 41072.

The percentage chosen for the set-aside is within the scope of congressional discretion. The Courts of Appeals have approved temporary hiring remedies insuring that the percentage of minority group workers in a business or governmental agency will be reasonably related to the percentage of minority group members in the relevant population. *Boston Chapter NAACP* v. *Beecher,* 504 F. 2d, at 1027, *Bridgeport Guard Inc.* v. *Bridgeport,* 482 F. 2d, at 1341; *Carter* v. *Gallagher,* 452 F. 2d, at 331. Only 4% of contractors are members of minority groups, see *Fullilove* v. *Kreps,* 584 F. 2d 600, 608 (CA2 1978), although minority group members constitute about 17% of the national population, see *Contractors Association of Western Pennsylvania* v. *Kreps,* 441 F. Supp. 936, 951 (WD Pa. 1977), aff'd, 573 F. 2d 811 (CA3 1978). The choice of a 10% set-aside thus falls roughly halfway between the present percentage of minority contractors and the percentage of minority group members in the Nation.

Although the set-aside is pegged at a reasonable figure, its effect might be unfair if it were applied rigidly in areas of the country where minority group members constitute a small percentage of the population. To meet this concern, Congress enacted a waiver provision into § 103 (f)(2). The factors governing issuance of a waiver include the availability of qualified minority contractors in a particular geographic area, the size of the locale's minority population, and the efforts made to find minority contractors. Department of Commerce, Guidelines for 10% Minority Business Participation LPW Grants, App. 165a–167a. We have been told that 1261 waivers had been granted by September 9, 1979. Brief for the Secretary of Commerce 62, n. 37.

C

A race-conscious remedy should not be approved without consideration of an additional crucial factor—the effect of the set-aside upon innocent third parties. See *Teamsters* v. *United States,* 431 U. S., at 374–375. In this case, the petitioners contend with some force that they have been asked to bear the burden of the set-aside even though they are innocent of wrongdoing. I do not believe, however, that their burden is so great that the set-aside must be disapproved. As noted above, Congress knew that minority contractors were receiving only 1% of federal contracts at the time the set-aside was enacted. The PWEA appropriated $4 billion for public work projects, of which it could be expected that approximately $400 million would go to minority contractors. The Court of Appeals calculated that the set-aside would reserve about .25% of all the funds expended yearly on construction work in the United States for approximately 4% of the Nation's contractors who are members of a minority group. 584 F. 2d., at 607–608. The set-aside would have no effect on the ability of the remaining 96% of contractors to compete for 99.75% of construction funds. In my view, the effect of the set-aside is limited and so widely dispersed that its use is consistent with fundamental fairness.[13]

Consideration of these factors persuades me that the set-aside is a reasonably necessary means of furthering the compelling governmental interest in redressing the discrimination that affects minority contractors. Any marginal unfairness to innocent nonminority contractors is not sufficiently significant—or sufficiently identifiable—to outweigh the governmental interest served by § 103 (f)(2). When Congress acts to remedy identified discrimination, it may exercise discretion in choosing a remedy that is reasonably necessary to accomplish its purpose. Whatever the exact breadth of that discretion, I believe that it encompasses the selection of the set-aside in this case.[14]

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[13] Although I believe that the burden placed upon nonminority contractors is not unconstitutional, I reject the suggestion that it is legally irrelevant. Apparently on the theory that Congress could have enacted no set-aside and provided $400 million less in funding, the Secretary of Commerce argues that "[n]onminorities have lost no right or legitimate expectation by the addition of Section 103 (f)(2) to the 1976 Act." Brief for the Secretary of Commerce 61. But the United States may not employ unconstitutional classifications, or base a decision upon unconstitutional considerations, when it provides a benefit to which a recipient is not legally entitled. Cf. *Califano* v. *Goldfarb,* 430 U. S. 199, 210–212 (1976) (opinion of BRENNAN, J.); *Richardson* v. *Belcher,* 404 U. S. 78, 81 (1971) ("To characterize an Act of Congress as conferring a 'public benefit' does not, of course, immunize it from scrutiny under the Fifth Amendment").

V

In the history of this Court and this country, few questions have been more divisive than those arising from governmental action taken on the basis of race. Indeed, our own decisions played no small part in the tragic legacy of government-sanctioned discrimination. See *Plessy* v. *Ferguson,* 163 U. S. 537 (1896); *Dred Scott* v. *Sanford,* 19 How. 393 (60 U. S.) (1857). At least since the decision in *Brown* v. *Board of Education,* 347 U. S. 483 (1954), the Court has been resolute in its dedication to the principle that the Constitution envisions a Nation where race is irrelevant. The time cannot come too soon when no governmental decision will be based upon immutable characteristics of pigmentation or origin. But in our quest to achieve a society free from racial classification, we cannot ignore the claims of those who still suffer from the effects of identifiable discrimination.

Distinguishing the rights of all citizens to be free from racial classifications from the rights of some citizens to be made whole is a perplexing, but necessary, judicial task. When we first confronted such an issue in *Bakke*, I concluded that the Regents of the University of California were not competent to make, and had not made, findings sufficient to uphold the use of the race-conscious remedy they adopted. As my opinion made clear, I believe that the use of racial classifications, which are fundamentally at odds with the ideals of a democratic society implicit in the Due Process and Equal Protection Clauses, cannot be imposed simply to serve transient social or political goals, however worthy they may be. But the issue here turns on the scope of congressional power, and Congress has been given a unique constitutional role in the enforcement of the post-Civil War Amendments. In this case, where Congress determined that minority contractors were victims of purposeful discrimination and where Congress chose a reasonably necessary means to effectuate its purpose, I find no constitutional reason to invalidate § 103 (f)(2).[15]

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[14] Petitioners have suggested a variety of alternative programs that could be used in order to aid minority business enterprises in the construction industry. My view that this set-aside is within the discretion of Congress does not imply that other methods are unavailable to Congress. Nor do I conclude that use of a set-aside always will be an appropriate remedy or that the selection of a set-aside by any other governmental body would be constitutional. See *Bakke,* 438 U. S., at 309–310. The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of a governmental body.

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[15] Petitioners also contend that § 103 (f)(2) violates Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d *et seq.* Because I believe that the set-aside is constitutional, I also conclude that the program does not violate Title VI. See *Bakke*, 438 U. S., at 287 (opinion of POWELL, J.); *id.*, at 348–350 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.).

SUPREME COURT OF THE UNITED STATES

No. 78-1007

H. Earl Fullilove et al., Petitioners, *v.* Philip M. Klutznick, Secretary of Commerce of the United States, et al.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[July 2, 1980]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN join, concurring in the judgment.

My resolution of the constitutional issue in this case is governed by the separate opinion I coauthored in *University of California Regents* v. *Bakke,* 438 U. S. 265, 324–379 (1978). In my view, the 10% minority set-aside provision of the Public Works Employment Act of 1977 passes constitutional muster under the standard announced in that opinion.[1]

I

In *Bakke,* I joined my Brothers BRENNAN, WHITE, and BLACKMUN in articulating the view that "racial classifications are not *per se* invalid under [the Equal Protection Clause of] the Fourteenth Amendment." *Id.,* at 356 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., concurring in the judgment in part and dissenting in part) (hereinafter cited as joint separate opinion).[2] We acknowledged that "a government practice or statute which . . . contains 'suspect classifications' is to be subjected to 'strict scrutiny' and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available." *Id.*, at 357. Thus, we reiterated the traditional view that racial classifications are prohibited if they are irrelevant. *Ibid.* In addition, we firmly adhered to "the cardinal principle that racial classifications that stigmatize—because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism—are invalid without more." *Id.*, at 357–358.

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[1] On the authority of *Bakke,* it is also clear to me that the set-aside provision does not violate Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d. In *Bakke* five Members of the Court were of the view that the prohibitions of Title VI—which outlaws racial discrimination in any program or activity receiving federal financial assistance—are coextensive with the equal protection guarantee of the Fourteenth Amendment. See 438 U. S., at 328 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.); *id.,* at 287 (opinion of POWELL, J.).

We recognized, however, that these principles outlawing the irrelevant or pernicious use of race were inapposite to racial classifications that provide benefits to minorities for the purpose of remedying the present effects of past racial discrimination.[3] Such classifications may disadvantage some whites, but whites as a class lack the " 'traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.' " *Id.*, at 357 (quoting *San Antonio Independent School District* v. *Rodriguez,* 411 U. S. 1, 28 (1973)). See also *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, n. 4 (1938). Because the consideration of race is relevant to remedying the continuing effects of past racial discrimination, and because governmental programs employing racial classifications for remedial purposes can be crafted to avoid stigmatization, we concluded that such programs should not be subjected to conventional "strict scrutiny"—scrutiny that is strict in theory, but fatal in fact. *Bakke, supra,* at 362 (joint separate opinion).

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[2] In *Bakke,* the issue was whether a special minority admissions program of a state medical school violated the Equal Protection Clause of the Fourteenth Amendment. In the present case, the issue is whether the minority set-aside provision violates the equal protection component of the Due Process Clause of the Fifth Amendment. As noted in *Bakke,* " '[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.' " 438 U. S., at 367, n. 43 (joint separate opinion) (quoting *Buckley* v. *Valeo,* 424 U. S. 1, 93 (1976) (*per curiam*)).

[3] In *Bakke,* the Medical School of the University of California at Davis had adopted a special admissions program in which 16 out of the 100 places in each entering class were reserved for disadvantaged minorities. A major purpose of this program was to ameliorate the present effects of past racial discrimination. See 438 U. S., at 362 (joint separate opinion); *id.*, at 305–306 (opinion of POWELL, J.).

Nor did we determine that such programs should be analyzed under the minimally rigorous rational-basis standard of review. *Id.*, at 358. We recognized that race has often been used to stigmatize politically powerless segments of society, and that efforts to ameliorate the effects of past discrimination could be based on paternalistic stereotyping, not on a careful consideration of modern social conditions. In addition, we acknowledged that governmental classification on the immutable characteristic of race runs counter to the deep national belief that state-sanctioned benefits and burdens should bear some relationship to individual merit and responsibility. *Id.*, at 360–361.

We concluded, therefore, that because a racial classification ostensibly designed for remedial purposes is susceptible to misuse, it may be justified only by showing "an important and articulated purpose for its use." *Id.*, at 361. "In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program." *Ibid.* In our view, then, the proper inquiry is whether racial classifications designed to further remedial purposes serve important governmental objectives and are substantially related to achievement of those objectives. *Id.*, at 359.

II

Judged under this standard, the 10% minority set-aside provision at issue in this case is plainly constitutional. Indeed, the question is not even a close one.

As the Court demonstrates, see *ante,* at 4–16, it is indisputable that Congress' articulated purpose for enacting the set-aside provision was to remedy the present effects of past racial discrimination. See also the concurring opinion of my Brother POWELL, *ante,* at 8–12. Congress had a sound basis for concluding that minority-owned construction enterprises, though capable, qualified, and ready and willing to work, have received a disproportionately small amount of public contracting business because of the continuing effects of past discrimination. Here, as in *Bakke, supra,* at 362 (joint separate opinion), "minority underrepresentation is substant and chronic, and . . . the handicap of past discrimination is impeding access of minorities to" the benefits of the governmental program. In these circumstances, remedying these present effects of past racial discrimination is a sufficiently important governmental interest to justify the use of racial classifications. *Ibid.* See generally *id.*, at 362–373.[4]

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[4] Petitioners argue that the set-aside is invalid because Congress did not create a sufficient legislative record to support its conclusion that racial classifications were required to ameliorate the present effects of past racial discrimination. In petitioners' view, Congress must make particularized findings that past violations of the Equal Protection Clause and antidiscrimination statutes have a current effect on the construction industry.

This approach is fundamentally misguided. Unlike the courts, Congress is engaged in the broad mission of framing general social rules, not adjudicating individual disputes. Our prior decisions recognize Congress' authority to

"require or authorize preferential treatment for those likely disadvantaged by societal racial discrimination. Such legislation has been sustained even without a requirement of findings of intentional racial discrimination by those required or authorized to accord preferential treatment, or a case-

Because the means chosen by Congress to implement the set-aside provision are substantially related to the achievement of its remedial purpose, the provision also meets the second prong of our *Bakke* test. Congress reasonably determined that race-conscious means were necessary to break down the barriers confronting participation by minority enterprises in federally funded public works projects. That the set-aside creates a quota in favor of qualified and available minority business enterprises does not necessarily indicate that it stigmatizes. As our opinion stated in *Bakke*, "[f]or purposes of constitutional adjudication, there is no difference between" setting aside "a predetermined number of places for qualified minority applicants rather than using minority status as a positive factor to be considered in evaluating the applications of disadvantaged minority applicants." *Id.*, at 378. The set-aside, as enacted by Congress and implemented by the Secretary of Commerce, is carefully tailored to remedy racial discrimination while at the same time avoiding stigmatization and penalizing those least able to protect themselves in the political process. See *ante,* at 28–38. Cf. the concurring opinion of my Brother POWELL, *ante,* at 13–21. Since under the set-aside provision a contract may be awarded to a minority enterprise only if it is qualified to do the work, the provision stigmatizes as inferior neither a minority firm that benefits from it nor a nonminority firm that is burdened by it. Nor does the set-aside "establish a quota in the invidious sense of a ceiling," *Bakke, supra,* at 375 (joint separate opinion), on the number of minority firms that can be awarded public works contracts. In addition, the set-aside affects only a miniscule amount of the funds annually ex-

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by-case determination that those to be benefited suffered from racial discrimination." *Bakke,* 438 U. S., at 366 (joint separate opinion).

See also *ante,* at 26; the concurring opinion of my Brother POWELL, *ante,* at 7–8.

pended in the United States for construction work." See *ante*, at 33, n. 72.

In sum, it is clear to me that the racial classifications employed in the set-aside provision are substantially related to the achievement of the important and congressionally articulated goal of remedying the present effects of past racial discrimination. The provision, therefore, passes muster under the equal protection standard I adopted in *Bakke*.

III

In my separate opinion in *Bakke*, 438 U. S., at 387–396, I recounted the "ingenious and pervasive forms of discrimination against the Negro" long condoned under the Constitution and concluded that "[t]he position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment." *Id.*, at 387, 395. I there stated:

> "It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. For far too long, the doors to those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors." *Id.*, at 401.

Those doors cannot be fully opened without the acceptance of race-conscious remedies. As my Brother BLACKMUN observed in *Bakke*, "[i]n order to get beyond racism, we must first take account of race. There is no other way." *Id.*, at 407 (separate opinion).

Congress recognized these realities when it enacted the minority set-aside provision at issue in this case. Today, by upholding this race-conscious remedy, the Court accords Congress the authority necessary to undertake the task of moving our society toward a state of meaningful equality of opportunity, not an abstract version of equality in which the effects of past discrimination would be forever frozen into our social fabric. I applaud this result. Accordingly, I concur in the judgment of the Court.

SUPREME COURT OF THE UNITED STATES

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[July 2, 1980]

MR. JUSTICE STEWART, with whom MR. JUSTICE REHNQUIST joins, dissenting.

"Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. . . . The law regards man as man, and takes no account of his surroundings or of his color. . . ." Those words were written by a Member of this Court 84 years ago. *Plessy* v. *Ferguson,* 163 U. S. 537, 559 (Harlan, J., dissenting). His colleagues disagreed with him, and held that a statute that required the separation of people on the basis of their race was constitutionally valid because it was a "reasonable" exercise of legislative power and had been "enacted in good faith for the promotion [of] the public good. . . ." *Id.,* at 550. Today, the Court upholds a statute that accords a preference to citizens who are "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts," for much the same reasons. I think today's decision is wrong for the same reason that *Plessy* v. *Ferguson* was wrong, and I respectfully dissent.

A

The equal protection standard of the Constitution has one clear and central meaning—it absolutely prohibits invidious discrimination by government. That standard must be met by every State under the Equal Protection Clause of the

Fourteenth Amendment. *Loving* v. *Virginia,* 388 U. S. 1, 10; *Hill* v. *Texas,* 316 U. S. 400; *Strauder* v. *West Virginia,* 100 U. S. 303, 307–308; *Slaughter-House Cases,* 16 Wall. 36, 71–72. And that standard must be met by the United States itself under the Due Process Clause of the Fifth Amendment. *Washington* v. *Davis,* 426 U. S. 229, 239; *Bolling* v. *Sharpe,* 347 U. S. 497.[1] Under our Constitution, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid. *McLaughlin* v. *Florida,* 379 U. S. 184, 192; *Bolling* v. *Sharpe, supra,* at 499; *Korematsu* v. *United States,* 323 U. S. 214, 216.[2]

The hostility of the Constitution to racial classifications by government has been manifested in many cases decided by this Court. See, *e. g., Loving* v. *Virginia, supra; McLaughlin* v. *Florida, supra; Brown* v. *Board of Education,* 347 U. S. 483; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337. And our cases have made clear that the Constitution is wholly neutral in forbidding such racial discrimination, whatever the race may be of those who are its victims. In *Anderson* v. *Martin,* 375 U. S. 399, for instance, the Court dealt with a state law that required that the race of each candidate for election to public office be designated on the nomination papers and ballots. Although the law applied equally to candidates of whatever race, the Court held that it nonetheless violated the constitutional standard of equal protection. "We see *no relevance,*" the Court said, "in the State's pointing up the race of the candidate as bearing upon his qualifications for office."

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[1] "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley* v. *Valeo,* 424 U. S. 1, 93.

[2] By contrast, nothing in the Constitution prohibits a private person from discriminating on the basis of race in his personal or business affairs. See *Steelworkers* v. *Weber,* 443 U. S. 193. The Fourteenth Amendment limits only the actions of the States; the Fifth Amendment limits only the actions of the National Government.

Id., at 403 (emphasis added). Similarly, in *Loving* v. *Virginia, supra,* and *McLaughlin* v. *Florida, supra,* the Court held that statutes outlawing miscegenation and interracial cohabitation were constitutionally invalid, even though the laws penalized all violators equally. The laws were unconstitutional for the simple reason that they penalized individuals solely because of their race, whatever their race might be. See also *Goss* v. *Board of Education,* 373 U. S. 683; *Buchanan* v. *Warley,* 245 U. S. 60.[3]

This history contains one clear lesson. Under our Constitution, the government may never act to the detriment of a person solely because of that person's race.[4] The color of a person's skin and the country of his origin are immutable facts that bear no relation to ability, disadvantage, moral culpability, or any other characteristics of constitutionally permissible interest to government. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States,* 320 U. S. 81, 100, quoted in *Loving* v. *Virginia, supra,* 388 U. S., at 11.[5] In short, racial discrimination is by definition invidious discrimination.

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[3] *University of California Regents* v. *Bakke,* 438 U. S. 265, and *United Jewish Organizations* v. *Carey,* 430 U. S. 144, do not suggest a different rule. The Court in *Bakke* invalidated the racially preferential admissions program that had deprived Bakke of equal access to a place in the medical school of a state university. In *United Jewish Organizations* v. *Carey,* a state legislature had apportioned certain voting districts with an awareness of their racial composition. Since the plaintiffs there had "failed to show that the legislative reapportionment plan had either the purpose or the effect of discriminating against them on the basis of their race," no constitutional violation had occurred. 430 U. S., at 179–180 (concurring opinion). No person in that case was deprived of his electoral franchise.

More than 35 years ago, during the Second World War, this Court did find constitutional a governmental program imposing injury on the basis of race. See *Korematsu* v. *United States,* 323 U. S. 214; *Hirabayashi* v. *United States,* 320 U. S. 81. Significantly, those cases were decided not only in time of war, but in an era before the Court had held that the Due Process Clause of the Fifth Amendment imposes the same equal protection standard upon the Federal Government that the Fourteenth Amendment imposes upon the States. See *Bolling* v. *Sharpe,* 347 U. S. 497.

[4] A court of equity may, of course, take race into account in devising a remedial decree to undo a violation of a law prohibiting discrimination on the basis of race. See *Teamsters* v. *United States,* 431 U. S. 324; *Franks* v. *Bowman Transportation Co.,* 424 U. S. 747; *Swann* v. *Charlotte-Mecklenberg Board of Education,* 402 U. S. 1, 18–32. But such a judicial decree, following litigation in which a violation of law has been determined,

The rule cannot be any different when the persons injured by a racially biased law are not members of a racial minority. The guarantee of equal protection is "universal in [its] application, to all persons . . . without regard to any differences of race, of color, or of nationality." *Yick Wo* v. *Hopkins,* 118 U. S. 356, 369. See *In re Griffiths,* 413 U. S. 717; *Hernandez* v. *Texas,* 347 U. S. 475; *Truax* v. *Raich,* 239 U. S. 33, 39–43; *Strauder* v. *West Virginia, supra,* 100 U. S., at 308. The command of the equal protection guarantee is simple but unequivocal: In the words of the Fourteenth Amendment, "No State shall . . . deny to *any* person . . . the equal protection of the laws." Nothing in this language singles out some "persons" for more "equal" treatment than others. Rather, as the Court made clear in *Shelley* v. *Kraemer,* 334 U. S. 1, 22,

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is wholly different from generalized legislation that awards benefits and imposes detriments dependent upon the race of the recipients. See text in Part B, *infra.*

[5] As Mr. Justice Murphy wrote in dissenting from the Court's opinion and judgment in *Korematsu* v. *United States,* 323 U. S. 214, 242:

"Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States."

See also *Defunis* v. *Odegaard,* 416 U. S. 312, 331–344 (Douglas, J., dissenting); A. Bickel, The Morality of Consent 132–133 (1975).

the benefits afforded by the Equal Protection Clause "are, by its terms, guaranteed to the individual. [They] are personal rights." From the perspective of a person detrimentally affected by a racially discriminatory law, the arbitrariness and unfairness is entirely the same, whatever his skin color and whatever the law's purpose, be it purportedly "for the promotion of the public good" or otherwise.

No one disputes the self-evident proposition that Congress has broad discretion under its Spending Power to disburse the revenues of the United States as it deems best and to set conditions on the receipt of the funds disbursed. No one disputes that Congress has the authority under the Commerce Clause to regulate contracting practices on federally funded public works projects, or that it enjoys broad powers under § 5 of the Fourteenth Amendment "to enforce by appropriate legislation" the provisions of that Amendment. But these self-evident truisms do not begin to answer the question before us in this case. For in the exercise of its powers, Congress must obey the Constitution just as the legislatures of all the States must obey the Constitution in the exercise of their powers. If a law is unconstitutional, it is no less unconstitutional just because it is a product of the Congress of the United States.

B

On its face, the minority business enterprise (MBE) provision at issue in this case denies the equal protection of the law. The Public Works Employment Act of 1977 directs that all project construction shall be performed by those private contractors who submit the lowest competitive bids and who meet established criteria of responsibility. 42 U. S. C. § 6705 (e) (1) (1976 ed. Supp. I). One class of contracting firms—defined solely according to the racial and ethnic attributes of their owners—is, however, excepted from the full rigor of these requirements with respect to a percentage of each federal grant. The statute, on its face and in effect, thus bars a class to which the petitioners belong from having the opportunity to receive a government benefit, and bars the members of that class solely on the basis of their race or ethnic background. This is precisely the kind of law that the guarantee of equal protection forbids.

The Court's attempt to characterize the law as a proper remedial measure to counteract the effects of past or present racial discrimination is remarkably unconvincing. The Legislative Branch of government is not a court of equity. It has neither the dispassionate objectivity nor the flexibility that are needed to mold a race-conscious remedy around the single objective of eliminating the effects of past or present discrimination.[6]

But even assuming that Congress has the power, under § 5 of the Fourteenth Amendment or some other constitutional provision, to remedy previous illegal racial discrimination, there is no evidence that Congress has in the past engaged in racial discrimination in its disbursement of federal contracting funds. The MBE provision thus pushes the limits of any such justification far beyond the equal protection standard of the Constitution. Certainly, nothing in the Constitution gives Congress any greater authority to impose detriments on the basis of race than is afforded the Judicial Branch.[7] And a judicial decree that imposes burdens on the basis of race can be upheld only where its sole purpose is to eradicate the actual effects of illegal race discrimination. See *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424.

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[6] See n. 4, *supra.* In *McDaniel* v. *Barresi,* 402 U. S. 39, the Court approved a county's voluntary race-conscious redrafting of its public school pupil assignment system in order to eliminate the effects of past unconstitutional racial segregation of the pupils. But no pupil was deprived of a public school education as a result.

[7] Section 2 of the Thirteenth Amendment gives Congress the authority to "enforce" the provisions of § 1 of the same Amendment, and § 5 of the Fourteenth Amendment provides that, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.". Neither section grants to Congress the authority to require the States to flout their obligation under § 1 of the Fourteenth Amendment to afford "the equal protection of the laws" or the power to enact legislation that itself violates the equal protection component of the Fifth Amendment.

The provision at issue here does not satisfy this condition. Its legislative history suggests that it had at least two other objectives in addition to that of counteracting the effects of past or present racial discrimination in the public works construction industry.[8] One such purpose appears to have been to assure to minority contractors a certain percentage of federally funded public works contracts.[9] But, since the guarantee of equal protection immunizes from capricious governmental treatment "persons"—not "races," it can never countenance laws that seek racial balance as a goal in and of itself. "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Regents of the University of California* v. *Bakke,* 438 U. S. 265, 307 (opinion of POWELL, J.). Second, there are indications that the MBE provision may have been enacted to compensate for the effects of social, educational, and economic "disadvantage."[10] No race, however, has a monopoly on social, educational, or economic disadvantage,[11] and any law that indulges in such a presumption clearly violates the constitutional guarantee of equal protection. Since the MBE provision was in whole or in part designed to effectuate objectives other than the elimination of the effects of racial discrimination, it cannot stand as a remedy that comports with the strictures of equal protection, even if it otherwise could.[12]

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[8] The legislative history of the MBE provision itself contains not one mention of racial discrimination or the need to provide a mechanism to correct the effects of such discrimination. From the context of the Act, however, it is reasonable to infer that the program was enacted, at least in part, to remedy perceived past and present racial discrimination. In 1977, Congress knew that many minority business enterprises had historically suffered racial discrimination in the economy as a whole and in the construction industry in particular. See H. R. Rep. No. 94–1791, pp. 182–183 (1977); H. R. Rep. No. 94–468, pp. 1–2 (1975); To Amend and Extend the Local Public Works Capital Development and Investment Act: Hearings before the Subcommittee on Economic Development of the House Committee on Public Works and Transportation, 95th Cong., 1st Sess., 939 (1977) (statement of Rep. Conyers). Some of this discrimination may well, in fact, have violated one or more of the state and federal antidiscrimination laws.

[9] See 123 Cong. Rec. H1436 (Feb. 24, 1977) (Rep. Mitchell) ("all [the MBE provision] attempts to do is to provide that those who are in minority businesses get a *fair share of the action* from this public works legislation") (emphasis supplied). Moreover, sponsors of the legislation repeatedly referred to the low participation rate of minority businesses in federal procurement programs. See 123 Cong. Rec. H1440 (Feb. 24, 1977) (Rep. Biaggi); 123 Cong. Rec. H1436–H1437 (Feb. 24, 1977) (Rep. Mitchell); 123 Cong. Rec. H1388–H1389 (Feb. 23, 1977) (Rep. Mitchell); 123 Cong. Rec. S3910 (Mar. 10, 1977) (Sen. Brooke).

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[10] See 123 Cong. Rec. H1440 (Feb. 24, 1977) (Rep. Conyers) ("minority contractors and businessmen who are trying to enter in on the bidding process . . . get the 'works' almost every time. The bidding process is one whose intricacies defy the imaginations of most of us here.") That the elimination of "disadvantage" is one of the program's objectives is an inference that finds support in the agency's own interpretation of the statute. See U. S. Department of Commerce, Economic Development Administration, EDA Minority Business Enterprise Technical Bulletin (Additional Assistance and Information Available to Grantees and Their Contractors In Meeting The 10% MBE Requirement) 9–10 (Oct. 11, 1977) (Technical Bulletin) ("a [minority] subcontractor's price should not be considered unreasonable if he is merely trying to cover his costs because the price results from *disadvantage* which affects the MBE's costs of doing business *or* results from *discrimination*" (emphasis added)).

[11] For instance, in 1978, 83.4% of persons over the age of 25 who had not completed high school were "white," see U. S. Dept. of Commerce Bureau of the Census, Statistical Abstract of the United States 145 (1979), and in 1977, 79.0% of households with annual incomes of less than $5,000 were "white," see *id.*, at 458.

[12] Moreover, even a properly based judicial decree will be struck down if the scope of the remedy it provides is not carefully tailored to fit the nature and extent of the violation. See *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406, 419–420; *Milliken* v. *Bradley*, 418 U. S. 717. Here, assuming that the MBE provision was intended solely as a remedy for past and present racial discrimination, it sweeps far too broadly. It

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The Fourteenth Amendment was adopted to ensure that every person must be treated equally by each State regardless of the color of his skin. The Amendment promised to carry to its necessary conclusion a fundamental principle upon which this Nation had been founded—that the law would honor no preference based on lineage.[13] Tragically, the promise of 1868 was not immediately fulfilled, and decades passed before the

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directs every state and local government covered by the program to set aside 10% of its grant for minority business enterprises. Waivers from that requirement are permitted, but only where insufficient numbers of minority businesses capable of doing the work at nonexorbitant prices are located in the relevant contracting area. No waiver is provided for any governmental entity that can prove a history free of racial discrimination. Nor is any exemption permitted for nonminority contractors that are able to demonstrate that they have not engaged in racially discriminatory behavior. Finally, the statute makes no attempt to direct the aid it provides solely toward those minority contracting firms that arguably still suffer from the effects of past or present discrimination.

These are not the characteristics of a racially conscious remedial decree that is closely tailored to the evil to be corrected. In today's society, it constitutes far too gross an oversimplification to assume that every single Negro, Spanish-speaking citizen, Oriental, Indian, Eskimo, and Aleut potentially interested in construction contracting currently suffers from the effects of past or present racial discrimination. Since the MBE set-aside must be viewed as resting upon such an assumption, it necessarily paints with too broad a brush. Except to make whole the identified victims of racial discrimination, the guarantee of equal protection prohibits the government from taking detrimental action against innocent people on the basis of the sins of others of their own race.

[13] The Framers of our Constitution lived at a time when the Old World still operated in the shadow of ancient feudal traditions. As products of the Age of Enlightenment, they set out to establish a society that recognized no distinctions among white men on account of their birth. See U. S. Constitution, Art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States"). The words Thomas Jefferson wrote in 1776 in the Declaration of Independence, however, contained the seeds of a far broader principle: "We hold these Truths to be self-evident, that all Men are created equal. . . ."

States and the Federal Government were finally directed to eliminate detrimental classifications based on race. Today, the Court derails this achievement and places its imprimatur on the creation once again by government of privileges based on birth.

The Court, moreover, takes this drastic step without, in my opinion, seriously considering the ramifications of its decision. Laws that operate on the basis of race require definitions of race. Because of the Court's decision today, our statute books will once again have to contain laws that reflect the odious practice of delineating the qualities that make one person a Negro and make another white.[14] Moreover, racial discrimination, even "good faith" racial discrimination, is inevitably a two-edged sword. "[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth." *University of California Regents* v. *Bakke, supra,* 438 U. S., at 298 (opinion of POWELL, J.). Most importantly, by making race a relevant criterion once again in its own affairs, the Government implicitly teaches the public that the apportionment of rewards and penalties can legitimately be made according to race—rather than according to merit or ability—and that people can, and perhaps should, view themselves and others in terms of their racial characteristics. Notions of "racial entitlement" will be fostered, and private discrimination will necessarily be encouraged.[15] See *Hughes* v. *Superior Court,* 339 U. S. 460, 463–464; T. Eastland & W. Bennett, Counting by Race 139–170 (1979); Van Alstyne, Rites of Passage: Race, the Supreme Court, and the Constitution, 46 U. Chi. L. Rev. 775 (1979).

There are those who think that we need a new Constitution, and their views may someday prevail. But under the Constitution we have, one practice in which government may never engage is the practice of racism—not even "temporarily" and not even as an "experiment."

For these reasons, I would reverse the judgment of the Court of Appeals.

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[14] See Technical Bulletin, *supra,* at 1. Cf., Ga. Code Ann. § 53–312 (1937), Tex. Penal Code Art. 493 (1948).

[15] "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." *Olmstead* v. *United States,* 277 U. S. 438, 485 (Brandeis, J., dissenting).

SUPREME COURT OF THE UNITED STATES

No. 78–1007

H. Earl Fullilove et al., Petitioners, v. Philip M. Klutznick, Secretary of Commerce of the United States, et al.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[July 2, 1980]

Mr. Justice Stevens, dissenting.

The 10% set-aside contained in the Public Works Employment Act of 1977, 91 Stat. 116 ("the Act") creates monopoly privileges in a $400,000,000 market for a class of investors defined solely by racial characteristics. The direct beneficiaries of these monopoly privileges are the relatively small number of persons within the racial classification who represent the entrepreneurial subclass—those who have, or can borrow, working capital.

History teaches us that the costs associated with a sovereign's grant of exclusive privileges often encompass more than the high prices and shoddy workmanship that are familiar hand maidens of monopoly; they engender animosity and discontent as well. The economic consequences of using noble birth as a basis for classification in 18th century France, though disastrous, were nothing as compared with the terror that was engendered in the name of "egalite" and "fraternite." Grants of privilege on the basis of characteristics acquired at birth are far from an unmixed blessing.

Our historic aversion to titles of nobility[1] is only one aspect of our commitment to the proposition that the sovereign has a fundamental duty to govern impartially.[2] When government accords different treatment to different persons, there must be a reason for the difference.[3] Because racial characteristics so seldom provide a relevant basis for disparate treatment,[4] and because classifications based on race are

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[1] "Such pure discrimination is most certainly not a 'legitimate purpose' for our Federal Government, which should be especially sensitive to discrimination on grounds of birth. 'Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people

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whose institutions are founded upon the doctrine of equality.' *Hirabayashi* v. *United States,* 320 U. S. 81, 100. From its inception, the Federal Government has been directed to treat all its citizens as having been 'created equal' in the eyes of the law. The Declaration of Independence states:

"'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.'

"And the rationale behind the prohibition against the grant of any title of nobility by the United States, see U. S. Const., Art. I, § 9, cl. 8, equally would prohibit the United States from attaching any badge of ignobility to a citizen at birth." *Mathews* v. *Lucas,* 427 U. S. 495, 520-521, n. 3 (STEVENS, J., dissenting).

[2] "The federal sovereign, like the States, must govern impartially. The concept of equal justice under law is served by the Fifth Amendment's guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment." *Hampton* v. *Mow Sun Wong,* 426 U. S. 88, 100.

See also *Harris* v. *McRae,* — U. S. —, — (STEVENS, J., dissenting); *Craig* v. *Boren,* 429 U. S. 190, 211 (STEVENS, J., concurring).

[3] "As a matter of principle and in view of my attitude toward the equal protection clause, I do not think differences of treatment under law should be approved on classification because of differences unrelated to the legislative purposes. The equal protection clause ceases to assure either equality or protection if it is avoided by any conceivable difference that can be pointed out between those bound and those left free. This Court has often announced the principle that the differentiation must have an appropriate relation to the object of the legislation or ordinance." *Railway Express* v. *New York,* 336 U. S. 106, 115 (Jackson, J., concurring).

[4] "Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizens, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white. But that sort of stereotyped

potentially so harmful to the entire body politic,[5] it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate.

The statutory definition of the preferred class includes "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." All aliens and all nonmembers of the racial class are excluded. No economic, social, geographical or historical criteria are

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reaction may have no rational relationship—other than pure prejudicial discrimination—to the stated purpose for which the classification is being made." *Mathews* v. *Lucas, supra,* 427 U. S., at 520–521 (STEVENS, J., dissenting) (footnote omitted).

[5] Indeed, the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals. The so-called guidelines developed by the Economic Development Administration, see the appendix to the opinion of THE CHIEF JUSTICE, ¶ 3, *ante,* at 43, are so general as to be fairly innocuous; as a consequence they are too vague to be useful. For example, it is unclear whether the firm described in n. 16, *infra,* would be eligible for the 10% set-aside. If the National Government is to make a serious effort to define racial classes by criteria that can be administered objectively, it must study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935, translated in 4 Nazi Conspiracy and Aggression 1417–PS, pp. 8–9 (1946):

"On the basis of Article 3, Reichs Citizenship Law, of 15 Sept. 1935 (RGBl. I, page 146) the following is ordered:

. . . . .

"Article 5

"1. A Jew is anyone who descended from at least three grandparents who were racially full Jews. Article 2, par. 2, second sentence will apply.

"2. A Jew is also one who descended from two full Jewish parents, if: (a) he belonged to the Jewish religious community at the time this law was issued, or who joined the community later; (b) he was married to a Jewish person, at the time the law was issued, or married one subsequently; (c) he is the offspring from a marriage with a Jew, in the sense of Section 1, which was contracted after the Law for the protection of German blood and German honor became effective (RGBl. I, page 1146 of 15 Sept. 1935); (d) he is the offspring of an extramarital relationship, with a Jew, according to Section 1, and will be born out of wedlock after July 31, 1936."

relevant for exclusion or inclusion. There is not one word in the remainder of the Act or in the legislative history that explains why any Congressman or Senator favored this particular definition over any other or that identifies the common characteristics that every member of the preferred class was believed to share.[6] Nor does the Act or its history explain why 10% of the total appropriation was the proper amount to set aside for investors in each of the six racial subclasses.[7]

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[6] In 1968, almost 10 years before the Act was passed, the Small Business Administration had developed a program to assist small business concerns owned or controlled by "socially or economically disadvantaged persons." The Agency's description of persons eligible for such assistance stated that such "persons include, but are not limited to, black Americans, American Indians, Spanish-Americans, oriental Americans, Eskimos and Aleuts. . . ." See opinion of THE CHIEF JUSTICE, *ante*, at 12. This may be the source of the definition of the class at issue in this case. See also *id.*, at 36, n. 73. But the SBA's class of socially or economically disadvantaged persons neither included all persons in the racial class nor excluded all nonmembers of the racial class. Race was used as no more than a factor in identifying the class of the disadvantaged. The difference between the statutory quota involved in this case and the SBA's 1968 description of those whose businesses were to be assisted under § 8 (a) of the Small Business Act is thus at least as great as the difference between the University of California's racial quota and the Harvard admissions system that MR. JUSTICE POWELL regarded as critical in *University of California* v. *Bakke*, 438 U. S. 265, 315–318.

[7] It was noted that the value of the federal contracts awarded to minority business firms in prior years had amounted to less than 1% of the total; since the statutory set aside of 10% may be satisfied by subcontracts to minority business enterprises, it is possible that compliance with the statute would not change the 1% figure.

The legislative history also revealed that minority business enterprises represented about 3 or 4% of all eligible firms; the history does not indicate, however, whether the 10% figure was intended to provide the existing firms with three times as much business as they could expect to receive on a random basis or to encourage members of the class to acquire or form new firms. An EDA guideline arguably implies that new investments made in order to take advantage of the 10% set aside would not

Four different, though somewhat interrelated, justifications for the racial classification in this Act have been advanced: first, that the 10% set aside is a form of reparation for past injuries to the entire membership of the class; second, that it is an appropriate remedy for past discrimination against minority business enterprises that have been denied access to public contracts; third, that the members of the favored class have a special entitlement to "a piece of the action" when government is distributing benefits; and, fourth, that the program is an appropriate method of fostering greater minority participation in a competitive economy. Each of these asserted justifications merits separate scrutiny.

I

Racial characteristics may serve to define a group of persons who have suffered a special wrong and who, therefore, are entitled to special reparations. Congress has recognized, for example, that the United States has treated some Indian tribes unjustly and has created procedures for allowing members of the injured classes to obtain classwide relief. See, *e. g., Delaware Tribal Business Committee* v. *Weeks*, 430 U. S. 73. But as I have formerly suggested, if Congress is to authorize a recovery for a class of similarly situated victims of a past wrong, it has an obligation to distribute that recovery among the members of the injured class in an evenhanded way. See *id.*, at 97–98 (STEVENS, J., dissenting).

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be considered "bona fide." See appendix to the opinion of THE CHIEF JUSTICE, *ante*, at 41.

The 10% figure bears no special relationship to the relative size of the entire racial class, to any of the six subclasses, or to the population of the subclasses in the areas where they primarily reside. The Aleuts and the Eskimos, for example, respectively represent less than 1% and 7% of the population of Alaska, see The New Columbia Encyclopedia (Columbia University Press 1975), pp. 47, 59, 891, while Spanish-speaking or Negro citizens represent a majority or almost a majority in a large number of urban areas.

Moreover, in such a case the amount of the award should bear some rational relationship to the extent of the harm it is intended to cure.

In his eloquent separate opinion in *University of California Regents* v. *Bakke,* 438 U. S. 265, 387, MR. JUSTICE MARSHALL recounted the tragic class-based discrimination against Negroes that is an indelible part of America's history. I assume that the wrong committed against the Negro class is both so serious and so pervasive that it would constitutionally justify an appropriate classwide recovery measured by a sum certain for every member of the injured class. Whether our resources are adequate to support a fair remedy of that character is a policy question I have neither the authority nor the wisdom to address. But that serious classwide wrong cannot in itself justify the particular classification Congress has made in this Act. Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification. Quite obviously, the history of discrimination against black citizens in America cannot justify a grant of privileges to Eskimos or Indians.

Even if we assume that each of the six racial subclasses has suffered its own special injury at some time in our history, surely it does not necessarily follow that each of those subclasses suffered harm of identical magnitude. Although "the Negro was dragged to this country in chains to be sold in slavery," *Bakke,* opinion of MARSHALL, J., *supra,* 438 U. S., at 387, the "Spanish-speaking" subclass came voluntarily, frequently without invitation, and the Indians, the Eskimos and the Aleuts had an opportunity to exploit America's resources before most American citizens arrived. There is no reason to assume, and nothing in the legislative history suggests, much less demonstrates, that each of these subclasses is equally entitled to reparations from the United States Government.[8]

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[8] Ironically, the Aleuts appear to have been ruthlessly exploited at some

At best, the statutory preference is a somewhat perverse form of reparation for the members of the injured classes. For those who are the most disadvantaged within each class are the least likely to receive any benefit from the special privilege even though they are the persons most likely still to be suffering the consequences of the past wrong.[9] A random distribution to a favored few is a poor form of compensation for an injury shared by many.

My principal objection to the reparation justification for this legislation, however, cuts more deeply than my concern about its inequitable character. We can never either erase or ignore the history that MR. JUSTICE MARSHALL has recounted. But if that history can justify such a random distribution of benefits on racial lines as that embodied in this statutory scheme, it will serve not merely as a basis for remedial legislation, but rather as a permanent source of justification for grants of special privileges. For if there is no duty to attempt either to measure the recovery by the wrong or to distribute that recovery within the injured class

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point in their history by Russian fur traders. See The New Columbia Encyclopedia, p. 59.

[9] For a similar reason, the discrimination against males condemned in *Califano* v. *Goldfarb*, 430 U. S. 199, could not be justified as a remedy for past discrimination against females. That case involved a statutory provision which relieved widows from the obligation of proving dependency on their deceased spouses in order to obtain benefits, but did not similarly relieve widowers.

"The widows who benefit from the disparate treatment are those who were sufficiently successful in the job market to become nondependent on their husbands. Such a widow is the least likely to need special benefits. The widow most in need is the one who is 'suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer.' [*Kahn* v. *Shevin*, 416 U. S. 351,] 354. To accept the *Kahn* justification we must presume that Congress deliberately gave a special benefit to those females least likely to have been victims of the historic discrimination discussed in *Kahn*." 430 U. S., at 221 (STEVENS, J., concurring in the judgment).

in an evenhanded way, our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate "a piece of the action" for its members.

Although I do not dispute the validity of the assumption that each of the subclasses identified in the Act has suffered a severe wrong at some time in the past, I cannot accept this slapdash statute as a legitimate method of providing classwide relief.

II

The Act may also be viewed as a much narrower remedial measure—one designed to grant relief to the specific minority business enterprises that have been denied access to public contracts by discriminatory practices.

The legislative history of the Act does not tell us when, or how often, any minority business enterprise was denied such access. Nevertheless, it is reasonable to infer that the number of such incidents has been relatively small in recent years. For, as noted by the Solicitor General, in the last 20 years Congress has enacted numerous statutes designed to eliminate discrimination and its effects from federally funded programs.[10] Title VI of the Civil Rights Act of 1964 unequivocally and comprehensively prohibits discrimination on the basis of race in any program or activity receiving federal financial assistance. In view of the scarcity of litigated claims on behalf of minority business enterprises during this period, and the lack of any contrary evidence in the legislative record, it is appropriate to presume that the law has generally been obeyed.

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[10] "The statute with the most comprehensive coverage is Title VI of the Civil Rights Act of 1964, 42 U. S. C. 2000d *et seq.;* which broadly prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance. Since the passage of Title VI, many other specific federal grant statutes have contained similar prohibitions against discrimination in particular funded activities. See, *e. g.,* State and Local Fiscal Assistance Amendments of 1976, 31 U. S. C. 1242; Energy Conservation and Production Act, 42 U. S. C. 6870; Housing and Community Development Act of 1974, 42 U. S. C. 5309; Comprehensive Employment and Training Act of 1973, 29 U. S. C. 991." Brief for Respondent 21, n. 7.

Assuming, however, that some firms have been denied public business for racial reasons, the instant statutory remedy is nevertheless demonstrably much broader than is necessary to right any such past wrong. For the statute grants the special preference to a class that includes (1) those minority owned firms that have successfully obtained business in the past on a free competitive basis and undoubtedly are capable of doing so in the future as well; (2) firms that have never attempted to obtain any public business in the past; (3) firms that were initially formed after the Act was passed, including those that may have been organized simply to take advantage of its provisions;[11] (4) firms that have tried to obtain public business but were unsuccessful for reasons that are unrelated to the racial characteristics of their stockholders; and (5) those firms that have been victimized by racial discrimination.

Since there is no reason to believe that any of the firms in the first four categories had been wrongfully excluded from the market for public contracts, the statutory preference for those firms cannot be justified as a remedial measure. And since a judicial remedy was already available for the firms in the fifth category,[12] it seems inappropriate to regard the preference as a remedy designed to redress any specific wrongs.[13]

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[11] Although the plain language of the statute appears to include such firms, as I have already noted *supra*, at 4–5, n. 7, the EDA guidelines may consider such newly formed firms ineligible for the statutory set-aside.

[12] See *University of California Regents* v. *Bakke, supra,* 438 U. S., at 418–421 (opinion of STEVENS, J.). See also § 207 (d) of the Local Public Works Capital Development and Investment Act of 1976, 90 Stat. 999, 1007–1008.

[13] I recognize that the EDA has issued a technical bulletin, relied on heavily by THE CHIEF JUSTICE, *ante*, at 17–20, which distinguishes be-

In any event, since it is highly unlikely that the composition of the fifth category is at all representative of the entire class of firms to which the statute grants a valuable preference, it is ill-fitting to characterize this as a "narrowly tailored" remedial measure.[14]

III

The legislative history of the Act discloses that there is a group of legislators in Congress identified as the "Black Caucus" and that members of that group argued that if the Federal Government was going to provide $4,000,000,000 of new public contract business, their constituents were entitled to "a piece of the action."

It is neither unusual nor reprehensible for Congressmen to promote the authorization of public construction in their districts. The flow of capital and employment into a district inevitably has both direct and indirect consequences that are beneficial. As MR. JUSTICE BRENNAN noted in *Elrod* v. *Burns*, 427 U. S. 347, however, the award of such contracts may become a form of political patronage that is dispensed by the party in power.[15] Although the practice of awarding such contracts to political allies may be as much a part of

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tween higher bids quoted by minority subcontractors which are attributable to the effects of disadvantage or discrimination and those which are not. That is, according to the bulletin, if it is determined that a subcontractor's uncompetitive high price is not attributable to the effects of discrimination, a contractor may be entitled to relief from the 10% set-aside requirement. But even assuming that the technical bulletin accurately reflects Congress' intent in enacting the set-aside, it is not easy to envision how one could realistically demonstrate with any degree of precision, if at all, the extent to which a bid has been inflated by the effects of disadvantage or past discrimination. Consequently, while THE CHIEF JUSTICE describes the set-aside as a remedial measure, it plainly operates as a flat quota.

[14] See THE CHIEF JUSTICE's opinion, *ante*, at 28.

[15] "Non-officeholders may be the beneficiaries of lucrative government contracts for highway construction, buildings, and supplies." 427 U. S., at 353.

our history as the employment practices condemned in *Elrod,* it would surely be unconstitutional for the legislature to specify that all, or a certain portion, of the contracts authorized by a specific statute must be given to businesses controlled by members of one political party or another. That would be true even if the legislative majority was convinced that a grossly disproportionate share had been awarded to members of the opposite party in previous years.

In the short run our political processes might benefit from legislation that enhanced the ability of representatives of minority groups to disseminate patronage to their political backers. But in the long run any rule that authorized the award of public business on a racial basis would be just as objectionable as one that awarded such business on a purely partisan basis.

The legislators' interest in providing their constituents with favored access to benefits distributed by the Federal Government is, in my opinion, a plainly impermissible justification for this racial classification.

IV

The interest in facilitating and encouraging the participation by minority buisness enterprises in the economy is unquestionably legitimate. Any barrier to such entry and growth—whether grounded in the law or in irrational prejudice—should be vigorously and thoroughly removed. Equality of economic and investment opportunity is a goal of no less importance than equality of employment opportunity. This statute, however, is not designed to remove any barriers to entry. Nor does its sparse legislative history detail any insuperable or even significant obstacles to entry into the competitive market.

Three difficulties encountered by minority business enterprises in seeking governmental business on a competitive basis are identified in the legislative history. There were references to (1) unfamiliarity with bidding procedures followed by procurement officers, (2) difficulties in obtaining financing and (3) past discrimination in the construction industry.

The first concern is no doubt a real problem for all businesses seeking access to the public contract market for the first time. It justifies a thorough review of bidding practices to make sure that they are intelligible and accessible to all. It by no means justifies an assumption that minority business enterprises are any less able to prepare and submit bids in proper form than are any other businessmen. Consequently, that concern does not justify a statutory classification on racial grounds.

The second concern would justify legislation prohibiting private discrimination in lending practices or authorizing special public financing for firms that have been or are unable to borrow money for reasons unrelated to their credit rating. It would not be an adequate justification for a requirement that a fixed percentage of all loans made by national banks be made to Eskimos or Orientals regardless of their ability to repay the loans. Nor, it seems to me, does it provide a sufficient justification for granting a preference to a broad class that includes, at one extreme, firms that have no credit problem[16] and at the other extreme, firms whose unsatisfactory credit rating will prevent them from taking advantage of the statutory preference even though they are otherwise qualified to do the work. At best, the preference for minority business enterprises is a crude and inadequate response to the evils that flow from discriminatory lending practices.

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[16] An example of such a firm was disclosed in the record of a recent case involving a claimed preference for a firm controlled by Indian shareholders:

"Based on the facts that were developed in the District Court, . . . the Indian community in general does not benefit from the [Bureau of Indian Affairs'] interpretation of [the Buy Indian Act].

"The facts that were developed in the District Court show that the beneficiaries of this interpretation were the owners of Indian Nations Construction Company. The president of the company is a one-fourth degree Indian who is an administrative law judge for the Department of Health, Education, and Welfare by occupation. The vice president of that company was a one-quarter blood Choctaw who is a self-employed rancher and who states his net worth at just under a half million dollars.

The question whether the history of past discrimination has created barriers that can only be overcome by an unusual measure of this kind is more difficult to evaluate. In analyzing this question, I think it is essential to draw a distinction between obstacles placed in the path of minority business enterprises by others and characteristics of those firms that may impair their ability to compete.

It is unfortunately but unquestionably true that irrational racial prejudice persists today and continues to obstruct minority participation in a variety of economic pursuits, presumably including the construction industry. But there are two reasons why this legislation will not eliminate, or even tend to eliminate, such prejudice. First, prejudice is less likely to be a significant factor in the public sector of the economy than in the private sector because both federal and state laws have prohibited discrimination in the award of public contracts for many years. Second, and of greater importance, an absolute preference that is unrelated to a minority firm's ability to perform a contract inevitably will engender resentment on the part of competitors excluded from the market for a purely racial reason and skepticism on the part of customers and suppliers aware of the statutory classification. It thus seems clear to me that this Act cannot be defended as an appropriate method of reducing racial prejudice.

The argument that our history of discrimination has left the entire membership of each of the six racial classes identified in the Act less able to compete in a free market than

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The treasurer and general manager of that corporation is a non-Indian and he states his net worth at $1.3 million." Tr. of Oral Arg. in *Andrus* v. *Glover Construction Co.*, O. T. 1979, No. 79-84, pp. 26-27.

others is more easily stated than proved. The reduction in prejudice that has occurred during the last generation has accomplished much less than was anticipated; it nevertheless remains true that increased opportunities have produced an ever increasing number of demonstrations that members of disadvantaged races are entirely capable not merely of competing on an equal basis, but also of excelling in the most demanding professions. But, even though it is not the actual predicate for this legislation, a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race.[17] Because that perception—especially when fostered by the Congress of the United States—can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become a truly irrelevant, or at least insignificant, factor. Unless Congress clearly articulates the need and basis for a racial classification, and also tailors the classification to its justification, the Court should not uphold this kind of statute.

This Act has a character that is fundamentally different from a carefully drafted remedial measure like the Voting Rights Act of 1965. A consideration of some of the dramatic differences between these two legislative responses to racial injustice reveals not merely a difference in legislative craftsmanship but a difference of constitutional significance. Whereas the enactment of the Voting Rights Act was preceded by exhaustive hearings and debates concerning discriminatory denial of access to the electoral process, and became effective in specific States only after specific findings were made, this statute authorizes an automatic nationwide preference for all members of a diverse racial class regardless of their possible interest in the particular geographic areas where the public contracts are to be performed. Just why a wealthy Negro or Spanish-speaking investor should have a preferred status in bidding on a construction contract in Alaska—or a citizen of Eskimo ancestry should have a preference in Miami or Detroit—is difficult to understand in light of either the asserted remedial character of the set-aside or the more basic purposes of the public works legislation.

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[17] See *United Jewish Organizations* v. *Carey,* 430 U. S. 144, 173–174 (BRENNAN, J., concurring in part): "[E]ven preferential treatment may act to stigmatize its recipient groups, for although intended to correct systemic or institutional inequities, such a policy may imply to some the recipients' inferiority and especial need for protection."

The Voting Rights Act addressed the problem of denial of access to the electoral process. By outlawing specific practices, such as poll taxes and special tests, the statute removed old barriers to equal access; by requiring preclearance of changes in voting practices in covered States, it precluded the erection of new barriers. The Act before us today does not outlaw any existing barriers to access to the economic market and does nothing to prevent the erection of new barriers. On the contrary, it adopts the fundamentally different approach of creating a new set of barriers of its own.

A comparable approach in the electoral context would support a rule requiring that at least 10% of the candidates elected to the legislature be members of specified racial minorities. Surely that would be an effective way of ensuring black citizens the representation that has long been their due. Quite obviously, however, such a measure would merely create the kind of inequality that an impartial sovereign cannot tolerate. Yet that is precisely the kind of "remedy" that this Act authorizes. In both political and economic contexts, we have a legitimate interest in seeing that those who were disadvantaged in the past may succeed in the future. But neither an election nor a market can be equally accessible to all if race provides a basis for placing a special value on votes or dollars.

The ultimate goal must be to eliminate entirely from governmental decisionmaking such irrelevant factors as a human being's race. The removal of barriers to access to political and economic processes serves that goal.[18] But the creation of new barriers can only frustrate true progress. For as MR. JUSTICE POWELL[19] and Mr. Justice Douglas[20] have perceptively observed, such protective barriers reinforce habitual ways of thinking in terms of classes instead of individuals. Preferences based on characteristics acquired at birth foster intolerance and antagonism against the entire membership of the favored classes.[21] For this reason, I am firmly convinced that this "temporary measure" will disserve the goal of equal opportunity.

V

A judge's opinion that a statute reflects a profoundly unwise policy determination is an insufficient reason for concluding that it is unconstitutional. Congress has broad power to spend money to provide for the "general Welfare of the United States," to "regulate Commerce among the several States," to enforce the Civil War Amendments, and to discriminate between aliens and citizens. See *Hampton* v. *Mow*

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[18] "The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized." *DeFunis* v. *Odegaard,* 416 U. S. 312, 342 (Douglas, J., dissenting).

[19] See *University of California Regents* v. *Bakke, supra,* 438 U. S., at 298 (opinion of POWELL, J.).

[20] *DeFunis* v. *Odegaard, supra,* 416 U. S., at 343 (Douglas, J., dissenting).

[21] In his *Bakke* opinion, *supra,* MR. JUSTICE POWELL stated:

"It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others." 438 U. S., at 295.

In support of that proposition he quoted Professor Bickel's comment on the self-contradiction of that argument:

"'The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.'" *Ibid.,* n. 35.

Sun Wong, 426 U. S. 88, 101–102, n. 21.[22] But the exercise of these broad powers is subject to the constraints imposed by the Due Process Clause of the Fifth Amendment. That Clause has both substantive and procedural components; it performs the office of both the Due Process and Equal Protection Clauses of the Fourteenth Amendment in requiring that the federal sovereign act impartially.

Unlike MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST, however, I am not convinced that the Clause contains an absolute prohibition against any statutory classification based on race. I am nonetheless persuaded that it does impose a special obligation to scrutinize any governmental decisionmaking process that draws nationwide distinctions between citizens on the basis of their race and incidentally also discriminates against noncitizens in the preferred racial classes.[23] For just as procedural safeguards are necessary to guarantee impartial decisionmaking in the judicial process, so can they play a vital part in preserving the impartial character of the legislative process.[24]

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[22] This preferential set-aside specifically discriminates in favor of citizens of the United States. See p. 4, *supra.*

[23] "When the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest." *Hampton* v. *Mow Sun Wong, supra,* 426 U. S., at 103.

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"It is perfectly clear that neither the Congress nor the President has ever *required* the Civil Service Commission to adopt the citizenship requirement as a condition of eligibility for employment in the federal civil service. On the other hand, in view of the fact that the policy has been in effect since the Commission was created in 1883, it is fair to infer that both the Legislature and the Executive have been aware of the policy and have acquiesced in it. In order to decide whether such acquiescence should give the Commission rule the same support as an express statutory or Presidential command, it is appropriate to review the extent to which the policy has been given consideration by Congress or the President, and the nature of the authority specifically delegated to the Commission." *Id.,* at 105.

In both its substantive and procedural aspects this Act is markedly different from the normal product of the legislative decisionmaking process. The very fact that Congress for the first time in the Nation's history has created a broad legislative classification for entitlement to benefits based solely on racial characteristics identifies a dramatic difference between this Act and the thousands of statutes that preceded it. This dramatic point of departure is not even mentioned in the statement of purpose of the Act or in the reports of either the House or the Senate Committee that processed the legislation,[25] and was not the subject of any testimony or inquiry in any legislative hearing on the bill that was enacted. It is true that there was a brief discussion on the floor of the House as well as in the Senate on two different days, but only a handful of legislators spoke and there was virtually no debate. This kind of perfunctory consideration of an unprecedented policy decision of profound constitutional importance to the Nation is comparable to the accidental malfunction of the legislative process that led to what I regarded as a totally unjustified discrimination in *Delaware Tribal Business Committee* v. *Weeks, supra,* 430 U. S., at 97.

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[24] See Linde, Due Process of Lawmaking, 55 Neb. L. Rev. 197, 255 (1976) (hereinafter Linde):

"For the last few years have reawakened our appreciation of the primacy of process over product in a free society, the knowledge that no ends can be better than the means of their achievement. 'The highest morality is almost always the morality of process,' Professor Bickel wrote about Watergate a few months before his untimely death. If this republic is remembered in the distant history of law, it is likely to be for its enduring adherence to legitimate institutions and processes, not for its perfection of unique principles of justice and certainly not for the rationality of its laws. This recognition now may well take our attention beyond the processes of adjudication and of executive government to a new concern with the due process of lawmaking." (Footnote omitted.)

[25] The only reference to any minority business enterprises in the Senate Report was a suggestion that Indians had been receiving *too great a share* of the public contracts. The Report stated:

"Some concern was expressed that Indians—with exceptionally high structural unemployment levels—were awarded projects at a per capita value far in excess of non-Indian communities." S. Rep. No. 95-38, 95th Cong., 1st Sess., p. 3 (1977).

The Court quotes three paragraphs from a lengthy report issued by the House Committee on small business in 1977, *ante,* at 13, implying that the contents of that report were considered by Congress when it enacted the 10% minority set aside. But that report was not mentioned by anyone during the very brief discussion of the set-aside amendment.

Although it is traditional for judges to accord the same presumption of regularity to the legislative process no matter how obvious it may be that a busy Congress has acted precipitately, I see no reason why the character of their procedures may not be considered relevant to the decision whether the legislative product has caused a deprivation of liberty or property without due process of law.[26] Whenever Congress creates a classification that would be subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment if it had been fashioned by a state legislature, it seems to me that judicial review should include

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When one considers the vast quantity of written material turned out by the dozens of congressional committees and subcommittees these days, it is unrealistic to assume that a significant number of legislators read, or even were aware of, that report. Even if they did, the report does not contain an explanation of this 10% set-aside for six racial subclasses.

Indeed, the broad racial classification in this Act is totally unexplained. Although the legislative history discussed by THE CHIEF JUSTICE and by MR. JUSTICE POWELL explains why Negro citizens are included within the preferred class, there is no absolutely discussion of why Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts were also included. See n. 6, *supra.*

[26] "It is not a new thought that 'to guarantee the democratic legitimacy of political decisions by establishing essential rules for the political process' is the central function of judicial review, as Dean Restow and Professor Strong, among others, have argued." Linde, *supra,* 55 Neb. L. Rev., at 251.

a consideration of the procedural character of the decisionmaking process.[27] A holding that the classification was not adequately preceded by a consideration of less drastic alternatives or adequately explained by a statement of legislative purpose would be far less intrusive than a final determination that the substance of the decision is not "narrowly tailored to the achievement of that goal."[28] Cf. THE CHIEF JUSTICE's opinion, *ante,* at 28; MR. JUSTICE MARSHALL's opinion concurring in the judgment, *ante,* at 5. If the general language of the Due Process Clause of the Fifth Amendment authorizes this Court to review acts of Congress under the standards of the Equal Protection Clause of the Fourteenth Amendment—a clause that cannot be found in the Fifth Amendment—there can be no separation of powers objection to a more tentative holding of unconstitutionality based on a failure to follow procedures that guarantee the kind of deliberation that a fundamental constitutional issue of this kind obviously merits.[29]

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[27] See Sandalow, Judicial Protection of Minorities, 75 Mich. L. Rev. 1162, 1188 (1977):

"[I]f governmental action trenches upon values that may reasonably be regarded as fundamental, that action should be the product of a deliberate and broadly based political judgment. The stronger the argument that governmental action does encroach upon such values, the greater the need to assure that it is the product of a process that is entitled to speak for the society. Legislation that has failed to engage the attention of Congress, like the decisions of subordinate governmental institutions, does not meet that test, for it is likely to be the product of partial political pressures that are not broadly reflective of the society as a whole."

[28] "Fear of legislative resentment at judicial interference is not borne out by experience where procedural review exists, any more than it was after the Supreme Court told Congress that it had used faulty procedure in unseating Representative Adam Clayton Powell. It is far more cause for resentment to invalidate the substance of a policy that the politically accountable branches and their constitutents support than to invalidate a lawmaking procedure that can be repeated correctly, yet we take substantive judicial review for granted. Strikingly, the reverse view of propriety prevails in a number of nations where courts have never been empowered to set aside policies legitimately enacted into law but do have power to test the process of legitimate enactment." Linde, *supra,* 55 Neb. L. Rev., at 243 (footnotes omitted).

In all events, rather than take the substantive position expressed in Mr. Justice Stewart's dissenting opinion, I would hold this statute unconstitutional on a narrower ground. It cannot fairly be characterized as a "narrowly tailored" racial classification because it simply raises too many serious questions that Congress failed to answer or even to address in a responsible way.[30] The risk that habitual attitudes toward classes of persons, rather than analysis of the relevant characteristics of the class, will serve as a basis for a legislative classification is present when benefits are distributed as well as when burdens are imposed. In the past, traditional attitudes too often provided the only explanation for discrimination against women, aliens, illegitimates, and black citizens. Today there is a danger that awareness of past injustice will lead to automatic acceptance of new classifications that are not in fact justified by attributes characteristic of the class as a whole.

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[29] The conclusion to The Chief Justice's opinion states:

"Any preference based on racial or ethnic criteria must necessarily receive a *most searching examination* to make sure that it does not conflict with constitutional guarantees." *Ante,* at 39 (emphasis added).

I agree with this statement but it seems to me that due process requires that the "most searching examination" be conducted in the first instance by Congress rather than by a federal court.

[30] For example, why were these six racial classifications, and no others, included in the preferred class? Why are aliens excluded from the preference although they are not otherwise ineligible for public contracts? What percentage of Oriental blood or what degree of Spanish-speaking skill is required for membership in the preferred class? How does the legacy of slavery and the history of discrimination against the descendants of its victims support a preference for Spanish-speaking citizens who may be directly competing with black citizens in some overpopulated communities? Why is a preference given only to owners of business enterprises and why is that preference unaccompanied by any requirement concerning the employment of disadvantaged persons? Is the preference limited to a subclass of persons who can prove that they are subject to a special disability caused by past discrimination, as the Court's opinion indicates? Or is every member of the racial class entitled to a preference as the statutory language seems plainly to indicate? Are businesses formed just to take advantage of the preference eligible?

When Congress creates a special preference, or a special disability, for a class of persons, it should identify the characteristic that justifies the special treatment.[31] When the classification is defined in racial terms, I believe that such particular identification is imperative.

In this case, only two conceivable bases for differentiating the preferred classes from society as a whole have occurred to me: (1) that they were the victims of unfair treatment in the past and (2) that they are less able to compete in the future. Although the first of these factors would justify an appropriate remedy for past wrongs, for reasons that I have already stated, this statute is not such a remedial measure. The second factor is simply not true. Nothing in the record of this case, the legislative history of the Act, or experience that we may notice judicially provides any support for such a proposition. It is up to Congress to demonstrate that its unique statutory preference is justified by a relevant characteristic that is shared by the members of the preferred class. In my opinion, because it has failed to make that demonstration, it has also failed to discharge its duty to govern impartially embodied in the Fifth Amendment to the United States Constitution.

I respectfully dissent.

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[31] "Of course, a general rule may not define the benefitted class by reference to a distinction which irrationally differentiates between identically situated persons. Differences in race, religion, or political affiliation could not rationally justify a difference in eligibility for social security benefits, for such differences are totally irrelevant to the question whether one person is economically dependent on another. But a distinction between married persons and unmarried persons is of a different character." *Califano* v. *Jobst*, 434 U. S. 47, 53.

"If there is no group characteristic that explains the discrimination, one can only conclude that it is without any justification that has not already been rejected by the Court." *Foley* v. *Connelie*, 435 U. S. 291, 311–312 (STEVENS, J., dissenting).

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